

Positive Action Measures in the European Union, Canada, United States & South Africa

Country Reports

PAMECUS Series: Volume 3

2009



The Research Consortium

University of Bradford

Project Director and Principal Investigator

Research Officer

Project Team and Experts

Legal team

Statistician

European Roma Rights Centre

Ludwig Boltzmann Institute of Human Rights

Non-European Country Experts

Canada

South Africa

USA

Professor Uduak Archibong

Dr Jite Eferakorho

Dr Karl Atkin (University of York), Professor Carol Baxter (NHS Employers), Dr Aliya Darr (NHS Employers/University of Bradford) and Professor Mark Johnson (De Montfort University)

Professor Mark Bell (University of Leicester) and Professor Lisa Waddington (University of Maastricht)

Andy Scally (University of Bradford)

Tara Bedard, Tatjana Peric and Savelina Velislavova Russinova

Katrin Wladasch

Professor Pat Bradshaw (York University)

Professor Oluyinka Adejumo (Kwa-Zulu Natal University)

Professor Phyllis Sharps (Johns Hopkins University)

Acknowledgements

The consortium members would like to thank all the participating organisations, government offices, companies and individuals who took part in the survey, consensus workshops, expert panels, interviews and conference calls. We are particularly indebted to Priority Research Limited for co-ordinating the survey. We would like to thank Jenny Bellamy for providing specialist guidance and support, Kellie Barnes for her administrative support throughout the study and her co-ordination of the conference. We are also grateful to Jan Wilcock for her help in producing the graphics for the report and to Fahmida Ashraf for her ongoing support and assistance. The consortium would also like to acknowledge the commitment and considerable assistance made by members of the steering committee, management board, and particularly the members of the Directorate-General for Employment, Social Affairs and Equal Opportunities. Despite all the above contributions, the consortium members remain responsible for any errors or misunderstandings reflected in this report.

ISBN 978 1 85143259 2

Disclaimer This publication does not necessarily reflect the position or opinion of the European Commission. The European Commission and University of Bradford are not liable for any use that may be made of the information.

Key contact person:

Professor Uduak Archibong

University of Bradford, Centre for Inclusion and Diversity

Bradford BD5 0BB, Telephone: 01274 236347 Fax: 01274 236443

Email: u.e.archibong@bradford.ac.uk



Contents

Introduction	1
1. PAMECUS Country Report: Austria	2
2. PAMECUS Country Report: Canada	14
3. PAMECUS Country Report - France	24
4. PAMECUS Country Report - Hungary	27
5. PAMECUS Country Report: Ireland	37
6. PAMECUS Country Report: The Netherlands	45
7. PAMECUS Country Report: Slovakia	57
8. PAMECUS Country Report: South Africa	66
9. PAMECUS Country Report: Sweden	79
10. PAMECUS Country Report: UK	91
11. PAMECUS Country Report: USA	101

Introduction

This document contains eleven country reports written as part of the European Commission research study on *positive action measures in the European Union, Canada, United States and South Africa (PAMECUS)*. The Centre for Inclusion and Diversity at the University of Bradford was commissioned to lead the project in collaboration with the European Roma Rights Centre and the Ludwig Boltzmann Institute of Human Rights. The main aim of the study is *to examine the role of positive action in preventing or remedying discrimination by comparing the legal frameworks, policies and practices of positive action in Europe, Canada, United States and South Africa*. To achieve this aim, the research team undertook four distinct tasks during the course of the study however only task three will be presented in this report:

1. develop a working definition of positive action;
2. conduct an on-line survey in 27 European Member States and the EFTA-EEA countries;
3. produce in-depth case studies of eight European Union countries, plus Canada, United States and South Africa; and
4. disseminate the findings of the research through a seminar and publications.

Methodological approach: A comparative case study approach was adopted in exploring legal frameworks and practical applications of positive action measures in selected non-European and European Union countries (including EFTA-EEA countries). The case study approach facilitated a sufficiently thorough investigation of each country within its real life context, using multiple sources of evidence. The non-European countries chosen for an in-depth comparative case study were South Africa, Canada and the United States. These countries were selected because of their history and credibility regarding anti-discrimination laws and affirmative action measures they practised. For Canada and the United States, the measures are well established, but in South Africa the measures and legal framework have been more recent.

The European countries involved in the case study are Austria, France, Hungary, Ireland, the Netherlands, Slovakia, Sweden and the UK. In general, these countries were selected on the basis of geographical importance, covering different regions in Europe, size and experience of positive action measures on the different grounds of equality, and evidence from a review of the literature (e.g., Dhami *et al.*, 2006). Changes were made to the original EU countries in negotiation with the Commission in order to capture as many examples of positive action (on all grounds) and lessons for the effectiveness and replicability of these measures. In addition, we also considered the need to work with countries represented by members of the project team to ensure ease of access to the required participating organisations.

A consensus workshop method was utilised in bringing together the wisdom, interpretations and experiences of all stakeholders for the best possible results and decisions on the context of positive action activities in each country. During each workshop, two discussion

groups were held with representatives from all stakeholders including employers covering private, public and third sector organisations, campaigning bodies representing disadvantaged groups, employer associations and trades unions amongst others. Workshops commenced with a keynote presentation detailing an overview of positive (affirmative) action with particular emphasis on the historical, political and social contexts. The keynote speakers also presented a snapshot of the processes to be followed within the workshop.

During the workshop, facilitators described the purpose and process of the workshop, elaborated on the role of the facilitator and ensured that the ethical components of the research were adhered to. The facilitators essentially enabled the process, kept it on track and intensified dialogue using probe questions to facilitate in-depth discussion. During the workshop, particular attention was paid to the understanding, impetus, effectiveness and impact of positive action. Themes elicited from workshops were further validated through targeted follow-up interviews with strategic individuals identified from the consensus workshops. The interviews provided more detailed insight into some of the positive action initiatives taking place within organisations. These semi-structured interviews were conducted by phone and face-to-face approach using an interview guide / proforma to facilitate 'guided conversation[s]' (Fielding, 1993: 144). To ensure that a consistent approach was undertaken, data collected from the consensus workshop and interviews was analysed systematically around four themes; understanding of positive action, impetus for positive action, effectiveness of positive action and impact of positive action. It must be noted that examples of positive action have been defined as such by participants based on their local contexts.

The individual country reports which detail the key findings from policy (and legal) perspectives are presented in the following chapters. The consensus workshop approach enabled researchers to empower research participants, thus positive action examples presented in the country reports represent the wisdom, interpretations and experiences of workshop participants and interviewees.

Key research collaborators: This phase of the study was led by consortium members from University of Bradford (UoB), European Roma Rights Centre (ERRC), Ludwig Boltzmann Institute of Human Rights (BIM), York University - Canada, University of Kwa-Zulu Natal - South Africa and Johns Hopkins University - USA.

1. PAMECUS Country Report: Austria

The Austrian country report was prepared by consortium members at the Ludwig Boltzmann Institute of Human Rights (BIM), in Vienna. The report begins with an analysis of positive action in this country in light of the current legislative framework followed by a presentation of the main findings that emerged from the consensus workshop. In addition we have incorporated the findings from the follow up interviews and documentary evidence as a way of triangulating the overall data. Finally, we present key consensus statements which emerged from the workshop followed by a set of key recommendations.

1.1. The context of positive action activity in the country

Positive action measures in Austria have a longstanding tradition in the field of disability, and legal obligations to employ women preferentially in case of equal qualification in public administration in order to achieve equal representation of both sexes (quota system) have been implemented since the 1980s.

Preferential treatment for other groups of people that might be in an under-privileged situation compared to the mainstream population is quite a new approach in Austria, however. Awareness of diversity in society and its consequences for all fields of political action is still low. Within the last five years some initiatives for people with non-Austrian ethnic backgrounds have been incorporated in the public as well as in the private sector, and acknowledgement of the need to remove barriers to create more equality of opportunities is rising. Nonetheless a clear political commitment and the will to develop sustainable strategies to combat structural discrimination are missing and action is very much dependent on the changing political atmosphere.

Migrants face heavy structural barriers before achieving full equality in society in Austria. This is due to a segregating educational system that sustains inequalities that originate from the educational background of the families of origin until the end of the school career. This system is disadvantaging people with a migrant background to a much higher extent than native Austrians, as language barriers at the beginning of the school career lead to most young people with migrant background ending up in the secondary school system of lower level.

For people with an educational degree acquired in their country of origin the very restrictive practice of recognition and accreditation is a barrier to being employed adequately. Because of these circumstances, migrants in Austria are still found mostly in low qualified positions of the labour market.

A hostile attitude towards Muslim people among large parts of society presents severe difficulties for women wearing headscarves, to obtain jobs. This is the basis for discriminatory incidents that Muslims are confronted

with both in the labour market as well as in access to goods and services, and especially in housing and education.

There is a wide range of government policies aimed at supporting people farthest from the labour market. Policy initiatives are trying to enforce the capacities of younger or older people, people with caring responsibilities, permanently unemployed persons, women with a migrant background and people with learning deficiencies. Special programmes to promote employment of these target groups have been put in place, mainly coordinated and financed by the Labour Market Service (Arbeitsmarktservice - AMS). The compatibility of all of these programmes and initiatives with the prohibition of discrimination imposed by the Equal Treatment Legislation that came into force only in July 2004 in order to implement the Directives 2000/43/EC and 2000/78/EC remains to be checked.

Activities to enhance non-discriminatory treatment of LGBT people are to be found mostly in the field of overall diversity strategies implemented in private companies and in some public authorities in the framework of a general commitment towards diversity. Specific initiatives do not concern strategies aiming at representation but do include more informal activities like the founding of networks.

1.2. Legal analysis

The analysis of Austrian legislation on positive action measures was undertaken using four questions that were developed by the legal team. The basis of research was the legislation in force, decisions of the Equal Treatment Commissions, the database on conciliations according to the Austrian legislation on equality for people with disabilities and the expert reports elaborated within the framework of the European Network of Legal Experts in the non-discrimination field.

1.2.1. Does legislation establish any positive action measures? E.g. mandatory quotas for disabled persons?

Specific measures are foreseen by legislation for national minorities, people with disabilities and women.

Protection of recognized national minorities (Volksgruppen: Croats, Slovenes, Hungarians, Czechs, Slovaks and Roma) is provided according to the state treaties of 1919 and 1955. The legal status and rights of these groups are guaranteed by various constitutional provisions and partly implemented by the National Minorities Act of 1976 (*Volksgruppengesetz*).¹ A national minority is defined by the National Minorities Act as an *ethnic group that comprises Austrian citizens with a non-German mother tongue and a common autonomous cultural heritage who have their residence and home in a part of the Austrian federal territory*. Everyone is free to declare his/her affiliation with an ethnic

¹ National Minorities Act (*Volksgruppengesetz*) BGBl. 396/1976, last amended by BGBl. I Nr. 35/2002.

group. The law explicitly states that no one belonging to an ethnic group must be put at a disadvantage as a result of the assertion or non-assertion of their rights as members of that ethnic group. Moreover, nobody can be forced to provide evidence of his or her affiliation with an ethnic group. The National Minorities Act in its Art. 8f provides for specific measures to ensure the continuing existence of the ethnic minority group, their characteristics and rights by means of financial contribution, education and assistance.

Associations and foundations that are based on the objective of providing for the maintenance and assurance of a national minority, its specific traditions and rights are entitled to apply for special funding.

The National Minorities Act also provides for the establishment of National Minority Advisory Councils (*Volksgruppenbeiräte*) to be located at the Federal Chancellery, who must be heard prior to the adoption of legal rules and general assistance policies affecting the interests of their ethnic groups, may submit proposals for the improvement of the situation of their ethnic group and must submit a plan on requested aid measures including a list of expected costs for the following calendar-year to the Federal Chancellery.

Furthermore minority legislation for Carinthia² and Burgenland³ in fulfilling the duties implied by Art 7 of the state treaty of 1955⁴ do include the obligation in regions, where national minorities are living, to provide for bilingual education at schools.

The objectives of the measures described above are two-fold. On the one hand they aim at fulfilling the duties imposed by international treaties to protect specific minority rights and preserve specific cultural traditions, on the other hand they aim at reducing barriers for these national minorities in equally participating in Austrian society, especially within the Austrian educational system, the latter falling within the objective of positive action measures as formulated in the project definition as measurements *"promoting substantive equality by taking into account the specific situation of members of disadvantaged groups ..."*

There is a wide range of positive action measures in place for people with disabilities. The core legal source is the Act on the Employment of People with Disabilities (*Behinderteneinstellungsgesetz*)⁵. The Act imposes a duty upon *all employers, who employ 25 or more employees within the (Austrian) federal territory to employ the minimum of one disabled person each 25*

*employees*⁶. This provision is implementing a quota regulation of 1:25, the so-called 'obligatory number' (*Pflichtzahl*), which constitutes an active employment obligation for people with disabilities. Access to this employment possibility, however, is restricted to disabled people who fulfil certain qualifications. They have to be Austrian nationals or nationals of one of the Member States of the European Union; third country nationals only qualify if they were granted asylum. Furthermore, the degree of disability must reach at least 50 per cent.

Employment of people with disabilities is promoted by various supportive measures like allowances and loans granted by law and funded by the compensation fee fund, which aim at facilitating technical appliances making the working place suitable for people with disabilities, promoting working or training places suitable to people with disabilities, subsidising the wages of disabled employees or trainees, alleviating the costs for personal assistance (*Arbeitsassistenz*), facilitating training, re-training, or work trial, contributing to the costs linked with taking up employment, or promoting self-employment of people with disabilities.

1.2.2. Does legislation establish any obligations on public or private sector organisations to take positive action?

Employers, who employ 25 or more employees, are obliged to employ a minimum of one disabled person per each 25 employees, see question 1.2.1. If employers do not comply, or do not want to comply with their employment duty, they are obliged to pay a compensation fee (*Ausgleichstaxe*) of € 214 (year 2008) per month (and person that ought to be employed). An option that is widely used by both private companies and public authorities. These fees go to a special fund administered by the Ministry of Social Affairs and designated to sponsor measures promoting the employment of people with disabilities (*Ausgleichstaxfonds*).

These positive measures are completed with an extensive protection against dismissals for the so-called "qualified disabled" workers described above. According to Article 8 Act on the Employment of People with Disabilities (*Behinderteneinstellungsgesetz*) any dismissal of a disabled worker fulfilling the criteria described above has to be agreed upon by the disability commission (*Behindertenausschuss*).

² Act on Minority Schooling for Carinthia (*Minderheitenschulgesetz für Kärnten*) BGBl. Nr. 101/1959, last amended by BGBl. I Nr. 76/2001

³ Act on Minority Schooling for the Burgenland (*Minderheitenschulgesetz für das Burgenland*), BGBl. Nr. 641/1994, last amended by BGBl. I Nr. 136/1998

⁴ State Treaty of St. Germain and Vienna (Staatsvertrag von St. Germain und Wien) BGBl. Nr. 152/1955.

⁵ Act on the Employment of People with Disabilities (*Behinderteneinstellungsgesetz*) BGBl. Nr. 22/1970, last amended by Federal Law Gazette I Nr. 82/2005

⁶ Article 1 Section 1 Act on the Employment of People with Disabilities (*Behinderteneinstellungsgesetz*) **Employment Obligation (Beschäftigungspflicht)** All Employers, who employ 25 or more employees within the (Austrian) federal territory are obliged to employ the minimum of 1 qualified disabled person each 25 employees. (*Alle Dienstgeber, die im Bundesgebiet 25 oder mehr Dienstnehmer (§ 4 Abs. 1) beschäftigen, sind verpflichtet, auf je 25 Dienstnehmer mindestens einen begünstigten Behinderten (§ 2) einzustellen.*)

1.2.3. What forms of positive action are permitted but not required by legislation?

Austrian Equal Treatment Legislation has included an exception to the prohibition of discrimination for specific measures adopted by ways of legislation, regulations, via instruments of collective agreements or in general provisions implemented by the employer for more employees for the promotion of equality (in employment) to prevent or compensate for disadvantages linked to any of the grounds referred to in the respective acts. The protected grounds referred to in the General Equal Treatment legislation are gender, ethnic origin or skin colour, sexual orientation, religion or belief and age.⁷ The exception is taken nearly word-by word from the positive action provisions of the EC Directives⁸ and included in all legal acts. It does not entail any limitation in terms of proportionality or adequacy. For the grounds of sexual orientation, religion and belief and age the exception is limited to the labour market, whereas for ethnic minorities positive action measures are legitimate for the wider scope of access to goods and services outside the labour market.

The exception for people with disabilities is formulated even wider. Any special measures promoting equal participation of people with disabilities in society are not considered as discrimination in the sense of the Disability Equality Act.⁹

The relevance of the provisions above however in public and private sector organisational strategies is still very low. With the exception of the legislation in place on preferential recruitment and treatment of people with disabilities there is no further legislation in place for other grounds. There are no regulations or collective agreements implementing positive action obligations. Some employers have included

positive action measures within their Company Agreements or Codes of Conduct, for references see the examples included in this report. These strategies in general however are not made public but are considered as part of internal organisational structures.

1.2.4. Are any forms of positive action prohibited by legislation?

As long as measures or strategies that give preferential treatment to certain groups comply with the limitations defined by law they are legitimate. This means a limitation of the legitimacy of positive action measures to the labour market for persons that are facing inequalities on grounds of their sexual orientation, age, religion or belief. Positive action in access to goods and services for those grounds would be unlawful according to the legislation in force at the time of this report.

There is no case law on positive action measures, neither regarding its enforcement nor regarding violations of its limitations in Austria.

1.3. Findings from consensus workshops, interviews and documentary analysis

Research on positive action measures implemented in Austria was done on a three-fold basis. Preliminary research of relevant publications was complemented by materials provided by stakeholders active in the implementation of positive action measures. Furthermore, we integrated the outcomes of the two consensus workshops conducted with selected participants in Austria and the data from 11 follow-up interviews in our findings.

1.3.1. Data Collection

Two consensus workshops were carried out in Austria, one in Vienna on 26 August 2008 and another one in Graz on 28 August 2008. The locations were chosen following extensive literature and web-research on positive action measures in place in Austria.

As the number of initial registrations for the workshop was quite low, the organisers intensified their efforts by sending targeted reminders urging people to apply and phoning selected addressees. Finally, 25 participants applied for the Viennese workshop and 17 for the workshop in Graz and a total of 38 attended the workshop in the two locations. Participants of both workshops were very engaged in the debate and contributed intensively to the aim of the workshops.

Participants represented a broad diversity of approaches and working fields. Diversity managers from private companies met consultants on issues of diversity management and equal opportunities; there were participants from ministries, Equal Treatment Ombudspersons, the Austrian branch of the UNHCR, the police forces, and participants based in the academic field. This heterogeneity led to very fruitful discussions and helped to develop a comprehensive

⁷ e.g. Article 22 Equal Treatment Act (*Gleichbehandlungsgesetz*): **Positive Measures (Positive Maßnahmen)**

Specific measures adopted by ways of legislation, regulations, via instruments of collective agreements or in general provisions implemented by the employer for more employees for the promotion of equality (in employment) to prevent or compensate for disadvantages linked to any of the grounds referred to (in the act), are not considered as discrimination in terms of the act. (*Die in Gesetzen, in Verordnungen, in Instrumenten der kollektiven Rechtsgestaltung oder in generellen mehrere Arbeitnehmerinnen umfassende Verfügungen des/der Arbeitgebers/Arbeitgeberin getroffenen spezifischen Maßnahmen zur Förderung der Gleichstellung im Berufsleben, mit denen Benachteiligungen wegen eines Diskriminierungsgrundes nach § 17 verhindert oder ausgeglichen werden, gelten nicht als Diskriminierung im Sinne dieses Gesetzes.*)

⁸ Article 5 (2000-43) and Article 7 (2000-73)

Positive action

1. With a view to ensuring full equality in practice, the principle of equal treatment shall not prevent any Member State from maintaining or adopting specific measures to prevent or compensate for disadvantages linked to any of the grounds referred to in Article 1.

2. With regard to disabled persons, the principle of equal treatment shall be without prejudice to the right of Member States to maintain or adopt provisions on the protection of health and safety at work or to measures aimed at creating or maintaining provisions or facilities for safeguarding or promoting their integration into the working environment

⁹ Article 7 Disability Equality Act (*Behindertengleichstellungsgesetz*) **Positive Maßnahmen:**

Spezielle Maßnahmen zur Herbeiführung der gleichberechtigten Teilhabe von Menschen mit Behinderungen am Leben in der Gesellschaft gelten nicht als Diskriminierung im Sinne dieses Bundesgesetzes.

picture of the relevance of positive action measures in place in Austria.

The high level of interest in actively participating in the consensus workshop was mirrored in the readiness to deliver more information on practical experience in the follow-up interviews.

Data collection was completed by research material provided by participants in the workshops and by the interviewees' statements. Based on the discussions in the workshops and the information provided by the interviews, recommendations for future activities in the field of implementing positive measures were elaborated.

1.3.2. Findings

The findings of the data collection show the high level of interest of people involved in the implementation of positive action measures and the high level of experience in the field of disability. Experience was shared according to positive action measures aiming at a higher level of equality for people with migrant background, Muslim women wearing headscarves, people with disabilities and the specific questions of reasonable accommodation and more generally for people with a high potential of being discriminated against.

Understanding of positive action

The understanding of positive action within the groups of workshop participants in Austria was a very broad one. The discussion was quite general, not focussing on specific target groups that much, but concentrating on different approaches and concepts and the underlying structural dimension of discrimination.

The general attitude towards positive action measures was a very positive one. The whole society approach was repeatedly stressed and valued as the most important element of positive action measures. Participants of both workshops consequently agreed on the necessity to consider benefits *for everybody*, when talking about positive action measures. Any measurements targeted at a single group should be only considered as positive action measures in terms of legitimacy, if the overall goal would be to create a *better society for all people*.

Refined to a more practical approach, participants in Vienna favoured a definition of positive action that includes any measures *offering possibilities for making use of special skills, compensating for disadvantages and the acceptance of these measures*, whilst the Graz participants formulated their approach even broader defining positive action measures as *implementing structures to offer every population group a maximum of development possibilities*.

A clear focus of the debate was on the need to eliminate structural discrimination and on this basis positive action measures were seen as a tool to *provoke structural change that enhances equal*

opportunities and helps to overcome underrepresentation of certain groups, for example concerning access to education.

The mainstreaming approach of positive action measures was enhanced when participants stressed that they *were a gain for everybody* and should therefore be taken into account in all sectors of society and for all groups needing it. Implementing positive action measures should not lead to simply installing preferential treatment for one or two groups, but to adopt an open attitude to see who needs which kind of empowerment and at which time. This needs the capacity to identify differences, discrimination and their consequences.

Consequently, creating *sensibility and awareness on discrimination* in its structural dimension was considered as a pre-condition for pro-active action. Furthermore, attention was paid to the relevance of *awareness raising on differences in opportunity*.

The pro-active aspect of positive action measures according to the workshop participants would have to include bringing theory into practice by *effective and goal-oriented measures*. They should aim at combating discrimination and provide *responsible solutions for remedying discrimination* and for *making differences visible in society*.

Evaluation, according to the participants, must be an inherent part of any positive action measures strategy.

Furthermore, the supportive element as a basic part of positive action measures was referred to. Without the provision of (financial) resources even the most elaborate strategies were doomed to fail according to the experience of participants. With this conviction in mind participants insisted on including the aspect of *resources* into their definition of positive action measures. This attitude was confirmed when talking with the interviewees about the circumstances that positive action measures need to be successful. Readiness to invest by providing financial resources, as well as institutional conditions were repeatedly accentuated as being the basic parameters needed.

The discussion on the understanding of positive action measures also included referral to ways and strategies and targets. *Positive Action Measures* within this discussion were identified as *concrete measures ahead of, during and after circumstances of discrimination, aiming at equal chances, e.g. structuring, conflict management, clear formulation of valid rules and others, all of these aiming at sustainable implementation*. Another aspect that was brought up was the legal aspect of positive action, especially when participants in Vienna clearly stressed the important role of legislation to reach the goals of equality of opportunities and participation. Pursuant to their understanding *laws that have a clear political will in favour of remedying deficits, recognition of rights, sustainability, changes that have consequences, equal treatment and societal*

participation could be considered as positive action measures.

Impetus for positive action

According to the workshop participants the impetus for implementing positive action measures in Austria primarily should be the overall goal of reaching a better society for all. The relevance of positive action for society was considered high, *because they (actions) are set to achieve a concrete change of social circumstances in all areas of life*. Raising the quality of life for 'people concerned' was considered a motivating factor that would contribute to the well-being of all. Observing the developments on the labour market and within society in general, participants diagnosed that *the gap of inequalities is widening*, which augments the relevance of implementing strategies aiming at more equality for all.

When talking about the actual motivation for implementing positive action measures in their organisations, 'in real life', participants were mostly referring to the need to reflect the diversity of society within their organisation. The basis for the motivation to act, according to participants in the Viennese workshop, was *self-reflection and personal commitment, the will to take risks* and the availability of *background knowledge*. In some cases the organisation's field of work had been the core motivation for initially dealing with the topics of representation of specific groups and reducing barriers in employment in a pro-active way. This was valid for a municipality department and a church - affiliated social service provider interacting predominantly with Austrian inhabitants with a migrant background, a private counselling institution focussing on people with hearing impairments and a public authority responsible for granting subsidies for buildings. Implementation of specific provisions to facilitate access to these organisations, not only as clients but also as employees, in these cases had been identified as basic requirements for working in these fields, to avoid misunderstandings and conflicts and to benefit from different perspectives.

The business case for diversity was discussed on a more general level within the workshops taking into account its internal and external aspects. Within this thematic subject the relevance of public image and the public relations aspect of positive action measures were mentioned. Acknowledgement of the rising relevance of social responsibility was considered high within human resources management - and the implementation of measurements aiming at combating inequalities and promoting diversity were seen as an essential part of any corporate social responsibility programme. In this context the potential of positive action to *raise employee satisfaction and efficiency* was stressed. Positive action was seen as a management tool that could *accomplish gain and had possibilities for both sides*.

Legal requirements, for example EU standards were considered as a factor that could also be of relevance. They were discussed more as theoretical parameters, however, as in general *normative/regulative factors* were given the least attention. This was somehow contradictory to the importance of a legal basis that had been stressed in finding a common understanding on what positive action measures meant to the participants at least, of the Viennese workshop.

Effectiveness of positive action

A key indicator for the effectiveness of positive action measures according to the participants of the workshop in Graz would be *a change in the norm as such*. Only when prevailing inequalities regarding the specific target group do not exist anymore, when awareness of the relevance of equality in society is implemented in all areas of society - they argued, - a need for positive action measures would become obsolete and the concrete measures would have been effective. The vision of the Viennese participants was that positive action measures could be considered as effective, when *they would lead to a change of content and enlightenment*.

In breaking down this philosophical approach to practice, participants tended to use the measure of *satisfaction* as a marker of effectiveness, *which is documented by ideas, actions and arguments*. Another option that was discussed was to test the effectiveness of positive action measurements by checking, if they had achieved the *nearest possible approximation to the targeted goal*. Effectiveness according to some participants *is measurable by reviewing changes of the initial situation in relation to the formulated goal*.

During discussion it was stressed that the effectiveness of positive action was dependent on a variety of factors, such as *time, target group, area of implementation and quality*. The importance of tailor-made solutions and the need to focus on the specific context in developing and implementing positive action measures were also emphasised by most interviewees. Furthermore, a learning attitude and the readiness to adopt a *process-oriented approach* were highlighted as a basis for effectiveness. Another pre-condition for successful implementation of any measures according to the experts involved in the research, would be awareness of the relevance of discrimination and structural barriers for certain groups in society incorporated within the organisation. There must be a clear commitment and awareness at all levels of the hierarchy, and explicitly on the top management level; an involvement of all in the development and implementation of these measures. To be effective the incorporation of activities has to be accompanied by discussions about the benefits of diversity on an ongoing basis. Otherwise the risk of losing the basic need of overall commitment was considered as high.

Effectiveness furthermore was seen as strongly correlated with readiness to provide enough resources. This does not only mean the need of pecuniary support for carrying through concrete projects, but also and at least equally important, the provision of institutional parameters and structures are required. The latter should include a commitment of all hierarchies within an organisation towards a process that would most likely hurt and include an organisational change. This requires a policy of transparency and dialogue within the organisation, the involvement of staff members from all levels on a continuous basis and the capacity to cope with any resentment that might arise.

As for concrete effects within organisations and companies *visible and relevant empowerment of staff members* was considered as a relevant signal. This could include a *strengthening of possibilities of self-organisation of staff members*. Any concrete gains should be measurable and recognisable. Moreover, effectiveness should be measured on the basis of *everyday occurrences and as a matter of course*.

One interviewee pointed out that people, especially concerning the question of accessibility for people with mobility restriction, had increasingly realised that using the possibilities that are set in place due to positive action initiatives, saves time and money. Furthermore representation of people that are confronted with structural or factual barriers and their involvement in the development of strategies could provide the organisation with *knowledge and expertise* it could not obtain otherwise easily.

Another indicator for effectiveness that was mentioned during an interview was the rise in complaints of being discriminated against. Within procedures towards more equality the provision of institutional possibilities to complain against discrimination and the creation of an atmosphere that enables people to use these structures was considered as a very important sub-goal.

The importance of evaluation as part of a process-orientated approach towards positive action strategies was highlighted. Several organisations reported on specific tools they had implemented mostly as part of their internal quality management. Others relied on casual feedback from employees and/or clients, or other indicators such as a rise in applications, or in using institutional structures (e.g. by filing complaints) or support programmes or a decline in complaints. To be identified as effective, positive action measures in the long term should be identified in all ranks of society. This could be measured by statistical and/or visible effects like a rise in representation of underprivileged groups in employment or other fields of society.

Impact of positive action

Positive action measures according to the participants have led to modified approaches within

society already. The pioneer role of gender equality policies and of inclusion policies for people with disabilities was referred to in this regard.

Within the companies, positive action measures have *led to an improved internal communication [system] and to a more positive internal perception [of the company]*. Interaction between employees with different group identities was strengthened as were mutual efforts towards raising the grade of reciprocal integration. Generally it was noticed that the level of sensitivity in terms of the relevance of difference and its implication for (in-)equalities had been raised as had the language and the topics of internal organisational development needs. Furthermore, a *change of attitudes* within the organisations was observed, concrete actions had led to a *re-definition* of the organisations, in particular of single persons and their role within the organisation.

In terms of 'visible' and statistically countable effects, the representation of specific groups that had been targeted by the initiatives have increased, communication barriers have been lowered and internal promotion and vocational training possibilities for all extended. Some interviewees could report on structural changes within the organisation. Readiness to provide dispositions for the special needs of specific groups as a matter of course, has been raised by the implementation of positive action provisions. This has led to concrete structural changes in terms of more flexibility in working hour models and creating possibilities for involvement for specific groups.

Generally, an atmosphere has been created that enables people to demand specific measures or simply to use their rights, which they would not have dared to before or within another setting. In one organisation the involvement of the targeted minority in all hierarchical ranks and in all decision making procedures, could be achieved. On the external side, attraction towards members of the target groups could be enhanced, clients have reacted in a positive way and the status of expertise grounded in experience bound to a certain group identity, could be consolidated (in contrast to the status of being needy). Moreover, the conviction was widespread within the group of actors involved in the research that each single initiative is contributing to changing attitudes towards underprivileged groups within the general public.

A broad variety of impact possibilities on a more general level was reported and discussed within the workshops. Positive action measures were qualified as providing the basis for a *greater variety of options* and an *increase in resources* and in the long run *provide for a best possible approximation to equal chances*. In terms of actual implications the launching of mentoring programmes, the incorporation of codes of conduct or anti-discriminatory company agreements, the installation of ombudspersons and/or counselling services, the creation of networks

and of institutionalised expert meetings were mentioned.

There had also been negative impacts experienced. The implementation of new recruitment procedures and/or the incorporation of specific procedures for specific needs, e.g. the introduction of bilingualism in one case, had led to partial deceleration of workflow. Newly created provisions stressing the importance of diversity and implying a commitment to raise the level of representation of underrepresented groups within the company had led to scepticism within the established staff. In some

1.4. Examples of positive action measures

Name of the Initiative: *Vienna needs you - policemen with a migrant background*

Sector/institution: Public Sector: Police Forces

Reasons for the initiative: One third of the Viennese population has a migrant background. This is not mirrored in the police forces who are directly confronted with the population in their job. Only about one per cent of the 6,000 policemen/-women currently have a migrant background. Their number should be increased in order to reflect the diversity of society in the organisational structure of the police.

Purpose: The number of police officers with a migrant background should be increased in order to integrate the diversity of society into the organisational structure of the police.

Process: The Viennese police started a recruiting campaign targeted at Austrian nationals of migrant background in November 2007, this by way of a PR campaign and by way of directly approaching young migrants. A 'tandem-couple' made up of a police officer with a migrant background and a representative of the Viennese Municipal Department for Diversity Issues, who had designed the concept of the initiative, visited schools and migrant community associations, to present the initiative and to be seen as a role model. There are no quotas implemented and there is no explicit preferential treatment of applicants with a migrant background. The initiative is not aiming at creating ethnically differentiated police departments, but aims at awareness-raising within the police and within the local population that the police are there for all and open to all. Awareness-raising of the impact of cultural heterogeneity is being introduced at all levels of vocational training, and a mentoring programme will be implemented for newly recruited police officers.

Outcome: Up to July 2008, about 170 migrants have been registered as applicants.

Name of the Initiative: *Housing Round Table (Wohnbautisch)*

Sector/institution: Public sector: Housing

Reasons for the initiative: The department for barrier-free housing had developed from a counselling institution for people with disabilities into an expert institution accessed by planners of housing projects (80% of client contacts). With the introduction of new housing regulations in the mid 1990s the necessity to integrate accessibility of dwellings in the planning phase of all

cases the implementation of positive action measures collided with other initiatives and/or revealed 'new blind spots'. Within this discussion the importance of awareness raising on a permanent basis and the need to stress the positive effects of a diverse workforce and of the organisational development that has been set in operation continuously were re-emphasised.

It was a process that becomes independent, that *gets a drive of its own*, that was assessed as the best possible outcome and ideal impact of positive action measurements.

housing projects was integrated into the public funding concept.

Purpose: Promoting accessibility to public and private housing for everyone.

Process: Each housing project, for which public funding is applied for, is discussed and examined by a so-called housing round table. The round table is constituted of representatives of the public housing funding agency, the regional departments for construction techniques, urban planning, land-use planning and the department for barrier-free housing. Each project has to be examined and approved by this expert board on an obligatory basis. Any planning deficits regarding accessibility have to be eliminated in order to fulfil the criteria for obtaining public funding.

Outcome: Since the introduction of the housing round-tables in the mid 1990 there have been 483 meetings (approximately every two weeks). The need for adjustments in terms of accessibility is decreasing as awareness of the planners and architects is rising. The integrated approach of the housing round tables has created awareness amongst professionals working in the field as well as amongst people concerned.

Name of the Initiative: *Project Diversity Management*

Sector/institution: University of Vienna

Reasons for the initiative: The University of Vienna strives to perceive, acknowledge and promote diversity and to support disadvantaged groups. The concept of diversity management is part of its strategic development plan.

Purpose: To sensitise on the topic of diversity, support disadvantaged groups and further internal networking.

Process: An internet platform was set up to provide information, and give room for discussions and exchange. Various initiatives or positive action measures are located in different departments of the University of Vienna and the 'Project Diversity Management' has a coordinating function. In addition, measures targeted at particular disadvantaged groups, for example deaf people and people who are hard of hearing, are initiated. Thereby internet pages have been translated into sign language and a brochure for teachers containing information about deafness and sign language has been compiled as well as recommendations on the change of exam modalities for deaf students and students who are hard of hearing.

Outcome: The department receives positive feedback from people who appreciate the initiative as a whole, or have benefited from specific measures. Sometimes people point out blind spots and ask for adjustment measures which should be taken in certain fields.

Name of the Initiative: *Diversity Check*

Sector/institution: Public sector: Community Level

Reasons for the initiative: In an effort to implement effective diversity management within the Viennese Municipality Department for Integration and Diversity Issues, it is attempting to overcome the lack of knowledge and increase awareness on the purpose behind the equal representation of minorities. By so doing, the Department demonstrates both that it makes sense and what diversity really means within the other departments became evident.

Process: Accompanying the service of providing counselling for any activities related to integration and diversity, the Department developed a self-assessment tool providing other departments with the opportunity to check their level of diversity and provide assistance in developing, implementing and evaluating their own diversity strategies. The Department for Integration and Diversity is continuously accompanying the process and is providing its expertise for the development and implementation of tailor-made solutions for the fields of action identified.

Outcome: 12 very different departments of the Viennese municipality have used the opportunity to check their level of diversity and to start implementing a tailor-made strategy for a change management process aimed at a reduction of inequalities and the promotion of greater diversity within their organisation.

Name of the Initiative: *Mingo Migrant Enterprises*

Sector/institution: Public Sector: Business Development

Reasons for the initiative: Companies with an immigrant background make up around twenty percent of Vienna's economy. Frequently these companies have special needs with regard to language and culture and thus face barriers.

Purpose: To enhance the accessibility to existing structures of service and support by the city of Vienna and therefore improve the competitiveness of small and medium sized enterprises and company founders with immigrant background.

Process: The initiative was started in May 2008. At the beginning it was important to introduce the project to intermediaries and to the public and hence reach the target group. An office was set up which offers free information and counselling in different languages. The assistance entails information about support offered by the city of Vienna, help with implementing operational steps to innovation as well as support in dealing with agencies and authorities.

Outcome: The response is generally positive and the organisation experiences increasing interest in the project as it gets more widely known. Numerous talks with customers, intermediaries and institutions have taken place and many entrepreneurs with immigrant background have already benefited from the initiative.

Name of the Initiative: *Welcome to Vienna*

Sector/institution: Public Sector: Community Level - Immigration, Citizenship and Registry Offices

Reasons for the initiative: While being the largest immigration authority of Austria, establishing equal opportunities is an important topic for the Viennese Immigration, Citizenship and Registry Offices Department. The initiative was launched by the former councillor of immigration with the aim of reducing barriers for new immigrants caused by a lack of information and initial support.

Purpose: The service-package 'Welcome to Vienna' is intended to support the integration efforts of new immigrants and to assist them in their new start.

Process: 'Welcome to Vienna' consists of several parts: The 'Welcome Folder', available in several languages, including information on housing, work, adult education, health care and emergencies, everyday life and recreation and a collection of useful contact addresses for several institutions; a quarterly newspaper for immigrants covering information on further education, language courses and health care; orientation sessions and a series of events available in different languages offering information on legal issues and work.

Outcome: The department is measuring the success of this initiative by means of regular evaluation including interviews with customers and the collection of statistical data on participants. The strategy of assisting new immigrants in their new start seems to be effective, as the feedback of participants, is positive and the measures are appreciated and well used. Other cities have installed similar welcoming packages modelled on this initiative.

Name of the Initiative: *Biculturalism*

Sector/institution: Equalizent (limited liability company), qualification centre for deafness, hardness of hearing, sign language and diversity management

Reasons for the initiative: The conviction that people belonging to minority groups should not be treated as objects was an important impulse for the start of the initiative. An attitude of esteem towards all core dimensions of diversity is an integral part of the company's philosophy. The belief that it will be more attractive as such and benefit economically was an impetus as well.

Purpose: To strengthen biculturalism and thereby facilitate integration, access to all ranks and to communication for all employees.

Process: Equalizent is a bilingual company, the working languages are sign language and spoken German. All staff members are capable of speaking sign language or are about to learn it. Integration is understood as mutual process. Deaf people and people who are hard of hearing are present in all ranks of the company. As there is a long tradition of deficient education of deaf people and people who are hard of hearing further education is often necessary and therefore facilitated.

Outcome: On the whole it was felt that biculturalism and bilingualism respectively are well established within the company. One big success is the career advancement of several deaf people and people who are hard of hearing. Presently one member of the company's management team is a deaf person. The goal of improving the fluency in sign language and German within the company was accomplished as well. A diversity scorecard is additionally used for evaluating the measures.

1.5. Key statements identified from consensus workshops grouped by theme

(a) Vienna, 26.08.2008

Emerging theme	Key statements	Rank (score)
Understanding of positive action	<ul style="list-style-type: none"> To offer possibilities for making use of special skills, compensating for disadvantages and the acceptance of these measures Responsible solutions for remedying discrimination to make differences visible in all ranks of society Awareness of differences as chance Attitude and sensibility as precondition for pro-active action Positive Action Measures are in practice effective and goal-oriented measures (inclusive evaluation) Laws that have a clear political will in favour of: remedying deficits, recognition of rights, sustainability, changes that have consequences, equal treatment and societal participation 	<p>1 (2)</p> <p>2 (4)</p> <p>3 (2)</p>
Impetus for positive action	<ul style="list-style-type: none"> Motivation to set actions, being willing to take risks, based on background-knowledge, self-reflexion and personal commitment Impetus for positive action measures is their relevance in society, because they lead to a change of social circumstances in all areas of life Raising employee satisfaction and efficiency Normative/ regulative factors Internal factors External factors Motives for positive action measures can be image-related Impetus for positive action measures can be legal requirements, for example EU-standards 	<p>1 (6)</p> <p>2 (6)</p> <p>3 (3)</p> <p>4 (1)</p>
Effectiveness of positive action	<ul style="list-style-type: none"> The quality of positive action measures shows in the internal and external satisfaction, which is documented by qualitative/ optional ideas, actions and arguments. They lead to a change of content and enlightenment The effectiveness is shown by a nearest possible approximation to the targeted goal The effectiveness of positive action measures is dependent on variable factors: time, target group, area of implementation and quality Effectiveness is measurable by changes of the initial situation in relation to the formulated goal 	<p>1 (11)</p> <p>2 (4)</p> <p>3 (2)</p> <p>3 (2)</p>
Impact of positive action	<ul style="list-style-type: none"> Effectiveness, society changes Positive action measures lead to an improved internal communication and to more positive internal and external perceptions Change of attitudes, actions and re-definition (person, organisation) Concrete impact can be: a greater variety of options, increase in resources, approximation to equal chances Making it a topical issue De-framing of differences Mutual impact of positive action measures among each other ('new blind spots') At best everybody benefits (-> higher acceptance) Staff, 2. Customers... Dismantling of barriers/ prejudices Gets a drive of its own 	<p>1 (4)</p> <p>2 (3)</p> <p>3 (1)</p>
Groups targeted for positive action initiatives	<ul style="list-style-type: none"> Young entrepreneurs and small and medium-sized businesses with a migration background, People with disabilities People with a migration background Barrier-free accessibility (for everybody) Women 	

(b) Graz, 28.08.2008

Emerging theme	Key statements	Rank (score)
Understanding of positive action	<ul style="list-style-type: none"> • Implementing structures to offer every population group a maximum of development possibilities • Positive action measures provoke structural change that enhances equal opportunities and helps to overcome underrepresentation of certain groups, for example concerning access to education • Measures which are a gain for everybody • Positive action measures include awareness raising and sensitising by means of role models • Positive action measures must include support (financial etc.) • Positive action measures are concrete measures ahead of, during and after circumstances of discrimination aiming at equal chances, e.g. structuring, conflict management, clear formulation of valid rules and others, all of these aiming at sustainable implementation 	1 (5) 2 (3) 3 (2)
Impetus for positive action	<ul style="list-style-type: none"> • They raise the quality of life of the 'persons concerned' and contribute to the well-being of all • Positive action measures are set to achieve a concrete change • The gap of inequality is widening! • Legal basis • To accomplish gain and possibilities for both sides • To adopt social responsibility on the basis of an attitude in favour of a just society 	1 (1) 1 (1) 1 (1)
Effectiveness of positive action	<ul style="list-style-type: none"> • When the norm has changed • Identification in all ranks of society • Statistical, visible effects (representation) • To strengthen possibilities of self-organisation of staff • Concrete gain recognisable and measurable • Everyday occurrence and matter of course • Empowerment of staff 	1 (5) 2 (2) 2 (2)
Impact of positive action	<ul style="list-style-type: none"> • Involvement of persons concerned on all hierarchy ranks in decisions/ as supervising-body (as experts) • Awareness raising, raising sensitivity • Higher representation • Support by e.g. mentoring programmes • Workflows decelerate • Scepticism • Organised appearance improves the possibilities of access • Reports lead to sensibility • Dialogue • Language changes 	1 (5) 2 (4) 3 (1)
Groups targeted for positive action initiatives	<ul style="list-style-type: none"> • Migrants • People with disability • Groups that are potentially discriminated against • Women who wear headscarves 	

1.6. Key summary

The attitude towards the implementation of positive action measures is quite positive in Austria, at least as regards experts and people that are actively involved in related issues. The understanding is a broad one, not limiting the concept to preferential treatment and/or quota systems but including various ways of promoting the potential of people far from the labour market. Due to the legal situation and the long-standing tradition positive action measures targeted at women and at people with disabilities or mobility restrictions are more widely accepted and the general public 'is used to them'. Specific measures for people that face barriers and structural inequalities because of their ethnic background or religion are less common and what is in place in terms of promotional programmes by the Labour

Market Service is little welcomed by the public in a political climate that is quite hostile towards migrants and especially towards Muslim people at the time of this report. Initiatives of single organisations and companies that are implemented as part of an overall diversity strategy or because of a specific focus on the population with migrant background are treated more favourably and are less known. Positive action measures for LGBT people are very rare, existing initiatives are focusing on making these groups visible in society and within organisations and trying to reach an equal standard of protection and social advantages for homosexual couples in comparison with married heterosexuals (marriage in Austria is limited to heterosexual couples).

The public sector and some municipalities have been taking a kind of pioneer role concerning the

implementation of positive action measures. This in some cases is due to their long-standing tradition in enforcing equality for women and men, in other cases it is grounded in successful single initiatives aiming at inclusion of people with disabilities, in others it has been single persons engaged in the promotion of more equality in society. Furthermore this development is grounded in the higher pressure towards being a morally correct employer and last but not least the easier access to funding for such issues within the public sector. Outside the public sector positive action measures are becoming more common in big enterprises either with international parent companies prescribing diversity and inclusion principles or in the semi-public sector (like insurance companies, bank institutes, oil companies) that face similar legitimization needs as the public sectors. Last but not least, positive action measures are being introduced in non-profit organisations. There is no big run on positive action measures or any initiatives fitting in the concept of diversity management in the sector of small and medium sized enterprises.

Positive action measures are introduced with different motivations. They do form part of diversity strategies, they are implemented as a reaction to changes in population, with the aim to reflect diversity in society within the organisations and/or to gain new or better access to specific groups of people within society. The business case is a topic, with a focus less on the clientele however than on the incorporation of positive action measures as part of a strategy to create a more agreeable working atmosphere for all. In a surprising number of cases, organisations and enterprises are very keen on providing the best possible opportunities for all, and see positive action measures as an essential part of it.

Due to the short course of time, success is very hard to evaluate. Experts reported significant changes in awareness and in attitude towards the needs of disabled people, reflected in the readiness to consider criteria of accessibility as a matter of course. Positive action measures that had been implemented as part of an organisational change management procedure had been comparatively very successful, even when the obstacles during the course of implementation procedures had been challenging. Single event measurements lacked sustainability, even if even those were considered as important contributions for awareness raising within organisations as well as concerning the general public.

1.7. Implications for policy and practice and recommendations

Practitioners and people working in the field of anti-discrimination and inclusion are quite positive about the potential of positive action measures in Austria. Interest in implementing diversity strategies in private companies has been rising over the past five years and the readiness to face the topic of heterogeneity in society by developing strategies to augment representation and more equality of opportunities is quite high within some public

authorities. The conviction that something has to be done and that this something has to be more than mere equal treatment has spread within stakeholders.

This attitude, as well as the basic knowledge about where to start and what to do, is limited to a small number of actors still and is far from being common sense. The positive approach of politics and of politicians of all political parties towards the topic of inclusion of people with disabilities as well as the legal provisions makes it easier to implement strategies targeting people with disabilities than for other groups of people that would need to get better engaged within the labour market.

For structural changes within Austrian society, more ambition of more stakeholders is needed. The initiatives that are in place can be considered as a very important start as they can serve as good practice and as a source for learning how to override barriers and stumbling blocks. However, without a clear political will and commitment of politicians the Austrian landscape of positive action measures in place will remain a very sparse one.

Signals from the side of employers' organisations get more vital every now and then, as employers are realising the need to find qualified people in the labour market and the potential that lies within a heterogeneous composition of employees. Trade Unions are slowly starting to take over responsibility for people that have difficulties in being employed. Initiatives and positive signals from the side of both social partners would be very important in terms of promoting the role of positive action measures in the Austrian labour market as social dialogue is still one of the most important factors of influence in any employment related developments.

Clear political statements from all stakeholders, which should include politicians, representatives from social partner organisations and companies, involving the media and providing information on good practice in Austria as well as in other European countries would be important factors enhancing positive attitudes towards positive action measures and furthermore - and even more important - for motivating more institutions to implement them. Insecurities in terms of what to do exactly and how are still prevailing and examples where there had been exchange of experience with initiatives from other European countries show that learning from their factors of success as well as from their failures facilitates factual and successful realisation of positive action measures.

Key barriers for equality of opportunities in Austria however are placed in the educational system that still has strong segregative elements. Breaking these barriers inter alia with positive action measures aiming at more equality for all would be one of the most important fields of action for the years to come.

References

Act on the Employment of People with Disabilities (Behinderteneinstellungsgesetz), BGBl. Nr. 22/1970, last amended by Federal Law Gazette I Nr. 82/2005

Caruso, Daniela (2002): Limits of the Classic Method: Positive Action in the European Union after the New Equality Directives. Jean Monnet Working Paper 10/02.

<http://www.jeanmonnetprogram.org/papers/02/021001.pdf>

De Vos, Marc (2007): Beyond Formal Equality: Positive Action under Directives 2000/43/EC and 2000/78/EC. European Communities, 2007.

Disability Equality Act (Behindertengleichstellungsgesetz), BGBl I Nr. 82/2005, Federal Law Gazette I Nr 82/2005

Equal Treatment Act - ETA (Gleichbehandlungsgesetz), BGBl I Nr. 66/2004, last amended by Federal Law Gazette / Nr.98/2008.

European Commission (2007): Putting Equality into Practice. What role for positive action? Luxembourg: Office for Official Publications of the European Communities.

Federal Disability Act (Bundesbehindertengesetz), BGBl Nr. 283/1990, last amended by Federal Law Gazette I Nr. 82/2005

Federal-Equal Treatment Act - F-ETA (Bundes-Gleichbehandlungsgesetz, BGBl. I Nr. 65/2004), Federal Law Gazette I Nr. 65/2004

Kaloianov, Radostan (2008): Affirmative Action für MigrantInnen? Am Beispiel Österreich. Studienreihe Konfliktforschung, Band 21. Verlag Braumüller. Wien.

National Minorities Act of 1976 (Volksgruppengesetz) - Bundesgesetz über die Rechtsstellung von Volksgruppen in Österreich. BGBl. 396/1976, last amended by BGBl. I Nr. 35/2002.

Schindlauer, Dieter (2007): *Report on measures to combat discrimination directives 2000/43/ec and 2000/78/ec country report Austria*. Report for the European Network of Legal Experts in the non-discrimination field. Human European Consultancy/Migration Policy Group, 2007. http://ec.europa.eu/employment_social/fundamental_rights/pdf/legnet/arep07_en.pdf

Relevant legislation can be found on the Website of the Litigation Association of NGOs Against Discrimination <http://www.klagsverband.at/gesetze>

2. PAMECUS Country Report: Canada

The Canada country report was prepared by the PAMECUS country expert for Canada. The report begins with a legal analysis of positive (affirmative) action in Canada, followed by a summary of findings from the consensus workshop and follow up interviews. It also presents examples of positive/affirmative action policies and communications from various organisations that participated in the consensus workshops and follow up interviews.

2.1. Background to the legal context of positive action in Canada

Canada is a federal state, comprised of 10 provinces and three territories.¹⁰ The legal context with respect to positive action includes a constitutionally enshrined right to equality, which applies to government action throughout Canada, as well as non-discrimination provisions and positive action measures contained in federal and provincial/territorial statutes, policies and programmes, which apply within their respective jurisdictions.

The *Canadian Charter of Rights and Freedoms* (“the Charter”)¹¹, one of Canada’s constitutional instruments, confers “equal rights” on “every individual” as follows:

*Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national and ethnic origin, colour, religion, sex, age or mental or physical disability.*¹² (Section 15(1))

The purpose of the equality rights guarantee under section 15(1) has been interpreted substantively and has been summarised by the Supreme Court of Canada as follows:

*It may be said that the purpose of s.15(1) is to prevent the violation of essential human dignity and freedom through the imposition of disadvantage, stereotyping, or political or social prejudice, and to promote a society in which all persons enjoy equal recognition at law as human beings or as members of Canadian society, equally capable and equally deserving of concern, respect and consideration.*¹³

Section 15(2) of the *Charter* specifically contemplates positive action measures and is said to have been included in the *Charter* out of “excessive caution” to ensure that affirmative action programmes would not be overturned on grounds of reverse discrimination:¹⁴

¹⁰ Given the scope of the legal analysis, this background paper will focus primarily on federal legislation and legislation in the provinces of Ontario and Quebec - Alberta is also mentioned once I think?.

¹¹ *Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c.11

¹² The listed grounds of discrimination have been expanded by the Courts to include grounds “analogous” to the enumerated grounds, such as sexual orientation.

¹³ *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497 at para. 51

¹⁴ *Lovelace v. Ontario*, [2000] 1 S.C.R. 950 at para. 105, Pentney et al. ed. *Discrimination and the Law* (Toronto: Thomson Professional Publishing Canada, 2004) (Looseleaf), at p.4-147,148;

Subsection (1) does not preclude any law, programme or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability. (Section 15(2))

In addition to the *Charter*, the federal government and every province and territory in Canada have enacted human rights legislation.¹⁵ Although the provincial and federal human rights statutes vary to some extent in content and scope, in general, they all:

(1) contain a prohibition of discrimination based on listed grounds,¹⁶. The statutes (generally) allow for affirmative action (as noted under 2.2.3); (2) provide for the adjudication of human rights complaints by a specialized statutory human rights tribunal;¹⁷ and (3) permit the specialised human rights tribunal to order positive action measures. Importantly, unlike the *Charter*, statutory human rights regimes apply to discrimination by private individuals or firms, as well as to government bodies.

2.2. Legal analysis

2.2.1. Does legislation establish any positive action measures? E.g. mandatory quotas for disabled persons?

In general, substantive equality in Canada has not been promoted by positive action requirements or schemes mandated by statute,¹⁸ but through anti-discrimination legislation, government programmes and policies, and the

¹⁵ See for example, Federal: *Canadian Human Rights Act*, R.S. 1985, c.H-6, as amended; British Columbia: *Human Rights Code*, R.S.B.C. 1996, c.210, as amended; Ontario: *Human Rights Code*, R.S.O. 1990, c.H.19, as amended; Quebec: *Charter of Human Rights and Freedoms*, R.S.Q. c.C.12, as amended. In addition to the human rights regimes established by provincial human rights codes, one leading Canadian human rights scholar has noted that : “examples of human rights provisions in contexts other than provincial human rights codes could be multiplied *ad libitum*.” Pentney et al. ed. *Discrimination and the Law* (Toronto: Thomson Professional Publishing Canada, 2004) (Looseleaf), at p.2-27. Such additional legislative provisions tend to prohibit discrimination in specific contexts (consistent with the general prohibition contained in the human rights statutes). Other examples include general statements of principle, such as in the British Columbia *Multiculturalism Act*, R.S.B.C. 1996, c.321 which states that it is provincial government policy to promote a society free from discrimination, promote cross cultural understanding and participation of all in the economic, social and cultural life of the province (s.3).

¹⁶ Federal: The Canadian Human Rights Act prohibits discrimination on the grounds of race, national or ethnic origin, colour, religion, age, sex, sexual orientation, marital status, family status, disability, and conviction for which a pardon has been granted (s.3(1)); British Columbia: prohibits discrimination on the basis of race, colour, ancestry, place of origin, religion, marital status, family status, physical or mental disability, sex or sexual orientation (ss.7-14); Ontario: prohibits discrimination on the basis of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, age, sex, sexual orientation, age, marital status, family status, disability, receipt of public assistance (with respect to accommodation only), record of offences (with respect to employment only) (ss. 2-6); Quebec: race, colour, sex, pregnancy, sexual orientation, civil status, age except as provided by law, religion, political convictions, language, ethnic or national origin, social condition, a handicap or the use of any means to palliate a handicap (s.10).

¹⁷ In some provinces, human rights complainants may also have access to the Courts for the adjudication of human rights complaints, for example in the recently amended Ontario *Human Rights Code*, s.46.1 permits Courts to determine human rights complaints if made in the context of civil proceedings.

¹⁸ In a 2002 lecture at the University of Toronto Faculty of Law, The Right Honourable Beverley McLachlin, Chief Justice of Canada, described affirmative action measures to date in Canada as being “restrained”. See Honourable B. McLachlin, “Racism and the Law: The Canadian Experience” (2002) 1 J.L. & Equality 7-24 at para.44.

jurisprudential development of the law, for example as a result of challenges to government action or inaction under section 15(1) of the *Charter* and the adjudication of human rights complaints under federal and provincial/territorial human rights regimes. There are, however, a few notable exceptions.

Employment Equity Legislation

The Federal *Employment Equity Act*¹⁹ (and its predecessor legislation) was enacted to remedy past discrimination and prevent future barriers to employment for four designated groups: women, persons with disabilities, Aboriginal peoples and members of visible minorities.²⁰ The Act applies to all federally regulated employers with 100 or more employees, all federal departments, and other designated parts of the federal public service including the Canadian Forces and the Royal Canadian Mounted Police. The Act requires employers to analyse their workforces; review employment systems, policies and practices to identify and eliminate barriers; provide reasonable accommodation; inform employees of the purpose of employment equity, key measures for implementing it and the progress achieved; and undertake policies and programmes to correct under-representation, including by means of qualitative and numerical goals or targets and activities with set timetables.²¹ For example, in 2000 the federal government adopted an 'Embracing Change' initiative which set a one in five benchmark for the hiring of visible minorities by 2003 and a one in five benchmark by 2005 for executive hiring.²²

Section 42(2) of the federal *Employment Equity Act* incorporates a federal government programme established by Treasury Board Circular, called the Federal Contractors Programme (FCP). Under the FCP, employers with 100 or more employees who have secured a federal goods or services contract of \$200,000 or more are required to sign a certificate of commitment to implement employment equity consistent with the *Employment Equity Act*.

The province of Quebec has enacted *An Act Respecting Equal Access to Employment in Public Bodies*,²³ to redress discrimination and achieve 'social, school and workplace integration' of four target groups: women, aboriginal peoples, persons who are members of visible minorities, and persons whose mother tongue is neither French nor English and who are neither aboriginal nor a visible minority. The Act requires public bodies employing 100 or more persons to analyse their workforces and establish an 'equal access employment programme' to 'increase the representation of each target group concerned in the

workforce and to correct practices in employment systems'.²⁴ The Act provides that an 'equal access employment programme shall comprise' various measures, including 'numerical goals, by type of occupation or occupational group, to be achieved with respect to each target group concerned'.²⁵ Since the legislation was enacted in 2001, the Quebec Human Rights Commission has reviewed the staffing analyses of employers, advised employers that their 'target group' numbers were not adequately representative, and required employers to take action.

Under the authority of the Quebec *Public Administrations Act*,²⁶ the province of Quebec has also enacted a *General Regulation respecting the conditions of contracts of government departments and public bodies*²⁷, which imposes a commitment to implement an 'affirmative action programme conforming to the [Quebec] Charter of rights and freedoms', on employers of 100 or more employees as a condition of any supply, construction or services contract with government departments and public bodies in Quebec (unless exempted by statute). Quebec's *Regulation respecting Affirmative Action*²⁸ provides that the object of any affirmative action programme is to remedy the situation of any groups subjected to discrimination as prohibited by the Quebec *Charter of Human Rights and Freedoms* ('the Quebec Charter'), but particularly 'women, members of cultural communities, the handicapped and Native peoples'.

In general, some other provinces in Canada may have specific or more limited employment equity policies or programmes, but do not similarly legislate employment equity.²⁹

²⁴ Ibid, s.13

²⁵ Ibid, s.13. The full text of s.13 of the Act is as follows: "The purpose of an equal access employment program is to increase the representation of each target group concerned in the workforce and to correct practices in employment systems. An equal access employment program shall comprise the following: (1) a review of employment systems and more particularly of recruitment, training and promotion policies and practices; (2) numerical goals, by type of occupation or by occupational group, to be achieved with respect to each target group concerned; (3) temporary corrective measures with specified goals by type of occupation or by occupational group, for the hiring or promotion of persons in each target group concerned; (4) equal opportunity measures and, if needed, support measures to eliminate discriminatory management practices; (5) a timetable for the implementation of measures and the achievement of goals; (6) measures to consult and inform the personnel and their representatives; and (7) the identity of the person in a position of authority who is responsible for the implementation of the program."

Section 14 of the Act provides some limits on the obligations imposed under the equal access employment program, as follows: "An equal employment program cannot require a public body (1) to hire or promote unqualified persons; (2) to hire or promote persons without basing the hiring or promotion on merit in cases where a collective agreement or established practices require the hiring or promotion be based on selection according to merit; (3) to take actions that would be unduly prejudicial to the interests of the public body or of persons who are not members of a target group concerned; (4) to create new positions in its workforce; or (5) to exclude seniority as a criterion for hiring, promotion, dismissal, layoff, recall or redeployment."

²⁶ R.S.Q., c. A-601

²⁷ R.Q. c. A-6.01, r.0.02

²⁸ *Affirmative Action Programmes, Regulation respecting*, R.Q. c. C-12, r.0.1, s.1

²⁹ Employment equity legislation was enacted in the province of Ontario in 1993 (*Employment Equity Act* R.S.O. 1993, c.35) but repealed in 1995 (pursuant to the *Job Quotas Repeal Act*, 1995) following a (conservative) change in provincial government. Equality seeking groups commenced a legal

¹⁹ S.C. 1995, c.44

²⁰ "Visible minorities" are defined in the federal *Employment Equity Act* as "persons, other than aboriginal peoples, who are non-Caucasian in race or are non-white in colour".

²¹ See for example the preliminary findings of the (federal) Senate Standing Committee on Human Rights report, "Employment Equity in the Federal Public Service - Not There Yet", February 2007, page 7, available at <http://www.parl.gc.ca/39/1/parlbus/commbus/senate/com-e/huma-e/rep-e/rep07feb07-e.pdf>

²² Ibid, at p.10 and Task Force on the Participation of Visible Minorities in the Federal Public Service, "Embracing Change in the Federal Public Service" March 2000, available at http://www.tbs-sct.gc.ca/pubs_pol/hrpubs/TB_852/dwnld/ecfps_e.pdf

²³ R.S.Q. A-20.01

Pay equity legislation

Pay equity legislation or programmes are in place in each of the provinces and territories in Canada, other than Alberta, Saskatchewan and the Northwest Territories.³⁰ The Ontario *Pay Equity Act*³¹ acknowledges in its preamble that it is an 'affirmative action' measure 'to redress gender discrimination in the compensation of employees employed in female job classes in Ontario'. The Act recognises the principle of equal pay for work of equal value and requires mandatory compliance by all public and private sector employers of more than 10 employees. The Quebec *Pay Equity Act*³² is similarly intended to 'redress differences in compensation due to systemic gender discrimination suffered by persons who occupy positions in predominantly female job classes' (s.1) and applies to public and private employers with 10 or more employees. The obligations on employers differ depending on the size of the employer, but all employers subject to the Act are required to make compensation adjustments.

Legislation concerning persons with disabilities

In addition to the prohibition of discrimination against persons with disabilities in all human rights statutes in Canada, the provinces of Ontario and Quebec have enacted specific legislation to redress the systemic barriers faced by persons with disabilities. The Quebec *Act to Secure Handicapped Persons in the Exercise of their Rights with a view to achieving social, school or workplace integration*,³³ requires every government department or public agency employing at least 50 persons and every local municipality with at least 15,000 inhabitants to adopt an action plan identifying barriers to integration and to report on the measures taken each year to reduce barriers to integration.³⁴ While the elimination of barriers *per se* may not necessarily qualify as 'positive action', legislation which requires government departments or agencies to adopt an action plan and to report on the progress of the implementation of the plan, arguably constitutes a legislated measure of positive action above and beyond anti-discrimination legislation.

The Act to Secure Handicapped Persons in the Exercise of their Rights with a view to achieving social, school or

challenge to the repeal of the Ontario employment equity legislation on the basis that such repeal violated the constitutional (substantive) equality rights of the beneficiaries of the act - women, persons with disabilities, aboriginal persons and members of racial minorities. The Ontario Court of Appeal dismissed the claim on the basis that the statutory *Human Rights Code* provides protection against discrimination in employment. The Court also held, in obiter, that in its view, the section 15 equality rights guarantee in the *Charter* does not impose a positive duty on a legislature to enact legislation to combat systemic discrimination in employment (See *Ferrell v. Ontario* (1998), 42 O.R. (3d) 97 (C.A.)).

³⁰ This statement is exclusively based on William Petney, *Discrimination and the Law* (Toronto: Thomson Professional Publishing Canada, 2004)(looseleaf) at 12-79. For example, the provinces of New Brunswick, Nova Scotia, Manitoba and Prince Edward Island have pay equity legislation. The statutory regimes in Canada vary, including with respect to whether they rely on a complaints-based system of enforcement or mandatory compliance (see Petney *supra*, at p. 12-77).

³¹ R.S.O. 1990, c.P.7

³² R.S.Q. c.E-12.001

³³ R.S.Q. c.E-20.1

³⁴ *Ibid*, section 61.1

workplace integration also contains the following requirements: (1) not later than December 17, 2005, the applicable government departments and public agencies must appoint a coordinator of services for handicapped persons within their respective entities (s.61.4); (2) with respect to workplace integration, the relevant government Minister (as defined in the act) must facilitate the integration of handicapped persons into the labour market by formulating, coordinating, monitoring and assessing a strategy for the integration and continued employment of handicapped persons, and by establishing result-based objectives, and must submit a progress report to the Government before December 17, 2007, with a further report reviewing and assessing the actions implemented and the effects of the strategy to be completed no later than December 17, 2009 (s.63); (3) Within the year following December 17, 2004, transportation bodies, companies or authorities subject to the Act must submit for approval to the Minister of Transport a development programme for the purpose of providing, within a reasonable period, public transportation for handicapped persons within the territory served by the company or transit authority (s.67).

The Ontario *Accessibility for Ontarians with Disabilities Act, 2005*³⁵ applies to both public and private sectors in Ontario. The purpose of the act is to develop, implement and enforce standards for accessibility related to goods, services, facilities, employment, accommodation and buildings. Although the Act does not establish quotas, within the Canadian legal landscape it is a positive measure since it requires, as a matter of law, the establishment of enforceable standards which may require positive action on the part of those subject to the standards. For example, pursuant to the *Accessibility Standards for Public Service* regulation made under the Act, designated public bodies and providers of goods and services are required to establish policies, practices and procedures and to conduct training of their staff. In addition, all organisations or bodies subject to an accessibility standard must file an accessibility report on a regular basis and may be inspected by officials to monitor and enforce compliance.

2.2.2. Does legislation establish any obligations on public or private sector organisations to take positive action?

In addition to the statutory positive action obligations described above, human rights statutes across Canada frequently contain provisions requiring public and private parties to accommodate individuals protected by the legislation, to the point of undue hardship.³⁶ This duty to accommodate applies in the context of employment and the provision of facilities and services. The appropriate accommodation and the point at which undue hardship is reached in any given case will depend on the circumstances of that case. It should be noted, however, that duties to provide an accommodation have not been

³⁵ S.O. 2005, c.11

³⁶ *Canadian Human Rights Act*, s.15(2); *Ontario Human Rights Code*, ss. 11 (2), 17(2) and 24(2),(3);

defined as positive action within the definition of positive action adopted for this PAMECUS project.

Section 15 of the *Charter* does not specifically require governments to take positive action. Arguably, the substantive nature of the right necessarily involves positive action by government bodies. The Supreme Court of Canada has recognised that the *Charter* right to equality may extend beyond an obligation on government to avoid legislation that is discriminatory to include an obligation to pro-actively alleviate socio-economic disadvantage through positive legislated measures. In *Eldridge v. British Columbia (Attorney General)*,³⁷ a case in which deaf persons successfully challenged the failure by the province of British Columbia to provide sign language translation for medically required services, the Supreme Court rejected arguments made by the provincial governments that section 15 does not oblige governments to implement programmes to alleviate disadvantage, as a 'thin and impoverished vision of s.15(1)'. While declining to rule definitively on the obligation on government to positively address systemic disadvantage, the Court in *Eldridge* left the door open as follows:

*It has been suggested that s.15(1) of the Charter does not oblige the state to take positive actions, such as provide services to ameliorate the symptoms of systemic or general inequality...Whether or not this is true in all cases, and I do not purport to decide the matter here, the question raised in the present case is of a wholly different order...This Court has repeatedly held that once the state does provide a benefit, it is obliged to so in a non-discriminatory manner...In many circumstances, this will require governments to take positive action, for example by extending the scope of a benefit to a previously excluded class of persons.*³⁸

Very few *Charter* equality rights cases, however, have imposed such positive obligations on government and the direction that the Supreme Court and Canadian jurisprudence will take in this regard remains unclear.³⁹

2.2.3. What forms of positive action are permitted, but not required, by legislation?

As discussed in the background section 2.1 above, positive action measures taken by public bodies are, in general, permitted as a component of the constitutional right to equality, the substantive purpose of which is not only to prevent discrimination but also to ameliorate the conditions of disadvantaged persons.⁴⁰ In addition, in

terms of the key permissive legislation applicable to public and private bodies, every human rights statute in Canada (with the exception of Alberta⁴¹) contains provisions which exempt 'special program(me)s' or 'affirmative program(me)s' from charges of discrimination.⁴²

The Ontario *Human Rights Code* defines a 'special program(me)' as being 'designed to relieve hardship or economic disadvantage or to assist disadvantaged persons or groups to achieve or attempt to achieve equal opportunity'. The Quebec *Charter of Human Rights and Freedoms* protects affirmative action programmes designed 'to remedy the situation of persons belonging to groups discriminated against in employment, or in the sector of education or of health services and other services generally available to the public'.⁴³

Human rights tribunals established under the human rights statutes also generally have broad remedial powers, including the power to order parties to take positive steps. Tribunals have, in a number of rare cases, ordered specific affirmative action measures. For example, in one famous case in which the positive action plan was upheld by the Supreme Court of Canada, *Canadian National Railway v. Canada (Human Rights Commission)*, sub nom. *Action Travail des Femmes v. Canadian national Railway*,⁴⁴ the Canadian Human Rights Tribunal imposed a mandatory affirmative action programme to ensure that one of every four new employees in a particular category of railway employee was a woman, until women comprised 13% of that job category. In *National Capital Alliance on Race Relations v. Canada (Health & Welfare)*⁴⁵, the Canadian Human Rights Tribunal made various positive action orders with respect to training, posting and recruitment procedures and data collection but also, as a 'temporary measure', ordered Health

discrimination but also to play a role in promoting the amelioration of the conditions of disadvantaged persons".

⁴¹ Zinn, R., *Law of Human Rights in Canada* (Aurora: Canada Law Book Inc., 2004) (Looseleaf), at 15-4 notes that the general provision of the Alberta *Human Rights, Citizenship and Multiculturalism Act*, R.S.A. 2000, c.H-14, as amended, s.11 does provide that contraventions of the Act will be deemed not to have occurred if it can be shown that the alleged contravention was reasonable and justifiable in the circumstances, which may protect positive measures.

⁴² Canadian Human Rights Act, s.16; British Columbia Human Rights Code, s.42.; Ontario Human Rights Code, s.14; Quebec Charter of Rights and Freedoms, s.86. As noted by Zinn, R, *Law of Human Rights in Canada* (Aurora: Canada Law Book Inc., 2004) (Looseleaf) at p.15-2, there are difference in the various statutory exemptions, particularly with respect to: (1) the intent or objectives of the programs; (2) the classes of persons the programs can be designed to assist; (3) the powers of the various human rights commissions; and (4) the status of the programs in relation to the provisions which prohibit discrimination.

⁴³ The Quebec *Regulation respecting Affirmative Action Programs*, R.Q. c.C-12, r.0.1 establishes guidelines for affirmative action programs and data analyses. Section 2(1) limits affirmative action programs with respect to employment insofar as it requires that affirmative action programs must include the following elements: (1) the objectives sought in regard to the greater representation of target group members; (2) the steps required to remedy the effects of an observed discriminatory situation; (3) a time-table for attaining the objectives and implementing the measures proposed to that end; and (4) the control mechanisms that would allow for assessing progress made and problems encountered in carrying out the program and for determining any adjustments.

⁴⁴ [1987] 1 SCR 1114 (SCC)

⁴⁵ (1997), 28 C.H.R.R.D/179 (C.H.R.T.)

³⁷ *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624

³⁸ *Ibid.* at para. 73

³⁹ In the 2004 decision of the Supreme Court of Canada in *Auton (Guardian ad litem of) v. British Columbia (Attorney General)*, [2004] S.C.R. 657, the Court held that "[t]his Court has repeatedly held that the legislature is under no obligation to create a particular benefit. It is free to target the social programs it wishes to fund as a matter of public policy, provided the benefit itself is not conferred in a discriminatory manner" (at para. 41). In the case, the Court refused to impose an obligation on provincial governments to fund particular therapies for children with autism. See also Bruce Porter, "Expectations of Equality", (2006) 33 S.C.L.R. (2d) 23 for a discussion of the conception of the *Charter* equality rights guarantee that would impose positive action on government and an analysis of the *Charter* jurisprudence to date.

⁴⁰ *Lovelace v. Ontario*, [2000] 1 S.C.R. 950 at para. 93: "In particular, s. 15(2) provides a basis for the firm recognition that the equality right is to be understood in substantive rather than formalistic terms...Having accepted the substantive approach, the Court has interpreted s. 15(1) not only to prevent

Canada to appoint visible minorities into the permanent management at a rate of 18% per year for five years in order to reach 80% proportional representation for this designated group.

2.2.4. Are any forms of positive action prohibited by legislation?

The jurisprudence interpreting s.15(2) of the *Charter* and the sections relating to special or affirmative programmes under the human rights statutes, has suggested limits on positive action measures. This jurisprudence is still developing, but the case law indicates that positive action measures may be required to withstand scrutiny in terms of the rational connection between the form of the programme and its ameliorative purpose.⁴⁶

In terms of legislation, section 33 of the federal *Employment Equity Act* prohibits the Commission and Tribunal which oversee and enforce the act from giving a direction or making an order that would (a) cause undue hardship on an employer (b) require an employer to hire or promote persons who do not meet the essential qualifications for the work to be performed; (c) make certain orders with respect to hiring, promotion and merit in the public sector; (d) require an employer to create new positions in its workforce; (e) impose a quota on an employer (with 'quota' being defined as a requirement to hire or promote a fixed and arbitrary number of persons during a given period); or (f) in the case of short term numerical goals, fail to take into account the above factors.

In addition, in section 2.2.3, it was noted that the language of the special programme exemptions in human rights statutes varies across Canada. It is possible that positive measures implemented by private actors outside of the scope of the specific language of the protective statutory provisions might be open to challenge. For example section 42 of the British Columbia *Human Rights Code* protects positive action measures in the context of employment and only where directed at certain groups.

In Canada, however, there have been very few challenges to positive action measures on the basis of reverse discrimination.

2.3. Findings from consensus workshop and interviews

This section of the country report provides an account of the findings from the Canadian consensus workshop and follow up interviews.

2.3.1 Data collection

A consensus workshop took place on 16th September, 2008, at the Schulich School of Business, York University in Toronto, Ontario. Thirteen people, representing thirteen different organisations, attended the workshop. The industries represented at the workshop included business, non-profit, community sector, law, government and education. In total, there were seven follow up

interviews, as we contacted additional people who did not attend the workshop.

2.3.2 Findings

In this section we present the main findings from the thematic analysis based upon the data we have collected from the consensus workshop and follow up interviews. As with all qualitative research, the interconnected and cross-cutting nature of the themes will lead inevitably to a certain degree of overlap and cross-referencing in presenting these findings.

Understanding of positive action

While most workshop participants' responses to the question about their understanding of positive action were based in the work or organisational context, the statement that received the most support in the consensus process was one that reflected a more general definition: *Positive action is ensuring equal access, full participation and advancement in all aspects of Canadian society: social, political, economic and cultural.* There was a consistent theme that is not present in this statement but was reflected in several other statements, involving the need for a strategic, thoughtful approach to overcome historic barriers and address systemic change. There was some discussion about the confusion around the terms 'affirmative action' and 'positive action', as there are several different governing bodies, policies and legislative documents that impact requirements and expectations around these issues. Some of the various legal groups and documents are outlined in the legal analysis above and include such things as the Employment Equity Act, the Ontario Human Rights Code, municipal legislation, organisational policy, and so on. There was also some discussion about the fact that in Canada there are no quotas, but there are goals set for specific minority groups and about the difference between the terms "equal" (treating people the same) and 'equity' (treating people fairly). There was some mention of a debate about reverse discrimination.

During the follow up interviews, we asked the interviewees to reflect on the highest ranked statements, according to the consensus workshop. We received some rich, context-specific information in response to this question. Someone from a large organisation in the for-profit sector felt that the definition was too broad and wouldn't translate easily, for example, to another language or culture. In an attempt to further specify the definition, this interviewee suggested using terms such as 'indicators of inequality or unfairness' and 'counting representation or counting users of a service according to backgrounds', acknowledging that these definitions were still *a bit primitive, but the best we've got at this point.* In support of this, another interviewee from the not-for-profit sector felt that the broad statement was *'too large for the employer context'* and employers would be 'unable to impact acting alone'. One interviewee from the not for profit sector added to this train of thought, one saying there should be mention of *some kind of action, usually programmes, legislation, that seek to redress something, to fix, palliative, an imbalance, disadvantage.* A community agency representative felt strongly that something needed to be added around an *anti-oppression framework - this is the acknowledgement that there is a power differential between the dominant*

⁴⁶ For example, in *Ontario (Human Rights Commission) v. Ontario (Ministry of Health)* (1994), O.R. (3d) 387 (C.A.), the Court rejected a "special program" purportedly to benefit persons with disabilities because the restrictions within the program were not rationally connected to its objective. For reasons related to cost, the program arbitrarily excluded persons with disabilities above the age of 24 and was successfully challenged on the basis of age discrimination by a 71 year old disabled man.

group and other groups, which affects access to resources, decision making and can put people at a major disadvantage.

One interviewee, a senior person in an area of government that handles these types of issues, spoke very strongly about what she perceives to be a Canadian concern; *we have a really difficult time in Canada addressing the issue of individual discrimination or prejudice - we just gloss over it, say, 'Oh, this doesn't happen in Canada.' But we know it does. We're seeing a shift in very overt racism, people feeling OK to say very derogatory things about people of other groups.* Her perspective was that:

This didn't happen 10 years ago - not because it wasn't politically correct, but because people knew you don't talk to people that way. Because this hasn't been top priority, talked about, people think we've made it, that everything's 'fine'. We're in a very different place in Canada than we were. That's why we can't have definitions that gloss over individual racism and discrimination. Harassment is subtle. Because it became unpopular to talk about these topics (they became dirty words), they have lost prominence. Even many large corporations are just paying lip service to it because they have Employment Equity Law, but a few are doing some really good things.

People think 'we've made it' because there is such a prevalence of women in various sectors and visible minorities in certain sectors - it's more about what kinds of jobs they're doing and in what areas (i.e. occupational segregation). Very little has been done for people with disabilities or aboriginal people. The [LGBT group] get looked at because they have disposable incomes, not because there's been an attitudinal move forward. I do think we are seeing tolerance for gay rights/ marriage having an effect in the workplace. The political scene is influencing - people take their cues from politicians - we are not as liberal as we once were.

I've seen a real shift in attitudes towards immigrants. Certain groups are more visible, 'not like us'. The biggest shift is in attitudes towards Muslims, especially people who are visibly Muslim or look like an Arab or South Asian - many of whom have been here for generations now feel more discrimination than ever. This is likely connected to 9/11 - several studies show this but reporting is not good because people feel afraid to report.

One other defining factor that was brought up in the interview process was the diversity within the country and, in particular, Quebec's perspective in the positive action discussion. In order to address this difference, we had one interviewee from Quebec send us some examples of documentation that are specific to the context of Quebec.

Impetus for positive action

The statement that got the most support during the workshop for this question was, *"Overt and subtle discrimination continues to prevail, which must be responded to."* However, if you combine some of the other statements, there was also strong consensus that the main impetus for positive action was the 'business case'.

Positive action was seen to positively impact the business case in three ways. First, several participants alluded to the need to engage in positive action to address the talent shortage that is developing in the Canadian labour market. As one participant from the not for profit sector noted: *In Toronto, we have 40% of the people who were not born here. The thing is that if you're not going to hire minorities, you cannot hire anybody. It's your pool. That's your workforce. You just cannot find a non-minority applicant.* Recruitment was not the only consideration on the talent side of the business case. There was also some discussion about the need to support diversity at more senior levels, with one participant saying,

The point is whether the situation has changed during the past 20 years. When you look at the top levels in organisations and people who set the policies...People who do not fit, just leave the organisations and establish their own organisations.

The second way that positive action was seen to support the business was in addressing the fact that *'Face to face interaction is so critical, customers need to see themselves reflected in branch operations'*, according to one participant from the for-profit sector. Another participant from the not-for-profit sector agreed, saying that with *diverse communities, new Canadian communities, as they are coming in, there are major tensions between our agencies and various communities. We can't sustain this kind of tension/conflict with clients.* She later alluded to the use of client-liaison people that represent diverse communities.

Finally, the need to stay competitive in the realm of brand and perceived social responsibility was seen as a business case driver. One of the participants represented a firm that evaluates the social responsibility profiles of companies, in order to help their clients invest in a socially responsible, ethical way. The need to maintain a brand of corporate social responsibility is directly linked to sales.

A second theme emerged that addressed the need to implement positive action measures in response to regulations - whether external or internal. In large organisations they are mandated to address these issues under the Employment Equity Act. In other organisations represented, internal drivers were the impetus, with two participants stating that the impetus for positive action measures in their organisations were, *'implementation of anti-oppression, anti-racism policy', and 'embedded in our mission, values, vision; and a powerful belief in the business case'.*

In one smaller government organisation, an interviewee explained that, although they do not yet have formal policies or legislative drivers, leadership is the key:

People will say that it's one of the most diverse teams they've ever worked on. The two top leaders [interviewee and her supervisor] both come from a place of advocacy and a professional knowledge and experience, background in this work, so a very different, deliberate and conscious effort to enhance diversity. There is a difference between having mandates and goals. The only thing that works is if the leadership is

walking the talk - putting goals in place, monitoring and rewarding people who are doing good things.

Effectiveness of positive action

There was a great amount of consistency in response to the question about the effectiveness of positive action in achieving their goals. A general theme of ‘yes, but’ emerged, which was well articulated in the highest ranked statement for this question, ‘positive action is necessary but not sufficient to address systematic discrimination. Positive action measures must be accompanied by broader normative change and supported by institutions’.

Several participants said that they had seen it work in their current or previous organisations, with one person commenting that they had ‘seen that it can lead to real programmes with real results’. In cases where positive action has been a success, one participant said, *it means commitment from the top. Unless the CEO and top executives get it as their project it won't happen. If you don't have that, it's very difficult to go further.*

In describing the need to be sensitive in how these initiatives are implemented, someone commented that:

When I was at two banks, in both organisations we introduced a compensation package that included a reward for them if they met equity requirements. It can be done. The other thing is that they love being lauded about their work but they also don't want to be embarrassed in front of others.

Finally, someone from the education sector said, *it should be mixed with organisational change strategy and it should be part of the big picture.*

Impact of positive action

Responses to this question were generally quite positive. Most people believed that positive action strategies have had a positive impact on many different groups, including women, people of colour, particularly women of colour, LGBT and people with disabilities. One not-for-profit sector representative felt that, ‘we are at the beginning stage for racialised groups’ and there was consensus that indigenous peoples were the least impacted by these measures.

Throughout the workshop participants commented that the length of time that positive action strategies had been

in place was positively correlated with the size of the impact on that particular group. For example, one participant with a background in financial services said, ‘I have seen positive impact in the representation of white women in the top levels’. Another community-agency representative who works in children’s services said:

LGBT population has benefited the most. In 1995 we passed a policy to protect them - we've worked on it longest. Kids in care, youth in care, adoptive families, foster parents, staff - we've done tons of training. We have a big BBQ every year during Gay Pride week - staff feel much safer to be 'out.' You see pictures of partners on their desks, we have lots of straight people helping at the BBQ. This is relevant because a large number of youth in care are a part of this group and we are better able to serve them as the culture of the organisation and our training of staff, community members and foster parents has changed.

She went on to say that she thought this initiative was first because a senior leader at the time it was implemented was gay and championed the cause internally.

One workshop attendee came from a not-for-profit company that works with organisations to implement strategies that support women. She felt that *women of colour have benefited in particular. We've enhanced our focus on this group in research, board processes, awards given and women of colour in senior positions at our organisation.*

People with disabilities were the group that one member of the financial sector felt had been most effectively supported in her organisation. She described a process that went from issue identification, through pilot studies to now having a fulltime department of six people dedicated to implementing accessibility strategies for this group. We will describe this case further in the following section.

Despite the positive tone of the previous comments, the overall feeling of the group was that white women have been the primary beneficiaries of positive action programmes and there is a long way to go for other groups. Demographic shifts are driving changes but proactive initiatives are largely losing steam.

2.4. Examples of positive action measures

<p>Name of the Initiative: <i>Anti-Oppression, Anti-Racism Policy</i></p> <p>Sector/institution: Community sector: Child services agency</p> <p>Reasons for the initiative: Started in response to tensions/conflict with clients and families from certain community groups. Strategic leadership developed a common understanding of what racialised individuals in the organisations, clients and people in the community might be experiencing.</p> <p>Process: Hired an external consultant to guide organisation through the process. Starting at the board level, they wrote a policy that outlines how they will</p>
--

work to create a workplace free of oppression. Felt that the board level policy was important as a public statement to the community about the commitment level of the organisation. Some concerns arose about the transition from policy to implementation. Came together with seven other agencies to create a common curriculum to train all leaders and supervisors on these topics. Although it was called training, was much more of a facilitation to help them to self-reflect on who to become an ally in this initiative. Have trained all board members, senior leadership and are in the process of training supervisors. There is a plan to train 10 more people across the areas to enable them to continue to train other employees at their location.

Stakeholder groups (staff, foster parents, kids, community groups such as the Counsel of Agencies Serving South Asians) were consulted before, during and after the policy was created.

Outcome: There is a 'buzz' around the agency – they're seeing it in all service areas. For example, conversations about how high the reception desk is (can people with disabilities see over it?), about content on the bulletin boards (is it too complex for ESL clients/community members?) and how to celebrate diversity at holiday parties, or whether there should be parties at all.

Name of the Initiative: *Office of the Fairness Commissioner*

Sector/institution: Public Agency

Reasons for the initiative: 'The Office of the Fairness Commissioner ensures that Ontario's regulated professions have registration practices that are transparent, objective, impartial and fair. (www.fairnesscommissioner.ca/en).

Process: This is a public agency, at arm's length from the government, which expects stakeholders to have these policies, therefore it is essential that leadership here do the same. No matter what the nature of the practice or how they provide information, interviewee believes that having a diverse team underlies all that they do. There is no formal process here, but top leaders come from a professional and personal backgrounds of knowledge and advocacy around diversity issues. Positive Action strategies are the foundation of the organisation.

Outcome: Employee feedback indicates that this is one of the most diverse teams employees have ever worked on.

Name of the Initiative: *Accessibility*

Sector/institution: For Profit: Financial Institution

Reasons for the initiative: Employment Equity legislation requires that large organisations do surveys of diverse groups. Analysis of the representation showed that among others, people with disabilities were under-represented within the employer's workforce.

Process: Put together a team (four to six people) headed by a Senior Manager to conduct a review of potential barriers to the employment of persons with disabilities. The review included an assessment of the accessibility of internal systems and research on various types of adaptive technologies to identify the best solutions. In addition, the accommodation policy was enhanced and streamlined to help provide a better experience for employees and managers to assess and request adaptive technology solutions.

Outcome: Have improved the representation numbers of employees with disabilities. In addition, information obtained from employee surveys, employee advisory groups, and anecdotally, suggests that the experience of employees with disabilities has improved. Another indicator of success in the removal of barriers is that the organisation now employs a full time sign language interpreter to support Deaf employees.

Name of the Initiative: *Enhancing consistency and transparency*

Sector/institution: Not-For-Profit, Work to advance women and business

Reasons for the initiative: Mandate of the organisation -

driven by values.

Process: Work to model the values, practices and attitudes that they advocate for their clients and stakeholders (Walk the talk). They do this in many ways, including: Encourage work/life effectiveness from the top down (i.e. organisational shut-down over Christmas holidays); Flexibility - many employees working from home, condensed work weeks, leaving early for various religious or other holidays; Year-round summer hours work week (Fridays finish at 1:00 p.m.); Salaries are well benched against other not for profits, but try to promote a strong employee value proposition; Employee development - much of the development is done on the job, so there is a strong emphasis on matching employees to assignments that are high visibility, working with high calibre leaders, with clear goals-setting and an alignment of personal development and organisational goals; Informal mentoring network. They have also set up a diversity and inclusion action counsel based on feedback, which is chaired by the president, which is responsible for responding to concerns and taking action on a way forward, whether through communication, training or other strategies.

Outcome: This organisation is measuring their outcomes regularly, using various tools, including goals setting (targeting specific retention rates) and surveys administered every two to three years.

Name of the Initiative: *Bridging Programme*

Sector/institution: Not-For-Profit, Industry Association

Reasons for the initiative: FARPA (Fair Access To Regulated Professions Act http://www.citizenship.gov.on.ca/english/about/getting_results/breakdownbarriers.shtml).

Regulation for professions usually based on self-regulatory model, but this is direct regulation. Assumption is that *province didn't trust the professions to sort this one out, saying, 'you've had a chance to create fair, transparent registration processes and haven't done it, therefore we'll impose it on you.* Although FARPA is not yet in this industry, they feel it will come, as it is 'the way the wind is blowing'. Acknowledge that 'sometimes you need regulation to get people to get the ball rolling'.

Process: In an attempt to get more people into the profession from other countries, facilitating new immigrants' entry into the profession, this group is in the process of consulting new immigrant groups to design a support programme that will help them with certification in the programme. They intend to use the findings to design more accessible training materials, for example more online materials, to help people that may not live in a large city or who may wish to begin their training in their countries of origin, before immigrating.

Outcome: They will measure success rates for their certification process. Ultimately, they hope to have the same success rates for new immigrants as for the mainstream groups. The next step would be to look at hiring and career trajectories after initial certification.

Name of the Initiative: *Pre-Employment Training Programme*

Sector/institution: For-Profit, BMO (Bank of Montreal-)

Reasons for the initiative: To have a bigger impact with regard to an increase in representation, part of the diversity strategy, business strategy to become more representative of the areas where we have business. Both for internal strategy - to create a diverse and inclusive workplace, and external strategy - to represent client/customer groups.

Process: In reviewing annual surveys on diversity that hold executives accountable for providing and creating an inclusive workplace, saw a need that presented itself as a gap with the people with disabilities group. Worked with an agency to design a training programme for students or potential candidates to get them prepared for the workplace. If they pass the training, they get hired. Did extensive work ahead of implementation with gathering input from target group, line managers, HR business partners and all other stakeholders. Communication was a key component to assuring the success of the project. As they roll out subsequent projects, they incorporate the feedback and customize each project according to which groups in the organisation are involved.

Outcome: Statistical quarterly reports, annual employee survey that look at results - has a diversity index attached to it, look at how people respond to questions about diversity. Retention rate, success of how many people get hired on, people/managers reactions, how people are evaluating the project. This project has a 90% retention rate after putting three groups of 13 through the process.

Name of the Initiative: *Internship Programmes*

Sector/institution: For-Profit, BMO (Bank of Montreal)

Reasons for the initiative: Federal legislation and leadership belief that diversity is necessary for business success.

Process: Several banks got together and created "Ability Edge" to increase internship opportunities for people with disabilities. It was very successful and still continues. Another internship programme for aboriginal students was implemented at BMO. Students do co-op work at the bank and got a scholarship towards post-secondary education. This allowed students to have the experience in that workplace, which helped towards better hiring rates upon graduation, as well as supporting students through the scholarship component.

Outcome: People with disabilities were able to secure full time, permanent employment after participating in 'Ability Edge' programme. The Aboriginal Student Internship was very effective, with many success stories of students that continued to land jobs in the financial sector, as well as in other sectors. In both cases, the exposure to the diversity of talent led to an increased awareness of the available talent pools that were historically overlooked. Interviewee said, 'unless you have diversity introduced into your workplace, you won't be convinced'. Results were measured regularly and representation of different groups increased in many different positions.

Name of the Initiative: *Task Force on the Advancement of Women*

Sector/institution: For-Profit, BMO (Bank of Montreal)

Reasons for the initiative: Federal legislation and leadership belief that diversity is necessary for business success.

Process: Former CEO, Tony Comper, is committed to the issue. He set a goal of gender parity at all levels of the organisation. He tied compensation to diversity results, which was very successful, particularly in business areas where women were not well represented.

Outcome: Had major impact on the number of women and other minority groups represented throughout the organisation. For more information on this, see book chapter in additional materials package, written by Nuzhat Jafri and Katie Ibister, 'A Decade of Diversity: Strategies Aimed at Advancing Women Benefit All Employees at Bank of Montreal'. Advancing Women's Careers. Edited by Ronald J. Burke and Debra L. Nelson.

2.5. Key statements identified from consensus workshop grouped by theme

Emerging theme	Key statements	Rank (score)
1. Understanding of positive action	<ul style="list-style-type: none"> Positive action is about ensuring equal access, full participation and advancement in all aspects of Canadian society: social, political, economic and cultural. Positive action is about carrying out thoughtful, methodical, strategic steps. Positive action is about measures taken to remedy discrimination and overcome barriers in the workplace Positive action is when one uses selection, development, and promotion programmes to create systemic change. Positive action seeks to address historical disadvantage. 	1 (7) 4 (4) 3 (1) 4 (1) 5 (0)
2. Impetus for positive action	<ul style="list-style-type: none"> Overt and subtle discrimination continues to prevail, which must be responded to. There is a business case for a diverse workforce in as much as it needs to address the diverse community. Meeting the needs of the organisation's stakeholders (clients, community, shareholders, employees, boards, etc.) in order to achieve organisational goals. Positive action is the right thing to do. Positive action is driven by compliance with external legal requirements and/or by internal policy, mission and/or vision. Talent shortage will require people to hire and work with minorities - the question remains - will this change attitudes? 	1 (4) 4 (2) 2 (4) 4 (1) 4 (1) 4 (1)
3. Effectiveness of positive action	<ul style="list-style-type: none"> Positive action should be part of a broader system for organisational cultural change. Positive action is necessary but not sufficient to address systematic discrimination. Positive action measures must be accompanied by broader normative change and supported by institutions. Positive action can lead to effective discussions, programmes and ultimately result in increased accessibility and equity. Positive action positive action can be effective if carried out effectively and in line with the true needs of the affected population. Positive action can be effective if it is implemented from the top down and if people put their conceptual ideas into practice (walk the talk). 	1 (8) 2 (7) 3 (1) 4 (0) 4 (0)
4. Impact of positive action	<ul style="list-style-type: none"> Positive action measures have a greater impact depending on how long they have been in place and on senior leadership commitment. Employees and clients have both benefited from positive action measures. Other than government and particular industries, there is little evidence of positive action in implementation. Have programmes targeted to certain groups (i.e. executive development groups). 	1 (2) 1 (2) 2 (1) 3 (0)
Groups targeted for positive action initiatives	<ul style="list-style-type: none"> <i>Groups most targeted</i> - Women, people of colour, members of the LGBT community and people with disabilities have benefited significantly but to different degrees in organisations. <i>Groups least targeted</i> - Indigenous peoples have not been impacted sufficiently 	1 (4)

2.6. Key summary

Positive action is perceived to be an effective tool for bringing about change in organisations. There is an acknowledgement that these strategies cannot be done in isolation and need to be part of broader normative changes in society. The main drivers of positive action appear to be the business case for diversity across the board and legislation for larger corporations. For several of our representative organisations, diversity was in their mandate, so positive action strategies were necessary internally, in order to 'walk the talk'. Positive change must start at the top and strong leadership as well as internal champions are necessary for success. Organisations have seen progress in their aims to

enhance diversity through positive action strategies, as seen through direct feedback and anecdotal information. Many organisations are setting goals, conducting surveys and measuring results of positive action strategies and all those that are measuring have seen an increase in representation and improved experience for target groups.

3. PAMECUS Country Report - France

As mentioned in the introduction, it was not possible to undertake all aspects of the in-depth-study in France. We will only present the legal report here. This legal report was written by Sophie Latraverse, a legal expert based in France.

3.1. Legal analysis

3.1.1. Does legislation establish any positive action measures? E.g. mandatory quotas for disabled persons?

In France, even though positive action based on the grounds of ethnic origin and race is prohibited (see section 3.1.4), it is nevertheless widely used in social policies and particularly as regards support to the underprivileged, to disabled people and to victims of discrimination on the ground of age in the sectors of employment, housing and education. The development of specific positive action policies and rules based on social conditions is clearly a way of circumventing the prohibition of positive action based on ethnic origin.

Positive action measures are regulated by specific statutes or by policies defined by legislation that has delegated management power to an administrative body. They take the form of specific recruitment conditions to promote the integration of disabled persons in the workforce, special admission and assistance processes in education as regards social condition and disability, and specific employment contracts, compensation and redundancy rules as regards age and disability.

The use of quotas is at the core of measures taken for the integration of disabled persons in the workforce. However, even though this measure was not challenged when it was introduced in the legislation in 1987 in the context of disability, it was deemed illegal by the Constitutional Council in respect of a legislative proposal to impose quotas on the representation of women on boards of big corporations (DC-2006-533 of March 16, 2006). In response the government amended the Constitution on July 21, 2008 and, among other reforms, introduced the principle that 'the law encourages the equal representation of women as regards professional and social responsibilities' (article 1 of the Constitution).

In education, the law provides for positive action measures as regards underprivileged and disabled children.

Considering the *de facto* inaccessibility of higher specialised education bodies - elite schools specific to the French system - to children from disadvantaged *neighbourhoods*, the Institut d'Etudes Politiques (one of these schools) has entered into partnerships with Schools from these *neighbourhoods* in order to select their best students and create a parallel recruiting system.⁴⁷ This programme is spreading to other similar 'Grandes Ecoles' and has led to the adoption of Article

11 of the Law on equal opportunities of March 31, 2006 that provides for special admission mechanisms for people from underprivileged backgrounds.

3.1.2. Does legislation establish any obligations on public or private sector organisations to take positive action?

Obligations created by law do not differentiate between the public and private sectors, since they cover access to housing, education and employment. In access to employment:

Specific measures

Article L1133-2 Labour Code (LC) which was amended by Article 6 of Law no 2008-496 allows differences in treatment on the basis of age to implement policies relating to professional integration, maintaining employment, reclassification (by way of retraining and/or re-affectation) or compensation in case of loss of employment.

On July 26, 2005, the Law no 2005-846 of July 26, 2005 was adopted in order to permit the government to adopt emergency measures for employment by way of Governmental Decree,⁴⁸ and has been followed by many Executive orders. Executive order no 2005-893 of August 2nd, 2005 and Decree 2005-894 of August 2nd, 2005,⁴⁹ create a new labour contract to facilitate hiring by small businesses as a mean to fight unemployment which is characteristic of the mechanisms of intervention of French policies: while it is open to the entire population, it is in fact the means chosen to support professional integration of disadvantaged groups, since individuals from these groups benefit from this scheme in practice. This contract allows small employers, with less than twenty employees, to conclude long term contracts with the possibility to end the contract without cause for a two year period. In case of termination of the contract however, the employer must pay an indemnity amounting to 8% of the gross salary owed to the employee since the beginning of the contract. Furthermore, in case of termination of the contract, the employee receives a special indemnity of 2%, in addition to unemployment benefit, which is paid by the employer through a special fund.

Article L1233-5 LC forces the employer to take into account age and disability as protecting factors in deciding which employees should be made redundant in case of economic redundancy, and article L1233-61 LC requires the employer to establish a plan to provide for, as a priority group, the reclassification by way of retraining and/or re-employment. Article R5123-9 et s. LC establishes a special regime to indemnify workers over 57 years of age until they reach retirement age in case of dismissal. In addition, article L1233-61 LC provides that in case of redundancy by an employer with 50 employees or more, extra conditions must be met

⁴⁷ This programme was challenged unsuccessfully on the basis of the principle of formal equality: CAA Paris 6 novembre 2003, UNI (Union nationale inter-universitaire) c/ résolutions du 3 septembre 2001 du conseil de direction de l'institut d'études politiques de Paris (IEP), N° 02PA02821

⁴⁸http://www.legifrance.gouv.fr/jopdf/common/jo_pdf.jsp?numJO=0&dateJO=20050727&numTexte=6&pageDebut=12223&pageFin=12224

⁴⁹http://www.legifrance.gouv.fr/jopdf/common/jo_pdf.jsp?numJO=0&dateJO=20050803&numTexte=26&pageDebut=12691&pageFin=12692;
<http://www.legifrance.gouv.fr/./affichTexte.do?cidTexte=JORFTEXT00000632473&dateTexte=20081029&fastPos=1&fastReqId=2014870856&oldAction=rechTexte>

before making redundant employees who are over 50 years of age.

Article 27-1 of Law no 84-16, article 35 par 3 of Law 84-53 and article 27 (1) of Law 86-33 eliminates all age limits for recruitment to the public service for disabled persons. In addition, disabled persons are not subject to the competition process by examination specific to the recruitment of civil servants and benefit from a special recruitment procedure by way of contract and probation period leading to full civil servant status (Decree no 95-979 for State civil service, Decree no 2006-565 for hospital civil service and Decree 2006-148 for territorial civil service).

Finally, disabled workers enjoy special protection in the event of dismissal, with an extension of the period of notice if the period does not already amount to at least three months (art. 5213-9 LC) and, since March 2004, they can take early retirement⁵⁰ on advantageous terms.

Finally article L441-1 of the Code of housing and construction provides that disabled persons should have priority in the allocation of social housing.

The use of quotas for the integration of disabled persons in the workplace

Article L5212-2 LC creates an obligation on private employers employing 20 or more full time salaried workers and the public sector, to ensure 6% of their workforce consists of disabled employees as defined under article L5212-13 LC.

The Law on disability creates a fund for the integration of disabled people in both private and public employment, as well as sanctions if the employment quota of 6% set forth in the Law is not respected (article 36 creating article 5212-12 LC). Article 36 of the Law provides for the possibility of private and public sector employers to comply with the obligation to employ a minimal quota of 6% of disabled salaried workers provided by Article 5212-2 LC, by making a financial contribution to the AGEFIPH,⁵¹ which finances the integration of disabled workers, and provides for a maximum penalty of 1500 times the minimum wage.

Article 26 of the Law no 2005-102 on Disability creates an additional reporting obligation on the employer in Article L2241-5 LC by imposing an annual evaluation of measures taken to integrate the disabled employee into the workplace.

3.1.3. What forms of positive action are permitted, but not required, by legislation?

The territorial policy specific to disadvantaged suburbs, called 'politique de la ville', concentrates a number of actions targeting populations of immigrant origin and encouraging integration and fighting discrimination on the basis of socio economic criteria. The major instruments of this policy are municipality contracts - 'contrats de Ville'- including thematic agreements

addressing issues of discrimination, Great City projects - Grands Projets de Ville - Urban stimulation zones - Zones de redynamisation urbaine (ZRU) and Priority educational measure zone - les Zones d'éducation prioritaires (ZEP).

As regards racial discrimination, governmental services have also initiated projects in the context of their general powers. In 2002, the DGEFP (General delegation to employment and vocational training), DPM (Direction of population and migration), ANPE (National Employment Agency) and the FASILD (National fund for the support of immigration and actions against discrimination now ACCSES) concluded a general agreement to take action to fight racial discrimination and to favour access of the population of foreign origin (minorities are not recognized by French law) to vocational training and employment.

Since 1993 there has been a sponsoring programme which supports youngsters towards employment. This programme mainly targets youth of immigrant origin, with low levels of qualification or from disadvantaged neighbourhoods. Since 1999, it has been extended to adults and regional agreements with representatives of employers and business development actors have been reached.

The year 2004 marked a turning point in terms of a national focus on the issue of racial discrimination and positive action. In this context the Minister of Social Cohesion proposed an ambitious programme set out in the Law no 2005-841 of July 26, 2005 on social cohesion. The Law outlines a vast system of vocational training and support to integrate unemployed people into the work force in non commercial activities and promotes equal opportunities. Title III of the Law expressly addresses 'equality of opportunities', with one chapter allowing for tax support to disadvantaged municipalities (Chapter III).

The second aspect of this social cohesion programme addresses the national housing crisis by investing massively in public housing, emergency housing and providing a special fund for disadvantaged neighbourhoods. This long term project has been continued by the new government⁵².

Except for actions directed at new migrants, which are managed by the National Agency for Migrants (Agence nationale de l'accueil des étrangers et des migrations ANAEM), the FASILD and urban policy institutions have been integrated in a new structure called Agence nationale pour la cohésion sociale et l'égalité des chances (ANCSEC) by Article 36 of the Law of March 31, 2006 on Equal Opportunities. The new structure acts jointly with the institutions managing urban renovation, the Agence nationale de rénovation urbaine (ANRU). All initiatives targeting people of foreign origin have been regrouped under the authority of a new governmental portfolio: the Ministry of Immigration, Integration, National Identity and Development (Ministère de l'immigration, de l'intégration, de l'identité nationale et du développement solidaire).

⁵⁰ J.O. no. 66 of 18 March 2004 page 5253, Decree no. 2004-232 of 17 March 2004, relating to a reduction in the retirement age for disabled persons who pay social security contributions

⁵¹ Association de gestion du fonds pour l'insertion professionnelle des personnes handicapées ; *Association of management of the professional integration fund for the disabled*

⁵² Sabeg, Y., *Les oubliés de l'égalité des chances*, Institut Montaigne 2004 ; Sabeg, Y., *Discrimination positive*, Calman-Lévy 2004 ; Blivet, L. *L'entreprise et l'égalité positive*, 2004, www.institutmontaigne.org/pub.php?id=60

As regards access to education of disadvantaged children, efforts have been reoriented towards the provision of after school support within the educational structure.

In schools, the principle of equality has been used to adjudicate on the applicability of the obligation to attend school to children whose religion enjoins worship on a day other than Sunday (see the decision of the Conseil d'Etat jurisprudence p. 13).⁵³

3.1.4. Are any forms of positive action prohibited by legislation?

There is no positive action policy targeting ethnic groups or groups designated in terms of their origin, whether they are North African, African or Roma, as this is formally prohibited by administrative and constitutional law. The key to the traditional French legal approach to racism and discrimination is a characteristic interpretation of the principle of equality in reference to an abstract universalistic framework, based on the philosophical principles envisaged as coming within statehood, nationhood, and citizenship. The resulting French approach has developed along two complementary lines: the condemnation of any reference to any concept of 'origin' and the refusal to use criteria of 'origin' for policy and administrative purposes.

Needless to say, French law includes a wide range of rules that allow for differential treatment in diverse circumstances. In particular, such distinctions are an essential element of the welfare state, and may also be based on public policy. The relevant categories are, however, accepted only to the extent that they rely on neutral criteria, devoid of identity content, such as socio-economic considerations.⁵⁴ Specifically, no circumstances are considered to justify differential treatment on grounds of 'race' or "ethnic origin". In its case law, the Constitutional Council has recognised only the French people, without distinctions based on ethnic origin, 'race' or religion, and the law has consistently refused to recognise the concept of minority or to admit such criteria as legal categories.⁵⁵

⁵³ CE April 14th 1995, *Consistoire central des israélites de France, Mr Koen*, (2 arrêts), Recueil Lebon page 169, Dalloz 1995, jur. page 481, note Koubi G.

⁵⁴ Gilles Pelissier, *Le principe d'égalité en droit public*, Paris, LGDJ, 1996 ; Conseil d'État, *Sur le principe d'égalité*, Paris, La Documentation française, 1996.

⁵⁵ C.C. May 9, 1991, no. 91-290

4. PAMECUS Country Report - Hungary

The Hungary country report was prepared by consortium members at the European Roma Rights Centre Budapest, Hungary. This report on positive action measures targeting Roma in Slovakia is a part of a larger research study on positive action in the European Union, Canada, United States and South Africa (PAMECUS). The report begins with an analysis of positive action in this country in light of the current legislative framework followed by a presentation of the main findings that emerged from the consensus workshop. In addition we have incorporated the findings from the follow up interviews and documentary evidence as a way of triangulating the overall data. Finally, we present key consensus statements which emerged from the workshop followed by a set of key recommendations.

4.1. The context of positive action targeting Roma in Hungary

As was evident in conducting this study, while the Hungarian policy environment has been progressively expanding in terms of positive action in support of disadvantaged Roma during the past 10 years,⁵⁶ the actual implementation of positive action measures within this framework is somewhat unclear and the results are difficult to measure in many cases.

One of the major obstacles to the assessment of positive action measures targeting Roma, and generally undertaking specific research regarding Roma in Hungary, is specifically linked to the data protection environment and issues surrounding ethnic identification. In Hungary, it is widely held that the collection of data disaggregated by ethnicity is prohibited, and that it is not possible to ascertain who is or is not Romani without some form of self-declaration. In reality, the collection of special forms of personal data is permitted under certain conditions and according to various legal regulations, but the Hungarian public refrains from recognising this. Nor do many want to push for the necessary legislative changes in order to facilitate the collection of such forms of data in all key sectoral fields in order to facilitate effectively policy making. The Hungarian legal environment is also complicated in terms of how members of the Romani minority are identified, and the official response to specific questions about Roma is “we are not able to judge who are Roma”, but upon further questioning, it is clear that everyone has very clear perceptions of who they believe to be Roma or not. In this way, it is possible to gather information regarding the impact of law and policy on Roma, with the understanding that there must be a certain margin of appreciation. For the purposes of the implementation of anti-discrimination law the Equal Treatment Act (ETA) under Article 19 allows for the identification of Roma based on perception. The majority of sociologists (Havas, Kertesi, Kezdi, etc), also use perception as the definitive factor to identify Roma for the purposes of sociological surveys. Although data aggregated in national sociological surveys can be used to design positive action measures at all levels, the lack of a system connecting

aggregated data to individual recipients frustrates all endeavours. Furthermore, it is also arguable that Article 43(4) of the Act on National and Ethnic Minorities (Act No. 77 of 1993) creates a legal presumption relating to the ethnic origin of children taught according to an ethnic minority curriculum:

At the request of the parents or legal representatives of eight students belonging to the same minority group, it is compulsory to establish and run a minority class or group.

This is the only mechanism available in the country at present which allows for the identification of individuals as being Roma.

As a result of a combination of factors concerning data protection and ethnic identification, many of the positive action programmes for Roma are couched within the frame of programmes for ‘disadvantaged’ or ‘socially excluded’ groups, of which Roma constitute a significant portion. Indeed, even within the government decree on the Decade of Roma Inclusion, many of the measures included refer to these groups rather than to Roma specifically. This study, therefore, was undertaken with the underlying assumption of the relevance of positive action measures targeting members of disadvantaged or socially excluded groups, and several of the programmes assessed fall within this category. This is problematic as there is a notable difference between policy and practice as concerns positive action measures for Roma in Hungary. Even though social class based positive action does in theory cover Roma, in practice these measures are implemented in a way that might perpetuate race based discrimination.

There can also be seen to be a difference in the approach of the civil sector compared to the private and public sector: The civil sector is more likely to develop measures specifically for Roma, while the private and public sector are more likely to implement measures for disadvantaged or socially excluded groups, following the rubric of the policy environment.

During the workshop in Hungary, the participants clearly distinguished between positive discrimination, to which they were strongly opposed, and equal opportunities which they accepted or promoted. However, it was apparent that differences between these two terms were not so clear upon further discussion, and that it was more of the perception of positive discrimination, and its resulting negative impact on members outside the target that contributed to such strongly held views. The term positive action as such is not used in Hungarian legislation. Instead, ETA defines preferential treatment, which is a form of positive action and a term governmental social policy also relies on.

One additional factor which can be seen from this study to set the general tone of positive action measures for Roma in Hungary is the prevailing negative attitude towards the Roma in Hungary, which impacts greatly the success of positive action measures targeting Roma and, indeed, even their implementation. It was noted in several cases, especially during discussions of programmes for the eradication of segregated Romani settlements that local non-Romani populations had

⁵⁶ Especially within the Decade of Roma Inclusion and the associated government action plans.

intense negative reactions to such measures, which resulted in changes to the plans or even the involvement of police and the Equal Treatment Authority in some instances. General deficiencies in planning and communication regarding such measures no doubt played its part in contributing to such reactions, but the negative implications of the ethnic tensions resulting will take much time to undo. Therefore, there can be seen to be a direct correlation between positive actions measures intended to improve the situation of the Roma and unintended negative consequences.

There are however, some highly professional measures implemented in Hungary, which have been well planned and adapted to address situations different than originally intended, that have positively impacted individual Roma. These programmes, regardless of the sector, tended to be more 'business oriented' in their planning and implementation, rather than stemming from social policy considerations concerning the Roma – which does not mean that they have not sought social policy impact. There is a clear lack of systematic implementation of such measures as would be needed to address the level of disadvantage of Romani communities in Hungary, and it was noted that there are few, to no, available forums which bring together like-minded individuals and organisations to discuss their programmes and the issues they encounter though these would be much needed. In this regard, the seminar organised in Hungary was quite a positive development.

4.2. Legal analysis

The Hungarian Equal Treatment Act (ETA) sets the general framework for equal treatment and non-discrimination in the country. At Article 4, the ETA stipulates that the principle of equal treatment must be observed by all public employers and authorities.⁵⁷ Article 5 widens this scope to include:

a) those who make a proposal to persons not previously selected to enter into contract or invite such persons for tender, b) those who provide services or sell goods at their premises open to customers, c) self-employed persons, legal entities and organisations without a legal entity receiving state aid, in respect of their relationships established in the course of their utilization of such a state aid, from the time when the state aid is utilized until the competent authorities can audit the utilization of the state aid in accordance with the applicable regulations; and d) employers in respect of employment relationships and persons entitled to give instructions in respect of other relationships aimed at employment and relationships directly related thereto.”

The right to equal treatment is also assured by the Civil Code of Hungary as under Article 75-84 all natural and

legal persons bear civil liability for failing to respect the right to equal treatment:

Discrimination against private persons on the grounds of gender, race, ancestry, national origin, or religion; violation of the freedom of conscience; any unlawful restriction of personal freedom; injury to body or health; contempt for or insult to the honour, integrity, or human dignity of private persons shall be deemed as violations of inherent rights. (Section 76)

4.2.1. Does Hungarian legislation establish any positive action measures for Roma? E.g. mandatory quotas?

In 2007, the Hungarian Parliament adopted Resolution 68/2007 (VI. 28.), the Hungarian government's Strategic Plan for the Decade of Roma Inclusion, which constitutes the most wide-ranging policy on Roma inclusion in Hungary. Following the decision of the Hungarian Parliament, the Hungarian government adopted Decision 1105/2007 (XII. 27.) on the measures to be taken by the government in 2008-2009 in connection with the Strategic Plan of the Decade of Roma Inclusion. The Strategic Plan adopted via Parliamentary Decision and the Action Plan promulgated through a Government Decree therefore have the weight of soft law in Hungary, which should be implemented by local governments and other relevant bodies. In practice, most measures which can be regarded as positive action for Roma in Hungary are implemented according to the provisions of this government policy; this is true for government bodies of various levels and civil society organisations.

4.2.2. Does Hungarian legislation establish any obligations on public or private sector organisations to take positive action?

There are no legal instruments in Hungary that obligate private sector organisations to take positive action. Public sector organisations of a certain size do have a positive duty to undertake equal opportunity actions. Article 63(4) of the Hungarian Equal Treatment Act sets out that:

Budgetary organisations employing more than fifty persons, as well as legal entities in which the state has a majority ownership are obliged to draw up an equal opportunities plan.

There is no guidance provided in the law or its implementing guidelines on the structure of content of such plans that would assist public bodies in establishing effective equal opportunity plans. Equal opportunities plans can include preferential treatment which is a form of positive action measures. They can even give preference to members of a disadvantaged group in order to reach a certain quota set in the plan – obviously in line with the relevant European Court of Justice jurisprudence, which is the test the ETA also uses. Also, according to the ETA, equal opportunity plans have to be in accordance with the general Hungarian laws (i.e. Labour Code, Act on Public Education, etc – see Section 4.2.3 below for further detail) as well.

The Hungarian Equal Treatment Authority is charged with overseeing the implementation of this duty by relevant organisations, but it does not have the power

⁵⁷ a) the Hungarian State, b) local and minority governments and all bodies thereof, c) organizations exercising powers as authorities, d) armed forces and policing bodies, e) public foundations, public bodies, f) organizations performing public services, g) institutions of elementary and higher education (hereinafter collectively: educational institutions), h) persons and institutions providing social care and child protection services, and child welfare service, i) museums, libraries, elementary educational institutions, j) voluntary mutual insurance funds, private pension funds, k) entities providing health care, l) parties, and m) budgetary organs that do not belong to points a)-l) in the course of establishing their relationships, in their relationships, in the course of their procedures and measures (hereinafter collectively: relationship)."

to comment on or evaluate the effectiveness of the measures implemented or require any change. The authority only has the power to start a procedure in case of concrete personal discontent about the lack of equal treatment, of e.g. being discriminated at work for being a woman, but not in case of not implementing the equal opportunities plan effectively.

Otherwise, following the 2003 amendment of the Hungarian Law on Public Education (Act LXXIX of 1993), Article 65 creates an obligation on kindergartens to enrol multiply disadvantaged children (residing in their district or whose parent(s) work in that district) from the age of three, if their parents request it while compulsory kindergarten education lasts for a year for those not multiply disadvantaged as according to the law all children must be accepted in kindergartens in the academic year prior to their enrolment in primary school:

In the year of his/her turning five from the first day of the kindergarten's academic year the child is obliged to participate in preparatory programmes held in the framework of kindergarten education, which prepare him/her for school life. (Section 24 (2)).

4.2.3. What forms of positive action are permitted, but not required, by legislation?

Hungarian law provides at Article 11(1) of the Equal Treatment Act, that positive "discrimination"⁵⁸ aimed at "the elimination of inequality of opportunities based on an objective assessment of an expressly identified social group is not considered a violation of the principle of equal treatment if:

a) it is based on an act, on a government decree based on an act or on a collective contract, effective for a definite term or until a specific condition is met,

b) the election of a party's executive and representative body and the setting up of a candidate at the elections defined at the Act on the Electoral Procedures is executed in line with the party's fundamental rules.

(2) The disposition defined in the above paragraph (1) shall not violate any basic rights, shall not provide unconditional advantages, and shall not exclude the consideration of individual circumstances."

The Equal Treatment Act sets out the following positive action allowances:

Article 23. An act, a government decree based on an act or a collective contract may order an obligation for positive discrimination for a specified group of employees in respect of the employment relationship or other relationship aimed at work.

Article 25(2). Based on health, disability or any characteristic defined in Article 8, a law or a government decree pursuant to an authorisation by law may grant additional benefits to specified groups of the society within the framework of the social and health care system, in accordance with the provisions of this Act.

Article 29. A government decree created pursuant to the law or the authorisation thereof may order an obligation to give positive discrimination to a specified group of participants in education within or outside the school system in respect of education or training.

In addition, Article 63(5) of the Hungarian Equal Treatment Act states,

"Municipal governments may devise a local equal opportunities policy, which serves for the analysis of the state of affairs of the disadvantaged groups living in the particular settlement and in which the municipal government defines the objectives promoting equal opportunities for these groups, with a particular attention to housing, education, health care, employment and social status. The local equal opportunities programme shall define the size of funds required for the implementation of the set objectives, a schedule of implementation. The municipal government shall approve a report on the actual completion of the implementation schedule by June 30 of the year following the subject year.

According to the Equal Treatment Authority, this provision is however, currently limited to a somewhat declaratory commitment to equal opportunities by local governments as these implementation of such policies can not currently be enforced (due to the fact that local government regulations do not count as a relevant legal basis for equal opportunities/preferential treatment measures in the current Equal Treatment Act.⁵⁹ However, local authorities may implement positive action measures in accordance with the general laws (i.e. Labour Code, Act on Public Education, etc.). The authority does not have the power to assure the implementation of these measures in this case either.

In the area of higher education, Article 39(7) of the Act on Higher Education (2005)⁶⁰ states,

'The Government may order preferential treatment

a) for disadvantaged student groups,

b) for those on unpaid leave for childcare, pregnancy benefits, maternity benefits, childcare allowance or childcare benefits,

c) for applicants termed disabled

provided that preferential treatment can only be assured in connection with the condition that serves as the basis of this treatment; and that it cannot lead to the exemption from the fundamental educational requirements essential for the acquisition of the professional qualification testified by the Bachelor's or Master's degree, or by the higher level vocational training certificate'.

As collective contracts may also order an obligation for preferential treatment as stated in ETA, the Hungarian Labour Code (Act XXII of 1992) also establishes the opportunity for employers to implement equal

⁵⁸ The original Hungarian Act uses the term "preferential treatment" but the official English translation uses the term "positive discrimination"; therefore we have used preferential treatment in this report.

⁵⁹ Therefore, the Equal Treatment Authority has proposed an amendment to the Equal Treatment Act enabling preferential treatment to also be undertaken and enforceable on the basis of an act/deGREE of local government.

⁶⁰ Government Decree 237/2006. (XI. 27.) specifies a point system for determining entrance to higher education institutions which provides extra points for students coming from disadvantaged backgrounds.

opportunity measures for members of disadvantaged groups. Article 70/A(2) specifically refers to Roma amongst the disadvantaged groups which equal opportunity measures may target. It establishes that equal opportunity plans may include the analysis of the employment circumstances (especially their salary, work circumstances, professional development, training and preferences regarding parenthood) of the disadvantaged group, the goals articulated by the employer for one year and the instruments necessary for achieving these goals, especially training, labour safety and any programme concerned with regularising the conditions of employment by the employer. In theory, Roma could be allowed e.g. preferential access to training as a means of achieving the employer's goals provided that these measures are in accordance with the ETA.

The equal opportunity plan must also include separate measures to ensure the suitability of the workplace for disabled persons and an order of how to implement/exercise the requirement of equal treatment in the employee organisation.

4.2.4. Are any forms of positive action prohibited by legislation?

In Hungary, as in other European countries, anti-discrimination legislation applies in a *symmetrical* fashion. This means that positive action measures designed to assist groups vulnerable to discrimination may constitute unlawful discrimination against members of the advantaged group. Unless specifically provided for in law, planned for a definite term or until a specific condition is met, and not providing unconditional advantage, positive action is vulnerable to legal challenge as discrimination. These conditions for positive action provided by ETA are in line with the ECJ jurisprudence established in *Eckhard Kalanke v Freie Hansestadt Bremen*, and reiterated in successive cases.

There is no case law on positive action targeting Roma in Hungary.

4.3. Findings from consensus workshop and interviews

4.3.1. Data Collection

The workshop in Hungary was conducted on 4 September 2008, at a venue provided by the Roma Integration Office of the Ministry of Labour and Social Affairs. Forty-six institutions/organisations (55 participants in total as several organisations sent more than one member) attended the workshop from the public, private and civil sectors, covering various sectoral fields including education, housing, employment and health.

Dr Judit Demeter, head of the Hungarian Equality Authority, opened the workshop with a keynote address talking about positive action and equal opportunities in Hungary and the general issue of positive action. Following Dr Demeter, ERRC Staff Attorney Anita Danka provided a more in depth discussion of the PAMECUS project and its objectives, the objectives of the workshop and its contribution to learning at the European level with regards to positive action targeting Roma, and about the general need for a systematic approach to the implementation of positive action to facilitate real equality of Roma. Dr Danka then set the

ground rules for the workshop and reminded the participants that their responses would feed into the larger European study.

Follow-up interviews were conducted with 16 participants in Hungary, with representatives from the public, private and civil sectors.

4.3.2. Findings

Understanding of positive action

During discussions and upon reflection of each participants understanding of positive action, the most common response related to measures, which aim to equalise the position of a particular group with that of the majority society. There was a strong link made by the participants between 'positive action' and 'equal opportunities' practices, regardless of the sector.

There was a general consensus that positive action measures should equalise 'social inequalities', eliminate disadvantage and even compensate for disadvantage. As one participant from the public sector (local authority) stated, 'extra services and benefit are needed because the starting point is different'.

When targeting Roma groups, some participants identified how positive action measures are more likely to be successful when they support Romani civil organisations; are implemented in partnership with Romani organisations; and promote professional development within the Romani community, especially amongst young Roma.

To a far lesser extent, some of the participants equated positive action with providing an advantage to marginalised groups such as Roma in Hungary. During the discussions, providing advantage was illustrated as actions intended to 'channel a person with disadvantage into a good social position'. Within this group, some participants clearly linked their understanding of positive action to quotas or preferential treatment to reduce disadvantage.

At the same time, there was a strong tendency to differentiate positive action from positive discrimination, which was in general quite negatively perceived amongst the participants. One NGO sector representative stated that positive action 'is not giving some extra service or benefit, it means equal treatment, while a participant from the public sector stated that positive action should "provide opportunities to the maximum; equal treatment without positive discrimination."

The participants of the workshop also linked positive action to concrete and measurable actions, which can practically be realised.

Impetus of positive action

Amongst the participants of the workshop in Hungary, the major impetus for the implementation of positive action for Roma stemmed from a personal commitment for improving the overall disadvantaged situation of Roma in Hungary in various sectoral fields. Responses in this section acknowledged the poor socio-economic position of Roma compared to non-Roma in Hungary, and underlying factors such as discrimination and exclusion. In many of the responses in this section, and during the

final session of the workshop on 'symbolising the results', participants referred to such motivations as 'my own conscience', 'solidarity', 'commitment to helping other members of this group', 'feeling justice upon achieving the result' and 'communal spirit'.

The second largest driver for positive action for Roma in Hungary stemmed from legal commitments to achieve equality of opportunities and end discrimination. Several participants referred to legal provisions in the Hungarian Constitution, the Equal Treatment Act, and the Higher Education Act, which set the legal framework for equality and enabled certain positive action initiatives by specific bodies on behalf of marginalised groups.

The third largest driver for positive action targeting Roma amongst the workshop participants stemmed from organisational commitment or interest. Here, participants referred to both the mission of their organisations and profit-oriented motivations. One participant stated that their organisation was 'one of the catalysts of the Decade of Roma Inclusion', clearly linking positive action measures, and indeed the existence of the organisation, to governmental policy on Roma integration in Hungary. Interestingly, in this section one participant linked their positive action programmes to the global nature of their organisation and stated that their 'everyday life is characterised by diversity and our goal is diversity', implying a push for positive action within large businesses in Hungary from main offices in other countries which may have more of a history of addressing discrimination and marginalisation.

Another motivation for positive action for Roma seemed to stem from the overall economic position of the country and the disadvantaged position of Roma. There was an emphasis on the need to combat unemployment amongst Romani communities, low education attainment levels as well as the overall substandard housing conditions prevailing in many Romani communities. There was also a focus in this regard on the deficiencies and gaps in the Hungarian economy, and several participants referred to the need for workers in the market, easing the labour market by training potential Romani employees to fill jobs as well as reducing the need for foreign labourers.

While not noted during the workshop, the interview material suggested positive action measures targeting Roma are also informed by the possibility of leveraging financial resources for the benefit of the wider community. For example through the Hungarian government's programme to support local governments to eliminate ghetto settlements, predominately inhabited by Roma, but which also positively impacts non-Roma living in similar conditions. The Government has specifically emphasised this so as, to 'sell' the project to local (non-Romani) citizens). However, this did not relieve tensions as the programmes' interviewees felt the programmes are still seen by the general population to benefit predominately the Roma populations.

Effectiveness of positive action

Amongst the participants of the Hungarian workshop, there was almost unanimous agreement that positive

action could be an important and effective tool for improving the situation of Roma. Indeed, it seemed to be the case that many participants recognised that only through targeted positive action will the situation of Roma in Hungary change. This positive assessment of positive action as a means of fostering social change, however, was clearly dependent upon certain essential preconditions.

The greatest support for positive action as an effective tool for improving the situation of Roma was noted amongst workshop participants when the social (and cultural) environment had been adequately prepared for such measures. In exploring this theme, participants mentioned the importance of facilitating the participation of Roma and non-Roma in developing such measures. This would ensure social acceptance of the measures. It was also noted that positive action is more effective when it meets social expectations of participants. Discussions during the workshop and follow-up interviews emphasised the importance of these preconditions, particularly as a counter to negative past experiences and reactions of local non-Romani populations, when previous programmes benefiting Roma had been implemented.

The second most frequently noted precondition concerned a constructive engagement with beneficiaries. Motivation within the Romani community to improve its position was also stated by several participants as necessary for positive action measures to be effective, as was a positive attitude towards such measures generally. In conducting the follow-up interviews, public sector representatives (especially those in local government) placed a particular emphasis on the attitude of Roma themselves as a key determinant of the success of the measures. Workshop participants felt that the effectiveness of positive action programmes was linked to the identification with and ownership by Roma of the goals of the various measures implemented. This was clearly linked to awareness of the various programmes. It was also noted that effective measures are flexible and take into account the different circumstances and interests of the various beneficiaries of any given measure.

Thirdly, and aside from concerns about the importance of commitment to positive action by the various stakeholders, it was felt that the effectiveness of positive action measures for Roma had been clearly dependent upon appropriate planning, execution and assessment of the measures. Follow-up interviews revealed that this had not happened in a significant number of cases.

Given the extreme marginalisation of Roma overall in Hungary, which permeates all areas of life, the effectiveness of positive measures was clearly perceived to be limited in as much as the measures focused on isolated sectoral fields. Measures take place within the general framework of Hungary's economic and social situation and rarely take into account changes within the Romani community. Some of the participants noted that the current positive action measures targeting Roma in Hungary are not effective because they are time limited. They therefore end before inequalities have been remedied as a consequence of limited

finances. It was also highlighted that positive action programmes in the area of employment and training, are not coupled with effective measures to ensure that employers hire Roma on an equal basis as non-Roma.

There was a general indication that there was a need for a more comprehensive and systematic approach to improving the situation of Roma, which linked housing, employment, education and health outcome measures. The current political and funding environment in Hungary was felt not to support this.

Impact of positive action

The results of the discussion during this session are somewhat scattered in terms of their relevance, which may indicate that many of those responsible for implementing positive action for Roma in Hungary are unclear of how to measure its impact. Indeed, it became apparent during the follow-up interviews that a number of programmes are not evaluated or measured in any systematic way, except where specifically required within the framework of the financing secured for the initiative. This also appeared to be influenced by the fact that many programmes implemented by local authorities in Hungary target socially disadvantaged groups rather than specifically targeting Roma. Consequently, several participants noted that they could not discern the impact of positive action measures on the Roma due to the lack of a clearly defined target group.

In general, it was felt that Roma had benefited from positive action programmes in Hungary. The majority of the measures which were under consideration during the workshop related to education, employment and housing, with some specific references to numbers of Roma positively affected.

It was also noted that positive action measures had also contributed to the strengthening of relations between the implementing organisation and the local Romani community. This has usually led to a better level of understanding and mutual acceptance between the two.

According to the participants, positive action measures targeting Roma in Hungary hardly seem to address intersectional grounds of exclusion and multiple forms of discrimination. Most positive action measures by private and civil organisations address Roma in general, while some address specific concerns of Romani women (such as health programmes for breast cancer screening amongst those aged between 40 and 65 years old). In

addition, many educational (preparatory classes for higher education) and employment training (such as that those in fire brigades) programmes target young Roma (aged between 18 and 24). There appeared, however, to be a clear gap in programming addressing the needs of particularly vulnerable members of the Romani community, such as elderly Roma, LGBT Roma and Roma with disabilities.

During the discussions about the impact of positive action, several participants pointed to negative indirect effects of positive action measures (resulting from inadequate planning). Specifically, increases in ethnic tensions and conflicts were, for example, noted, particularly in relation to housing). Where positive results have been achieved, the lack of adequate planning and communication in the design and development phase of such schemes has resulted in ill feelings amongst non-Roma (who may also live in similar conditions). Positive action implementers have not always been successful of communicating in a convincing manner the benefits of such a measure for society in general. Consequently, many non-Roma believe that too many resources are being channelled to Roma.

At the same time, the limitations of resources made available for positive action programmes for Roma were raised by participants, as was the short sighted planning of policy makers in developing policies and programmes for Roma. While acknowledging the overall positive impact of the Hungarian government's (very unique) programme to eliminate Romani ghettos and improve the housing situation for members of this community, it was noted that this has also yielded unexpected negative results.

For example, the Dencshaza local government improved the structural and infrastructural (water, electricity) housing stock of Roma and other marginalised persons. As water and electricity connections were installed in each house, public water pumps previously paid by the local government were shut off in the neighbourhood and the residents began to receive bills that they could not afford to pay due to rampant unemployment (the employment scheme originally planned by the local government was rejected for funding by the national government because it fell outside the scope of the housing programme). Electrical and water supplies of some families were subsequently cut leaving the affected families with no nearby water supply.

4.4. Examples of positive action measures

Name of the initiative: *Roma Internship Programme for Reporters and Editors*

Sector/institution: Public/Civil (Hungarian Public Television and Hungarian Public Radio facilitated through a Foundation (Roma Production Office Foundation) established by an employee of the Public Television for this purpose; began 2008.

Reason for the initiative: The initiative intended to increase the positive presence of Roma in the media, as a response to several factors, including their under-representation, the negative representation of Roma and the need for the perspective of Roma to be represented. The initiative began when the Public Televisions Minority Programme Department won a film award of around 400 EUR. This money gave impetus to developing and fundraising for the larger programme which now exists.

Process: The Public Television and Public Radio each facilitate 10-month internships for five Romani individuals, during which the interns: 1) attend professional skills classes; 2) are provided with tools to address psychologically harmful situations they may encounter; 3) paired with a professional mentor; 4) provided with a scholarship; and 5) receive a certificate upon completion.

Outcome: Thus far, 8 out of 10 interns who have completed the programme are fully employed by Hungarian Public Television, creating stability and security in their lives. Although unintentional, Romani women have been accepted into the programme, which has created disproportionate positive impacts for women who experience multiple forms of exclusion. In addition, the Hungarian public now sees Romani reporters in primetime programming at a national level.

Name of the initiative: *Equal Chances against Breast Cancer for Romani Women (till 2007) and Equal Chances against Breast Cancer for Socially Underprivileged Women (from 2008)*

Sector/institution: Civil/NGO (Jewish Joint Distribution Committee)

Reason for the initiative: Understanding that Romani women, especially those over the age of 45, are particularly disadvantaged from a health perspective (such as health outcomes and access to health care services) and that cancer awareness projects have not reached them.

Process: In cooperation with Romani NGOs and representatives, the organisers initially reached out to Romani women in three areas, with the aim to encourage greater breast cancer screening. This included providing transport to screening sites and mobile screening units in isolated settlements. Further and through cooperation with Romani representatives and health service providers, the scheme tried to facilitate sustainability by encouraging open lines of communication and cooperation. The project tapped on available but not availed screening services provided by the National Public Health Medical Officers' Services (ANTSZ).

Outcome: In the first year, 95.7% of Romani targeted women participated in the programme. In 2008, the

programme is expanding to cover 20 geographic locations and wider health concerns as breast cancer is not the major health problem of Romani women.

Name of the initiative: *Preparatory Course for Graduation*

Sector/institution: Public (Ministry of Local Government and Regional Development)

Reason for the initiative: To increase the number of Roma employed within the police force, fire departments and catastrophe defence response units.

Process: The Ministry organises vocational guidance camps and regular preparatory classes for school entrance exams for Romani youth between the ages of 18 and 24 over an eight month period. For individuals that attend the programme and pass through the relevant colleges, the programme managers provide support in accessing placements and accommodation. The Ministry advertises the programme through Romani media sources and the National Roma Minority Self-Government.

Outcome: Of the 80 participants between 2004 and 2006, 52.5% attended police technical college and several others enrolled in the police academy. An unintended effort of the programme is the informal network established among the participants, who are able to support each other also companies implementing similar schemes.

Name of the initiative: *'Accepting' Working Place Model*

Sector/institution: Private (Hungerit Zft; a poultry processing plant)

Reason for the initiative: The project, targeting disadvantaged groups, was developed to address high turnover within the company's workforce, mainly comprised of unskilled workers with low levels of education.

Process: Together with the local employment centre and vocational training centre, Hungerit implemented a project targeting both the employer and employees. Thirty persons (selected from those over the age of 45; low education level; or returning from maternity leave) participated in 13 months of education and on-the-job training. In parallel, managers underwent 'acceptance' training, which covered theoretical labour matters, labour rights, and 'awareness raising' of the situations facing disadvantaged groups. The aim was to equip managers to better lead a more diverse workforce.

Outcome: Since the programme formally ended in April 2007, 29 of the 30 participants remain employed at Hungerit. Hungerit's workforce has more generally diversified and employees are staying for longer. A more inclusive atmosphere prevails at the company and the training for employers was expanded.

Evaluation: Participant evaluations and staff turnover tracking indicate that the outcomes of this programme have been very beneficial for the participants and Hungerit, but it is generally recognised that this kind of initiative is a pilot and there is a need for better planning and networking with other companies implementing similar schemes.

Name of the initiative: *Katapult*

Sector/institution: Civil/NGO (Katapult Mentor programme)

Reason for the initiative: Established in 2005 in response to provisions in the law on higher education (amended in 2000), which creates an obligation to give preferential treatment to disadvantaged students.

Process: The NGO provides mentoring assistance to students from disadvantaged backgrounds to help ensure that they did not drop out of school and complete their tertiary studies.

Outcome: Between 2005 and 2008, the number of pupils participating in the programme substantially increased from 273 to 1300.

Name of the Initiative: *Roma Mainstream Media Internship Programme*

Sector/institution: Voluntary sector: Center for Independent Journalism (CIJ) (Független Média Központ)

Reasons for the initiative: In 1998 when CIJ began the programme, there were few Romani journalists working in newsrooms of the mainstream media in Hungary. Due to the ignorance stemming from the lack of direct contacts with Romani audiences, the portrayal of the Romani community in the media was highly stereotypical and negative.

Process: The CIJ has run this internship programme annually since 1998. The 10-month long programme, including an accredited journalism course, is divided into two semesters. The first part provides intensive theoretical training, while the second offers internships for Romani students in the newsrooms of various national and regional media organisations in Hungary.

Outcome: By the end of the tenth course in May 2009, CIJ will have trained more than 100 journalists of Romani origin. Many of the graduates have been distinguished for their journalism excellence, and over 40% of the alumni have been working as journalists in the public and commercial media in Hungary. In 2003 the programme received the award for the best European intercultural education project of the year from the Belgian Evens Foundation.

Name of the initiative: *Desettlement Project: Eliminating the Settlement/Ghetto Outside the Village*

Sector/institution: Public (Dencshaza Local Government)

Reason for the initiative: After being invited to tender as part of the national government's de-settlement project, the local government decided to apply for monies to integrate Roma living in a segregated settlement and provide adequate housing for them. The project targeted both (primarily) Roma and non-Roma living in substandard ghetto conditions.

Process: The local government conducted a survey of all inhabitants of the segregated settlement to find out what help they would like (such as improving existing house or move to new house). All participants responded that they wanted their existing homes renovated. As a consequence the local government authority applied for a complex project integrating housing and employment training, as a way of address widespread unemployment (however, only the housing component was accepted due to the scope of the national funding scheme). There was also little outreach and general awareness raising of the programme, particularly in relation to the potential wider benefits.

Outcome: The local government undertook the renovation of the houses in the settlement and water and electricity infrastructure were installed in each house.

Evaluation: The conditions of the houses improved, but continuing lack of employment has meant that many individuals are not able to afford paying electricity and water bills. Some have had services cut; while public water access points previously available in the neighbourhood have been disconnected. In addition, the local non-Romani population has opposed the project, which was seen to benefit mainly Roma. Tensions between Roma and non-Roma have heightened.

4.5. Key statements identified from consensus workshops grouped by theme

Emerging theme	Key statements	Score
Understanding of positive action	<ul style="list-style-type: none"> Responsible measures Advantage, 'quota' Equalizing disadvantages Positive outcome Concrete measures for eliminating disadvantage Concrete programmes targeting Roma Morally based measures Making it equal Increasing opportunities Giving advantages + it should be measurable + eliminating the direct systems of oppression Social expectations having/possessing legal background 	<p>6 3 7 5 5 1 2 2 2 2 2 2 2</p>
Impetus for positive action	<ul style="list-style-type: none"> The advancement of equality Being affected, professional commitment Legislative commitment Interest, profit Law/ordinance/act requires Ethics, individual commitment Mission of the organisation Personal motivation Social facts Legal background Legal visualizations of needs 	<p>5 6 4 2 1 10 5 2 2 4 2 2</p>
Effectiveness of positive action	<ul style="list-style-type: none"> Yes, necessary advantage Yes, but with appropriate guarantees Yes, but depending on the social environment Yes, but depending on the participants Unambiguous/Unconditional Yes Conditional Yes: according to the attitude of society, to the method Conditional Yes: according to the attitude of the individual Unconditional no Conditional no: because of concrete disadvantage Positive yes Negative yes Conditional yes 	<p>4 6 7 6 3 4 4 3 2 4 2 2 2</p>
Impact of positive action	<ul style="list-style-type: none"> Cooperation Professional development Because the lack of definite target group, none The existence of the organisation Yes, positive impact Yes, half success Yes, measures with contradictory impact Direct positive results Indirect impact 	<p>9 8 3 2 8 3 3 6 3</p>
Groups targeted for positive action initiatives	<ul style="list-style-type: none"> Intellectuals Young people Poor people Roma generally (no target group) The whole society Roma Roma age groups Romas according to qualification Multiple narrowed target groups 	<p>1 2 1 0 4 3 5 2 0</p>

4.6. Key recommendations

In order to increase the effectiveness and scope of positive action programmes targeting Roma in Hungary, the Hungarian government should consider undertaking the following:

1. Amend the Hungarian legal framework to expand the duty and/or opportunity to undertake positive action measures on behalf of Roma including:
 - a) Amend the data protection law to enable the collection of data on the basis of ethnicity, and the development of programmes specifically targeting particular ethnic groups, such as Roma;
 - b) The Equal Treatment Act should define a clear obligation for all public and private employers, regardless of their size, to develop and implement

- c) The Equal Treatment Act should be amended to mandate the Equal Treatment Authority to proactively assess equal opportunity plans and measures for compliance with the principles of equal treatment, and sanction those not meeting the minimum standards;
- d) The Labour Code and the Law on Education (as well as laws in other relevant sectoral fields) should be amended to clearly provide for positive action measures for Roma as Hungary's most disadvantaged group;
- e) The Strategic Plan for the Decade of Roma Inclusion and accompanying Action Plan, adopted via

parliamentary decision and government decree, respectively, should be amended to clearly provide for measures target Roma specifically, and not as members of the category of disadvantaged or socially excluded groups;

2. Most positive action measures implemented in the country are linked to the availability of financing through national government or EU funds. This funding, however, is time-limited and narrow in scope, resulting in piecemeal programming rather than fostering the development of complex programmes required to really improve the situation of many Roma living in extremely marginalised conditions in Hungary. The Government needs to address this problem.
3. Government bodies at all levels should actively be encouraged to implement positive action programmes for Roma and other disadvantaged groups in order to set an example to the rest of society;
4. The Hungarian government should undertake to educate the Hungarian public about the meaning and potential positive consequence of positive action. This would help address widespread misunderstandings that appear to exist, and facilitate the linking up of various actors already engaged in such measures;
5. Government bodies should engage in widespread and effective awareness raising campaigns of both the need for positive action measures for Roma and the benefits of such measures for wider society; and
6. Romani individuals who have benefited from various positive action initiatives should be encouraged to work within the extension of such programmes, in order to increase representation of Roma amongst positive action implementers.

5. PAMECUS Country Report: Ireland

The Republic of Ireland country report was prepared by consortium members at the Centre for Inclusion and Diversity, University of Bradford. The report begins with an analysis of positive action in this country in light of the current legislative framework followed by a presentation of the main findings that emerged from the consensus workshop. In addition we have incorporated the findings from the follow up interviews and documentary evidence as a way of triangulating the overall data. Finally, we present key consensus statements which emerged from the workshop followed by a set of key recommendations.

5.1. Context of positive action in the Republic of Ireland

Within the Republic of Ireland, the consequences of past discrimination are recognised in law and this allows certain steps to be taken to outlaw discrimination in employment on nine distinct grounds, namely gender, family status, marital status, age, disability, sexual orientation, religion, race and membership of the traveller community (Employment Equality Act, 1998).

The scope of the grounds of equality covered by legislation in Ireland is by far the widest compared to any other country studied within the consensus workshops. In addition, the Equal Status Act (2000) complements the Employment Equality Act in ensuring that people are not denied access to services, facilities or amenities because of race, age, disability or membership of a traveller community. As highlighted in the legal analysis below, the Equal Status Act *prohibits discrimination in areas outside employment, principally goods and services, accommodation and education*. The Disability Act (2005) on the other hand introduced a requirement into the equality legislation by imposing positive duties on public authorities to establish a 3% quota in terms of employment of staff within their organisations. Together with these pieces of legislation, the statutory bodies (e.g. the National Disability Authority), established by the government, advance the positive action provisions as it affects issues within its mandates.

In the Irish context, positive action policy has been put in place to redress disadvantage, eradicate discrimination and guarantee equal opportunity for every member of society. The Irish legal framework has a very close similarity with the approach taken by the EC through enactment of disparate directives to address individual strands (e.g. Employment and Race directives). Essentially, what we see in the Irish context is almost a direct transposing of the EC directives with respect to the language and content of legislation.

5.2. Legal analysis

5.2.1. Does legislation establish any positive action measures? E.g. mandatory quotas for disabled persons?

The Disability Act 2005 states: 'a public body shall - (a) in so far as practicable take all reasonable measures to promote and support the employment by it of persons

with disabilities'.⁶¹ This broad duty is underpinned by a specific obligation on public bodies to 'ensure, unless there is good reason to the contrary for not doing so, that not less than 3 per cent of the persons employed by it are persons with disabilities'.⁶² This provision placed on a statutory footing the 3% employment target that the public sector had already been pursuing as a policy objective.⁶³

Public bodies must report annually on their compliance with above statutory duties to a Monitoring Committee within their parent government department. These Monitoring Committees then report to the Minister responsible and the National Disability Authority (NDA).⁶⁴ The NDA may, with the consent of the Minister responsible, require a public body to take measures in order to comply with their duty under the Act. The Act specifies that such measures could include steps such as training for disabled persons or recruitment competitions only open to disabled persons.⁶⁵ In its 2006 report on the implementation of the duty, the NDA noted difficulties in data collection. All government departments met the 3% threshold when based on the percentage of employees responding to the survey who declared themselves disabled. Yet response rates were very low, so when taken as a percentage of all employees, only 4 out of 15 departments achieved the 3% requirement.⁶⁶

5.2.2. Does legislation establish any obligations on public or private sector organisations to take positive action?

There are no additional obligations on public or private sector organisations to take positive action. It should be noted that case-law has suggested that there may be situations where non-discrimination requires positive steps to be taken. In *Campbell Catering Ltd. v Razaq*,⁶⁷ the Labour Court considered the situation of non-Irish workers subject to disciplinary proceedings at work. Given differences of language and culture, the Labour Court stated:

'employers have a positive duty to ensure that all workers fully understand what is alleged against them ... special measures may be necessary in the case of non-national workers to ensure that this obligation is fulfilled and that the accused worker fully appreciates the gravity of the situation and is given appropriate facilities and guidance in making a defence.'

Although this is not a duty on all employers to take positive action, it implies a duty for employers to make accommodations taking into account the diversity of their workforce.

⁶¹ s. 47(1).

⁶² s. 47(4).

⁶³ See further, S Quinlivan, 'Report on measures to combat discrimination: Directives 2000/43/EC and 2000/78/EC. Country report: Ireland' (2007), para 5: <http://ec.europa.eu/employment_social/fundamental_rights/pdf/legnet/irIrep07_en.pdf>.

⁶⁴ National Disability Authority, '2006 report on compliance with Part 5 of the Disability Act 2005 on employment of people with disabilities in the public service', p. 7.

⁶⁵ s. 49.

⁶⁶ NDA (n 64 above) 31-32.

⁶⁷ Determination No. EED 048, 23 July 2004.

5.2.3. What forms of positive action are permitted, but not required, by legislation?

There are two main pieces of legislation dealing with equality law in Ireland: the Employment Equality Acts 1998-2004 and the Equal Status Acts 2000-2004. The former prohibits discrimination in the employment sphere, whereas the latter prohibits discrimination in areas outside employment, principally goods and services, accommodation and education. Both Acts prohibit discrimination on the following grounds: gender, marital status, family status, sexual orientation, religion, age, disability, race and membership of the Traveller community.

There are quite a number of scattered exceptions within both Acts which could conceivably be used to justify the taking of positive action.⁶⁸ For reasons of space, not all of these can be considered, so the subsequent analysis concentrates on the main provisions which are expressly intended to permit positive action.

Within the Employment Equality Acts 1998-2004, section 24(1) provides an exception for positive action relating to gender equality:

'This Act is without prejudice to any measures -

(a) maintained or adopted with a view to ensuring full equality in practice between men and women in their employments, and

(b) providing for specific advantages so as -

(i) to make it easier for an under-represented sex to pursue a vocational activity, or

(ii) to prevent or compensate for disadvantages in professional careers.'

This is almost identical to the provision on positive action in Article 141 of the EC Treaty. In relation to the other discrimination grounds, section 33 states:

'Nothing in this Part or Part II shall render unlawful measures maintained or adopted with a view to ensuring full equality in practice between employees, being measures -

(a) to prevent or compensate for disadvantages linked to any of the discriminatory grounds (other than the gender ground),

(b) to protect the health or safety at work of persons with a disability, or

(c) to create or maintain facilities for safeguarding or promoting the integration of such persons into the working environment.'

The text of this provision closely reflects Article 5 of the Racial Equality Directive⁶⁹ and Article 7 of the Employment Equality Directive.⁷⁰ As such, case-law has confirmed that the taking of positive action is an option

⁶⁸ See further, C Costello, 'Positive action' in C Costello and E Barry (eds), *Equality in diversity: the new equality Directives* (Dublin: Irish Centre for European Law, 2003) 177, 199. eg s. 6(6)(b) Equal Status Act permits different treatment in the provision of housing accommodation to persons based on family size, family status, marital status, disability, age or membership of the Traveller community, whilst s. 16(1) permits preferential fees or charges based on age or disability.

⁶⁹ Directive 2000/43/EC.

⁷⁰ Directive 2000/78/EC.

for employers, not a requirement.⁷¹ One potential limitation is the reference in section 33 to 'full equality in practice between employees'; this creates uncertainty over its application to potential employees in recruitment processes.

In the Equal Status Acts 2000-2004, section 14 states:

'Nothing in this Act shall be construed as prohibiting—

... (b) preferential treatment or the taking of positive measures which are bona fide intended to—

(i) promote equality of opportunity for persons who are, in relation to other persons, disadvantaged or who have been or are likely to be unable to avail themselves of the same opportunities as those other persons, or

(ii) cater for the special needs of persons, or a category of persons, who, because of their circumstances, may require facilities, arrangements, services or assistance not required by persons who do not have those special needs.'

The broad language used in this provision gives rise to some ambiguity regarding its scope. Costello points out that it does not refer to specific grounds, but rather to 'disadvantaged' persons. It is not evident whether this automatically includes all of the discrimination grounds, or whether there is need for additional proof that the group in question is subject to disadvantage.⁷² There has been limited litigation on the meaning of section 14. In *O'Connor v The Icon Night Club (Limerick)*,⁷³ a man challenged an entry charge to a club which did not apply to women. The club argued that this was a form of positive action for women under section 14, but this was rejected by the Equality Officer on the basis that it was 'a measure taken for commercial reasons aimed at attracting more customers'.

5.2.4. Are any forms of positive action prohibited by legislation?

The legislation constructs positive action as an exception from the principle of non-discrimination. Therefore, positive action which goes beyond the scope of the exceptions provided for in the Acts⁷⁴ runs the risk of constituting unlawful discrimination. For example, in *Glennon v Board of Management, St Clare's Comprehensive School and the Minister for Education and Science*,⁷⁵ the Equality Officer cited the approach of the European Court of Justice to interpreting the scope for positive action under the gender equality Directives. Accordingly, she observed that a 'straightforward quota system' would be unlawful.⁷⁶

⁷¹ *O'Sullivan v The Galway-Mayo Institute of Technology*, DEC-E2004-050, 23 August 2004 (Equality Tribunal).

⁷² Costello (n 68 above) 205.

⁷³ DEC-S2004-001, 5 January 2004 (Equality Tribunal).

⁷⁴ The statutory exceptions for positive action are described in para 2.3 of this report.

⁷⁵ DEC-E2003-030, 16 July 2003 (Equality Tribunal).

⁷⁶ Para 5.13.

5.3. Findings from consensus workshop and interviews

This section of the country report provides an account of findings from the consensus workshop and follow-up interviews. We have also integrated analysis of the documentary materials provided by interview participants.

5.3.1. Data collection

The Ireland workshop was conducted on 28th August 2008 in Dublin and was well attended. The workshop started with a keynote speech, which was followed by two separate discussion groups facilitated by members of the PAMECUS research team. The participants were very engaged with the process and what is presented below represents the emerging themes.

The workshop was attended by 41 participants across public, private and third sector organisations drawn from health, banking, education (further and higher), business and voluntary/community sector, traveller groups and government (central and local). During the workshop, facilitators described the purpose, process of the workshop, elaborated on the role of the facilitator and ensured that the ethical components of the research were adhered to. The facilitators essentially enabled the process, kept it on track and intensified dialogue. The workshop followed five steps: setting the scene; generating new ideas (brainstorming); clustering the ideas; naming the clusters; and symbolizing the resolve. Four focused questions were used to inform the workshop discussions. During the discussions, the facilitator introduced a number of probes to facilitate more in-depth discussion around these topics.

Themes elicited from workshops were further validated through conducting targeted follow-on interviews with individuals identified from consensus workshop. The interviews provided a more detailed insight into some of the positive action initiatives taking place within organisations. Several workshop participants volunteered to be interviewed to provide further information about positive action measures implemented within their respective organisations. Seven of these interviews were conducted with participants from across a cross-section of organisations.

5.3.2. Findings

In this section we present the main findings from the thematic analysis based upon the data we have collected from the Ireland consensus workshop and follow up interviews. As with all qualitative research, the interconnected and cross-cutting nature of the themes will lead inevitably to a certain degree of overlap and cross-referencing in presenting these findings.

Understanding of positive action

Participants viewed positive action consisting of a range of activities aimed at improving access to training and employment opportunities for marginalised groups. Some workshop participants suggest that positive action measures are more salient in education and employment, and in the provision of services. As one participant stated 'positive action is designed to remove

barriers in work, education and access to services.' In addition to providing access to employment, positive action measures are also put in place to support existing staff. For example, one interviewee described a staff network at her university designed in consultation with staff to develop guidelines and communication policy to help create a more accessible workplace.

Positive action was described at the workshop as a *tool* (or a *concept*), designed to overcome historical disadvantage; break down barriers; and empower target groups. It was also seen to include actions (and attitudes) which promote inclusion of under-represented groups; designed to counteract the effects of discrimination, which have evolved due to bias and prejudices against minority groups and promote social inclusion of marginalised people (e.g. Travellers).

A number of initiatives were identified during interviews, which underscored the importance of positive action in increasing opportunities and removing barriers. For example, the WISER project helped a university examine recruitment and retention of women in historically underrepresented disciplines. Similarly, the 'Say no to ageism' project is another example of positive action initiative designed to assess organisations' practice with respect to age discrimination, and remove cultural and structural barriers, and change attitudes toward older people in hospital settings in the provision of services.

Positive action was regarded as a (proactive) policy aimed at giving excluded or marginalised groups opportunities in education, employment and services. It was viewed as consisting of targeted initiatives aimed at addressing long-standing discrimination and ultimately bringing about 'more equality in practice'. For example, it involves measures such as providing access to disabled groups and customers in the provision of services. In some cases, the law guarantees the use of quotas (e.g. 3% target requirement for people with disabilities in public sector organisation).

Impetus for positive action

Legislation: Most of the participants identified legislation as the major impetus for positive action in Ireland, specifically the Employment Equality Act and Equal Status Act (and Disability Act). Together, these Acts place specific positive duties on employers and service providers to ensure equal treatment to all regardless of differences on the following nine equality strands: gender, marital status, family status, sexual orientation, religion, age, disability, race and membership of the Traveller community. For example, the staff disability review at a university was triggered by the Equality Act and duties it imposed on having 3% disability requirement. This initiative has been successful not just quantitatively as indicated by the staff census survey conducted by the National Disability Authority (NDA), but qualitatively as suggested by staff feedback.

Similarly leveraged by legislation, public (and private) organisations have initiated positive action activities. For example, one interviewee from a private sector bank stated that her bank provides placement opportunities to long term unemployed disabled people

who have never been able to access mainstream employment. This initiative helped break down perceptions of disabled people in the workforce and at the end of the programme the bank provides references for the trainees.

Business case: Another major impetus for positive action that emerged from the workshop is the business case (i.e. good business practice). Some argued that promoting equality through positive action gives businesses a competitive edge/advantage. In addition, businesses are driven to comply by the fear of litigation and compensation. For example, a representative from a higher education institution told of a government initiative (Science, Engineering and Technology, SET) designed to address the significant underrepresentation of women in SET disciplines. For this stakeholder, the government has identified these fields as a priority for gaining competitive advantage, since loss of women, amounts to loss of science knowledge (loss to economy/society).

It is worth noting that while there is no statutory obligation to implement the 3% quota under the EEA or Disability Act, some private sector organisations make some effort to employ people with disability sometimes through government funded programmes. However, market exigencies were seen to present challenges to well intentioned private organisations, who operate in a very competitive environment and whose work is target-driven.

Policy: Related to the business case, is the policy driver. Some businesses want to be voted Employer of Choice and are equally concerned about brand name (business consideration and organisational image). These businesses are committed to equal opportunity policy as part of their larger institutional strategic goal. For example, a representative from an organisation stated that they advise the Irish government on policies aimed at promoting equal opportunities/inclusion for people with disabilities.

Organisational mission: This emerged as another key driver. For example, advocacy groups such as the Travellers Organisation have specialised needs and interests, in addition to commitment. In the case of one organisation, their mission is to address a marginalised sector of society and as one participants stated, *travellers may need particular services different from mainstream society*. Similarly, as one participant in the health sector stated, *we are committed to 'quality care for all patients no matter what ethnic group'*. Another in the education sector stated that he is committed to show *'respect for multiple cultures by including different teaching methods'*.

Individual commitment: This was identified as another driver. This happens within the context of an organisation or a movement. For example, a motivated individual in top management who is committed to challenging structural inequalities may be responsible for promoting a diversity policy driven by his moral ideals, such as fairness and justice. Interviewees perceived this buy-in from senior management as an added incentive for positive action to succeed; but they also perceive the lack of buy-in as a liability or a barrier.

Effectiveness of positive action

Responses reveal three categories of respondents ('Yes'; 'Yes, but'; and a few 'No'). Most responses were ambivalent and fell into the middle of the continuum; 'yes but'. It is not surprising however that respondents who felt positive action measures were positive agreed to take part in follow up interviews and the interview data provided ample examples to support their claim that positive action measures are effective within their organisations. Some exemplars of effective positive action initiatives that emerged from the interviews include:

- A private bank collaborated with the National Learning Network (NLN) to provide placement opportunities to people with a disability at no cost to the bank. The interviewee described this initiative as a 'win-win situation for the bank because the bank is receiving individuals from NLN who are keen to work and the bank is providing them with training at no cost to the organisation'.
- A hospital participated in an EU funded 'migrant friendly hospitals' project set up by the *Boltzmann Institut für Menschenrechte* (BIM) in 2002-4 to provide literacy training for migrants to help improve communication and cultural diversity training for hospital staff. The purpose of this programme was to facilitate care delivery for migrant patients and sensitise staff to the needs of this community. As a result of this programme, the hospital now has proper interpreting guidelines and a more streamlined approach to service access for the migrant population.
- A drugs awareness project was started targeting parents within the Traveller community. This project resulted from research highlighting the problem of drug use in the Traveller community. Although the success of the programme is difficult to evaluate due to the stigma attached to drug use, the facilitator (interviewee) has run a ten session course five times in less than two years. When asked about the success of this initiative, he said it is measured by the 'number of people who attend the course and how many go on to become trainers'. So far, two people are undergoing training to become trainers.

In addition to interview responses highlighting the effectiveness of positive action in various organisations, responses from workshop participants fell broadly into the three aforementioned categories. Below is a summary of the statements that emerged from participants who answered in the affirmative (yes). Some examples of their responses include *positive action is successful and effective in raising awareness about issues or attitudes relating to racism, sexism and other -isms*. Another participant stated that *without belief in positive action, (we) might not have employed some people we have employed*, thus attributing employment of staff to the existence of positive action programmes. In terms of particular strands covered, some participants were specific in attributing the employment of disabled and female staff to positive action initiatives. For example, one participant stated that *positive action is hugely effective and has led to doubling the number of disabled employees in the*

health organisations. While another participant from the voluntary sector stated that *positive action has raised visibility around disability and has led to gender balance on regional and development boards.*

The 'yes, but' group said positive action was effective, but had certain reservations. For this group, they affirmed that positive action is effective in terms of gaining access to work and education, but less successful with respect to pay, promotion and retention. Furthermore, they attribute fear of litigation and the imposition of (statutory) positive duties to the success of positive action programmes. These participants would like to see positive action being practiced as part of the norm, rather than resulting from external legal leverage. Along these lines, one participant stated that positive action in and of itself will not affect the kinds of changes it proposes and as such must operate alongside other programmes. Some illustrative responses range from *positive action in isolation may not be effective, positive action is effective if there is buy-in from leadership within organisations, positive action is effective if there is change in organisational culture, positive action is effective if it is mainstreamed as part of an overall inclusion approach.* Still some workshop participants stated that positive action is a difficult concept to evaluate/measure, because a monitoring system is *not strongly established to provide accurate data* and it takes time and money to conduct an access audit.

Some participants acknowledged the fact that positive action worked, however some organisations limit the benefits of positive action to the most advantaged members of the target group. As one participant puts it, *while some travellers benefit, the practice is for universities to cherry-pick the most advantaged Travellers, while the most excluded remain overlooked.*

Finally, those who thought positive action was ineffective (the 'No' group) argued that as long as there is resistance from the mainstream, positive action will be seen as tokenistic and stigmatised. They further stated that positive action cannot be effective because it does not address the underlying causes of social exclusion. As one participant put it *positive action does not address the reasons behind social exclusion.* Another participant mentioned *disclosure issues* as an impediment to targeting all people with disability because 'some disabilities are extremely sensitive (and) could jeopardise job opportunities, i.e. disclosure of a mental health issue'. Finally, some participants saw the role of the media as largely undermining the effectiveness of positive action initiatives, because the negative portrayal of positive action helps perpetuate stereotypes and prejudices.

Impact of positive action

The impact of positive action was felt across various sectors. A participant stated 'positive action is relatively new in Ireland and enshrined in the Equal Status Act and Employment (Equality) Act, but is not an ideal that has taken off. It's *mainly limited to disability in the public sector*'. Another participant from a health organisation stated that as a result of audit in hospitals, issues of 'access' have been addressed and structural changes have benefitted the disabled groups.

Hospitals have *consulted within the LGBT community* and have made funds available for capacity-building and transgender initiatives to improve access to health care. Similarly, within the education arena there have been campaigns to raise awareness about LGBT issues through *Gay Pride* celebrations. However, the university network for LGBT staff has not been well attended (only one person responded to an email request), and this might be due to issues of disclosure and a hostile organisational culture.

Other initiatives include the *government internship for Travellers*. As one representative from the third sector stated, while the government internship for travellers is well-known, it is not a well accepted initiative. A similar government initiative is *National Action against Ageism*, which is under the auspices of the Ministry of Integration (see exemplar for details).

Another participant stated that positive action has led to initiatives for marginalised people. There are social inclusion models currently devised to address and support the needs of all nine groups covered under equality legislation, such as gender, disabled, travellers, lone parents, race religion, and social status.

Generally, whilst there were overwhelming positive responses in terms of the impact of positive action, some participants were more cautious and pointed out that positive action is in its early days. In fact, one participant said it is difficult to evaluate its impact in a meaningful way and that there is the need to develop an evaluation mechanism. Examples from interview data suggest that there is a real positive impacts; however the means of assessing the impact varies across organisations. Some exemplars of impact assessment mechanisms that emerged from interviews include 'informal evaluation' (in the case of the private bank sector internship placement programme); 'combination of formal staff survey and informal feedback' from staff (in the case of disabled staff initiative); and more formal 'equality impact assessment' tools (in the case of the Migrant friendly hospital project, where BIM provided the tools to measure staff use of interpreting services, and using equality impact assessment tools to measure the effectiveness of equality policy).

Some argued that the benefits of positive action come at a cost to beneficiaries. For example, with respect to Travellers, the benefits include pre-employment training (access for all), which has benefited women in particular. However, there are attendant conflicts with mainstream work patterns, in addition to funding/statutory body requirements, which forces travellers to adapt their lifestyles to normative patterns correspondingly. The effects of positive action, therefore, can sometimes be counter-productive. The same was also seen to be true for Travellers/Romas/Settlers in the context of gaining access to education.

Beneficiaries mentioned by participants include women and young families. For example, AKIDWA has seen an increase in female applicants and it also has an all-female board membership. Members of migrant communities and Limited English Proficient students (LEP) have benefited largely within the education context. Science, Engineering and Technology (SET)

schemes have also benefited women in education. In terms of employment and promotion within HE context, women have benefited mostly from programmes

designed to promote gender balance and equity in the workplace.

5.4. Examples of positive action measures

Name of the initiative: *National Learning Network (NLN) Placement*

Sector/institution: Private Sector Bank

Reasons for the initiative: Organisation conducted a review of recruitment policies two years ago. This highlighted a lack of disabled people in the workforce and that disabled people faced hurdles when applying for jobs.

Process: The organisation underwent Disability Awareness Training. The provider of this training had links with the National Learning Network so suggested that the Diversity Lead make similar links with NLN. As a result, the bank in collaboration with MLN provides a 10-week work placements in the bank for people with little or no experience of employment, including people with mental health problems and disabilities, -in collaboration with the National Learning Network. Trainees are paid an allowance by NLN.

Outcome: It is seen as a 'win-win' situation for the bank. The bank is getting individuals from NLN who are keen to work and the bank is providing them with training at no cost to the organisation. The bank is able to provide opportunities for people that have never been able to access mainstream employment and at the same time is breaking down perceptions of disabled people that exist within the workforce. Individual gets a reference from the bank once training is completed. So far managers have given good feedback on trainees even though first cohort hasn't finished yet. Line managers have taken them under their wing.

Name of the initiative: *Staff disability Review*

Sector/institution: Public/Major university

Reasons for the initiative: 3% requirement of the Disability Act.

Process: The initiative started in 2008. It is a two-phased process, which involves: consultation and asking staff to comment on review; and: develop guidelines and communicate policy. This effort culminates with the creation of a network for disabled staff.

Outcome: Developed a Code of Practice, conducted a needs assessment, provided training, produced a central document giving guidance regarding entitlement to benefits and support for staff. In addition, developed guidelines for managers on recruitment and retention policy. Currently conducting an accessibility audit.

Name of the initiative: *Say No to Ageism*

Sector/institution: Public/Major Hospital

Reasons for the initiative: The initiative was launched by the Equality Authority, National Council on Ageing and Older People, and HSE-extension of 'Say No to Ageism' week, which takes place annually in Ireland. The goal is to create an equality competent health service.

Process: 'Say no to Ageism' is a joint initiative launched by the Equality Authority, National Council on Ageing and Older People and the Health Service Executive. A week is devoted to raising awareness of ageism and its impact on older people and to support practical initiatives within organisations to develop age friendly service provisions. As part of the initiative, the goal is to assess whether the organisation is practicing age discrimination, help combat ageism, and review attitudes towards older people amongst staff within the organisation and to identify cultural/structural barriers in meeting the needs of older people.

Outcome: Expected: to raise awareness amongst staff regarding equality legislation and encourage consultation/feedback from service users on a continuous basis. Evaluation was carried out by Disability Awareness regarding training offered. The results were positive and people are asking for more training. It brought about awareness-raising around accessibility issues, which was a very effective way of highlighting areas where change should be prioritized. As a result of the audit, structural changes to building have taken place.

Name of the initiative: 'Migrant friendly hospitals' project (Dec 2002-2004)

Sector/institution: Public/Major teaching Hospital

Reasons for the initiative: Undertook a needs assessment as part of 'a Migrant Friendly' project around working with migrant patients with staff and a local group working with asylum seekers. Identified communication problems leading to frustration.

Process: A hospital participates in an EU funded 'migrant friendly hospitals' project set up by BIM in 2002-4 to provide literacy training for migrants to help improve communication and cultural diversity training for hospital staff. The purpose of this programme was to facilitate care delivery for migrant patients and sensitise staff to the needs of this community.

Outcome: As a result of this programme, the hospital now has proper interpreting guidelines and a more streamlined approach to service access for the migrant population.

Name of the initiative: *Drugs Project*

Sector/institution: Voluntary / Travellers Organisation

Reasons for the initiative: The organisation was set up in 1989 when there was a lot of hostility towards the traveller community. Pavee Point (a national Traveller organisation) was then set up and two years later this traveller organisation emerged as an offshoot of Pavee Point.

Process: A drugs awareness project was started targeting parents within traveller community. This project resulted from research highlighting the problem of drug use. The success of the programme is difficult to evaluate due to the stigma attached to drug use. Nonetheless, the facilitator (interviewee) has run a 10-session course five times in less than two years. When asked about the success of this initiative, he said it is measured by the 'number of people who attend the course and how many go on to become trainers'. So far, two people are training to become trainers.

Outcome: Parents are educated about drug use through attending the drugs awareness course. This acts as a stepping stone so that people can then attend the

addiction study course (20 weeks) which equips them with the knowledge/skills to carry out drugs training. The aim is to reduce the of people in the community using drugs as well try to normalize discussion about drugs and engage the community in discussion about the problems of drug use.

5.5. Key statements identified from consensus workshops grouped by theme

Emerging theme	Key statements	Rank (score)
Understanding of positive action	• Context is crucial for positive action to work - such as organisational culture and monitoring	1 (9)
	• Positive action needs to be managed carefully to avoid negative consequences, such as ghettoisation or backlash	2 (8)
	• Overcoming historical disadvantage and increasing participation	3(8).
	• Identity barriers; remove barriers; and empower marginalised groups	4(6)
	• Promotes inclusion of underrepresented groups through policy/legislation	
Impetus for positive action	• Recognise historical exclusion and inequalities	
	• Grassroots Pressure and the Business Case: Individuals and organisations have driven the case for positive action, but there is also now more recognition of the benefits for business	1 (14)
	• Legislation (Employment equality act)- Positives and Negatives: A key driver but it can be difficult to win hearts and minds and to ensure joined-up and effective implementation	2 (12)
	• Individuals: The role of individuals is important in motivating positive action and shaping the core values of the organisation	3(7)
	• Equality policy (business case or cost-benefit) aimed at addressing underrepresentation	
Effectiveness of positive action	• Grassroots effort (e.g. Travellers advocacy group; developing skills and qualifications for jobs)	
	• Positive action can be effective in raising awareness and visibility	1 (9)
	• Positive action can be effective if there are sufficient resources and it is sustained	2 (8)
	• Unsure, because it is difficult to measure effectiveness	3 (5)
	• It is effective only in combination with other measures	4 (2)
Impact of positive action	• Positive Action faces challenges where it involves self-disclosure and this can poses risks for individuals in some circumstances	5 (1)
	• Yes and no; maybe; it depends; in theory	
	• Positive action is used to improve partnership and consultation with disadvantaged/excluded groups	1 (5)
	• Positive action can deliver benefits such as more accessible buildings or capacity-building for relevant NGOs	2 (4)
	• Positive action in Ireland has mostly focused on gender and to a lesser extent, disability and Travelling community	3(4)
	• Position action has led to implementing social inclusion programmes and educational training	4(3)
Groups targeted for positive action initiatives	• Position action has led to career retention and progression	5(1)
	• Position action has led to participation at all levels and a diverse	6(1)
	• Gender (females)	
	• Travellers (Roma)	
	• Disability	
	• (Im)migrants	
	• Religious groups	
	• Unemployed (long-term)	
	• Groups with limited English proficiency	

5.6 Key summary

- An overwhelming majority of the participants believe that positive action measures are effective as a tool in redressing injustices resulting from past and present disadvantages and discrimination;
- Most felt that positive action measures are necessary to empower marginalised groups and promote social inclusion;
- Positive action is a proactive policy aimed at giving excluded and marginalised groups opportunities in education, employment and service provisions;
- Legislation is a major impetus for positive action measures to be effective;
- Corporate social responsibility, as part of the larger strategic goal of organisations (or business case) is a major impetus for positive action; and
- Buy-in from top management is vital to the success of positive action.

5.7 Implications for policy and practice and recommendations

- Need to develop capacity of organisations to implement positive action measures;
- Strengthening of legislation is a major leverage for positive action measures to succeed;
- Government needs to properly educate citizens about the larger benefit of positive action to society;
- Assessment of the impact of positive action measures should be broadened to include qualitative measures;
- Beneficiaries of positive action programmes should not have to relinquish essential aspects of their identity in order to benefit from social goods.

6. PAMECUS Country Report: The Netherlands

The Netherlands country report was prepared by consortium members at the Ludwig. Boltzmann Institute of Human Rights in Vienna. The report begins with an analysis of positive action in this country in light of the current legislative framework followed by a presentation of the main findings that emerged from the consensus workshop. In addition we have incorporated the findings from the follow up interviews and documentary evidence as a way of triangulating the overall data. Finally, we present key consensus statements which emerged from the workshop followed by a set of key recommendations.

6.1. The context of positive action activity in the country

The Netherlands have a long tradition of handling minority issues with a variety of strategies. There are big differences however depending on which minority groups are concerned.

Ethnic minorities with a migrant background living in Dutch society are being addressed as *allochtoon* minorities. Legislative as well as policy initiatives have been implemented since the 1980s to enable people with a migrant background obtain more equality in society. In 1994 the government introduced legislation that was opposed by employers' organisations from the start; that obliged employers to collect data on the ethnic background of their employees and to implement strategies to raise the percentage of certain groups within their staff; according to the percentages that were present within their respective region. Compliance with the obligations imposed was limited to 14%.⁷⁷ Subsequent legislation, the *Wet Samen* (more information below), was more focussed on motivating employers to collect data and implement equality action plans without imposing sanctions. The entering into force of these provisions was accompanied by public relations initiatives and they were subsequently agreed on by the employers' associations.

The years that followed saw a transfer of measures that had been developed especially for minorities in the 1990's, into common labour market strategies, in terms of a mainstreaming approach. In 2004 the *Wet Samen* expired and the government decided not to implement the legal obligations imposed by its regulations again. The focus of initiatives aimed at reducing inequalities in Dutch society henceforth set in 'soft legislation' and in providing counselling on how to create a more diverse workforce and, in awareness raising on the benefits and the business case for diversity.

In 2004, the government started an 'inclusive policy' ('inclusief beleid') initiative aimed at mainstreaming an inclusive approach for people with disabilities. This included an action plan called Equal Treatment in Practice ('Actieplan gelijke behandeling in de praktijk')

⁷⁷ Abell, Paul (1997): Case Study for Good Practice for the Prevention of Racial Discrimination and Xenophobia and the Promotion of Equal Treatment in the Workplace: Netherlands. Dublin (European Foundation for the Improvement of Living and Working Conditions)

that involved requesting five government departments⁷⁸ to send in their policy plans.

There is a certain resistance towards positive action measures within Dutch society. The public visibility of any positive action measure plans is restricted to advertisements, in which members of specific underrepresented groups are especially invited to apply for jobs. The success of these ads is very much doubted, as would be seen from the opinions of participants of the Consensus Workshops in section 6.3.2.

In 2003 one member of the Liberal Party (the VVD) even proposed to abolish the positive action exception in the General Equal Treatment Act (see below) arguing that such 'positive discrimination' would evoke resistance among groups that are not targeted by such policies.⁷⁹

6.2. Legal analysis

The Analysis of Dutch legislation on positive action measures was undertaken by using four questions that were developed by the legal team. Basis of the research were legal texts in the English translation provided by the Dutch Equal Treatment Commission (Commissie Gelijke Behandeling) on its website, expert reports elaborated in the framework of the European Network of Legal Experts in the non-discrimination field and selected literature on Dutch equal treatment legislation and practice as on positive action and data collection.

6.2.1. Does legislation establish any positive action measures? E.g. mandatory quotas for disabled persons?

There are no positive action measures established by legislation in the Netherlands at the time of this report being drafted.

6.2.2. Does legislation establish any obligations on public or private sector organisations to take positive action?

The so-called Employment of Minorities (Promotion) Act, the *Wet Stimuleren arbeidsdeelname minderheden* (SAMEN), which entered into force in January 1998, obliged employers with at least 35 employees to strive for a proportional representation of ethnic minorities in the employer's workforce. The SAMEN Act gave effect to the Netherlands' obligations under the CERD convention. This meant that the percentage of ethnic minorities in the employer's total workforce should have been approximately equivalent to the percentage of members of ethnic minorities in the regional labour force, taking the merit principle into account. The ethnic minority or *allochtoon* groups targeted by the legislation were persons who (or whose parents), were born in Turkey, Morocco, Surinam, the Dutch Antilles, former Yugoslavia, and all countries of Latin-America, Africa and Asia with the exceptions of Japan and Indonesia. The *Wet Samen* contained a duty for employers to

⁷⁸ The Ministries of Internal Affairs and Kingdom Relations, Education, Social Affairs and Employment, Transport and Water Management, Housing, and the Ministry of Healthcare had to submit proposals.

⁷⁹ Holtmaat, Rikki (2007): *Report on Measures to Combat Discrimination Directives 2000/43/EC and 2000/78/EC Country Report the Netherlands*. Report for the European Network of Legal Experts in the non-discrimination field. Human European Consultancy/Migration Policy Group, 2007. p. 59. http://ec.europa.eu/employment_social/fundamental_rights/pdf/legnet/nlr_ep07_en.pdf

register the ethnic origin of their staff members, with the aim to measure progress in implementing the principle of equal treatment and equal opportunities in the work place, to present an annual report on the representation of minorities in the company and to develop an employment strategy. The data was used by the Equal Treatment Commission (the quasi-judicial body that hears most cases of alleged discrimination) as evidence in cases of presumed indirect discrimination and in cases of affirmative action measures as a tool to assess, whether those were justified because of the structural under-representation of members of minority groups. The Wet Samen expired on 31 December 2003, when an evaluation showed that the level of compliance was not very high and that the numbers of participation of minorities in the labour market did not show considerable improvements, and suggested the strengthening of non-legal initiatives to promote minority workforce. Critics of this decision (including the Equal Treatment Commission and most of the workshop participants) admit that the law had its shortcomings. Nonetheless they are of the opinion that the law did a lot to change the attitude towards diversity within Dutch companies and that it should have been preserved until a better alternative was available. In its Commentary on the 2004 CERD Report on the Netherlands, the Equal Treatment Commission states that the compulsory registration of the ethnic origin of staff members had provided an important and useful tool to follow the developments in the labour market and, more particularly, the position of members of racial and ethnic minorities.⁸⁰

The same would be valid for a government bill that has been proposed by the Labour Party (PvdA) and is currently discussed. The law would oblige local authorities (in concrete municipalities) to exempt disabled people, who are *owners of a parking card for disabled persons* (houders van een gehandicaptenparkeerkaart), from car parking expenses. At the moment this is handled individually by the municipalities, the legislation under discussion would be contributing to creating uniformity by imposing the duty to provide for free parking for owners of a specific parking card to local authorities.⁸¹

6.2.3. What forms of positive action are permitted but not required by legislation?

The possibility of implementing positive action measures is explicitly foreseen as a tool to reducing existing inequalities on grounds of gender, race and disability. Legislation does not foresee any exception to the principle of non-discrimination in order to ensure equality regarding religion and belief, age and sexual orientation, meaning that positive action on these grounds is not formally permitted. The government

regards positive action in favour of these groups as undesirable, given the (alleged) absence of a 'structurally disadvantaged position' of these groups⁸².

The General Equal Treatment Act (Algemene Wet Gelijke Behandeling, AWGB), which prohibits discrimination on the grounds, *inter alia*, of race and ethnic origin, religion or belief, sexual orientation and, in areas outside employment, sex, in its Article 2 Section 3 allows for positive action as one of its general exceptions from the principle of equal treatment, if the aim of the programme is to reduce de facto inequalities and the unequal treatment measure is proportionate to the aim in question. The prohibition of any *differentiation*⁸³ contained in this Act does not apply if the aim of the differentiating measure is to place women or persons belonging to a particular ethnic or cultural minority group in a privileged position in order to eliminate or reduce existing inequalities connected with race or sex and the differentiation is in reasonable proportion to that aim. The legal parameters for positive action measures however are interpreted quite restrictively by the ETC. It follows from the legal text and the ETC case law that positive action measures and policies targeted at these groups can be considered as lawful, if they are:

1. a specific measure;
2. aimed at placing women or people belonging to ethnic minorities, who are in a disadvantaged position, in a privileged position;
3. aimed at eliminating or reducing existing inequalities, whereas these inequalities have to be proven;
4. reasonably proportionate to the aim pursued in terms of initiative as well as in terms of intensity, which has to be determined according to type and the level of employment;
5. implemented in such a way that no automatic priority is given to a woman or a person belonging to an ethnic minority group.⁸⁴

The Equal Treatment Commission specified these criteria, when a regional police force asked its opinion on its positive action policies designed to promote the increased participation of women during selection procedures and in hiring new personnel. The

⁸⁰ Commissie Gelijke Behandeling (2004): Commentary of the Netherlands' Equal Treatment Commission on the fifteenth and sixteenth Periodic Report of the Kingdom of the Netherlands on the Implementation of the Convention on the Elimination of all forms of Racial Discrimination (CERD/C/452/Add.3)

[http://www.cqb.nl/_media/downloadables/advies%202004%2002%20\(EN\).pdf](http://www.cqb.nl/_media/downloadables/advies%202004%2002%20(EN).pdf)

⁸¹ Information provided by Marianne Gijzen, see also: Voorstel van wet van het lid Van Dijken houdende wijziging van de Gemeentewet in verband met een vrijstelling van parkeerbelastingen voor houders van een gehandicaptenparkeerkaart <http://static.ikregeer.nl/pdf/KST123567.pdf>

⁸² See Parliamentary Documents II, 2004-2005, 28 770, no. 11, p1-29 and M. H. S. Gijzen (2006): Selected Issues in Equal Treatment Law: A multi-layered comparison of European, English and Dutch law, Intersentia Antwerpen-Oxford, Chapter 5, footnote 188.

⁸³ Dutch Equal Treatment legislation is not using the term discrimination as it is perceived as an asymmetric pejorative term. The legal term used is "differentiation" which is considered as neutral and symmetric, not related to the disadvantaged position of the *group* to which an individual applicant belongs. Information provided by: Waddington, Lisa/Gijzen, Marianne (2004) Dutch Report on the Implementation of the Disability Provisions of the Framework Employment Directive. Report for the European Network of Legal Experts in the non-discrimination field. p.8. http://ec.europa.eu/employment_social/fundamental_rights/pdf/aneval/di_sabfull_nl.pdf

⁸⁴ For references to the relevant Opinions of the ETC see M. H. S. Gijzen (2006): Selected Issues in Equal Treatment Law: A multi-layered comparison of European, English and Dutch law, Intersentia Antwerpen-Oxford, chapter 5, pp. 255ff. The Opinions are all published on the ETC Website, the ones of relevance for this report are provided only in Dutch.

recommendation by the Commission was that the employer should compare the number of the specific target group working in the police force with the number of qualified persons belonging to this group in the labour market. Only in case of a discrepancy between those numbers, was preferential treatment allowed. Furthermore the Commission advised that the plan including, a positive action strategy, was publicly announced in all job advertisements.⁸⁵

The relevant provision in the context of women with regard to employment is the Equal Treatment Act women / men Art. 5(1) and Article 7:646(4) of the Civil Code. The General Equal Treatment Act only allows for positive action in favour of women outside of employment.

A similar exception clause is included in the provisions of the Act on Equal Treatment on the grounds of disability or chronic illness, which, in its Article 3 Section 1, states that the prohibition of differentiation does not apply, ifb. *the differentiation relates to a regulation, standard or practise, which is aimed at creating or maintaining specific provisions and facilities for the benefit of persons with a disability or chronic illness and c. if the differentiation concerns a specific measure, which has the aim of granting persons with a disability of a chronic illness a privileged position in order to neutralise or ameliorate existing disadvantages and the discrimination is proportionate to the objective.*

The Act on the Reintegration of Disabled People in Employment, which came into force in July 1998, aims at creating a coherent set of measures which might facilitate the (re)integration of 'employment disabled people' ('arbeidsgehandicapten') in the labour market. The Act enshrines the possibility of implementing quotas to reach a 5% norm. The regulation aims at encouraging employers to employ people with a reduced working capacity. It is not obligatory, but is focussing on reducing or taking away barriers or the objections of employers towards the employment of people with disabilities. Any employer who employs a disabled worker or who assigns him or her to more suitable position within the company can receive considerable compensation to finance all costs this may involve. It is also possible under this Act to grant facilities to a disabled worker, which are intended to maintain, restore or improve his or her capacity for work. These benefits, however, are not available to employers of "disabled workers" in general. Dutch law makes a distinction between disability and partial or complete 'arbeidsongeschiktheid' (reduced working capacity). Subsidies to promote employment are only available with regard to the latter group. In order to fall into this group, an adult must be classified (by the social security office) as having at least a 35% reduced working capacity, and a young person must be classified as having had a condition since childhood reducing his or her working capacity. Individuals who meet these criteria, are eligible for a reduced working capacity /

social security benefit (depending on their degree of reduced working capacity). If they find (partial) employment, that benefit is reduced or removed. These incentives are designed to get such people off benefits and into work. Many (but not all) people with (severe) disabilities fall into this group. Moreover, people with conditions that might not be regarded as disabilities, such as stress / burn out, a bad back, a recovering drug addict, also qualify. This measure can be regarded as part of the general policy to stimulate employment and reduce the number of recipients of welfare benefits.

Unequal treatment on grounds of age based on employment or labour-market policies to promote employment in certain age categories, is not to be considered as unlawful differentiation, if such policies are laid down by, or pursuant to, Article 3 Section 7 (1a) of the Equal Treatment in Employment (Age Discrimination) Act,⁸⁶ which states that "*The prohibition on discrimination shall not apply if the discrimination is based on employment or labour-market policies to promote employment in certain age categories, provided such policies are laid down by or pursuant to an Act of Parliament.*"

Based on this provision, unequal treatment on grounds of age could be regarded as an objectively justified exception to the prohibition of differentiation, if it is implemented as part of a strategy aiming at promoting employment for certain ages.

There is no legal tool to legitimate positive action measures to augment equal opportunities for people, whose sexual orientation, religion or belief causes barriers in Dutch society. Draft legislation conceding the possibility of applying positive action for all the grounds covered by the general Equal Treatment Act was published in 2005. Prior to preparing the draft, the government collected expert statements from NGOs and the Equal Treatment Commission that stressed the importance of adopting a coherent approach for all grounds, and public discussion was launched. In the end the amendments were abandoned on the grounds that no changes were necessary to fulfil the obligations imposed by the EC non-discrimination -Directives 2000/43, 2000/78 and 2002/73.

In place of the legal obligation to register data on the ethnic origin of staff members that had been introduced by the Wet Samen (see above), the Ministry of Social Affairs and Employment has introduced an 'Equal Pay Quickscan' that could be used by companies on a voluntary basis to register data on staffing and the pay structures of companies. This data can be used as evidence in discrimination cases, as well as to legitimise positive action measures by the companies themselves; and is a valuable tool for government bodies to monitor the efficiency of policy strategies.

⁸⁵ Commissie Gelijke Behandeling (2004): The Dutch Equal Treatment Commission. <http://www.cqb.nl/media/downloadables/Engelse%20folder%20nov%202004.pdf>

⁸⁶ Act on Equal Treatment on the ground of Age in Employment (Wet gelijke Behandeling op Grond van Leeftijd bij de Arbeid) of 1 May 2004. Translation provided by the Dutch Equal Treatment Authority.

<http://www.cqb.nl/legislation.php>

6.2.4. Are any forms of positive action prohibited by legislation?

Positive action on the grounds of sexual orientation, age and religion is prohibited by law. In addition, positive action is limited to benefiting women (but not men), members of ethnic minority groups (but not members of the ethnic majority group) and people with disabilities (but not people without disabilities).

Furthermore, any kind of preferential treatment that is not objectively justified by a clearly defined target and that does not fall under the provisions listed above, would be considered as differentiation and, as such, would be prohibited by legislation. The requirement of proportionality is interpreted quite narrowly in Dutch law. Under-representation and/or structural disadvantages of the group targeted by the measure would have to be proved on request by providing statistical data on the percentage of members of specific groups in the employer's workforce, in comparison to the percentage in the general public in the relevant area.⁸⁷ According to Opinions of the Equal Treatment Commission this might not be strictly necessary in areas outside employment, where the Commission has accepted a 'non-statistical evidence approach' in cases where a disadvantaged position was considered as structural and a 'fact of common knowledge.'⁸⁸

The Dutch definition leaves less scope for affirmative action policies and programmes than is allowed under Directives 43/2000/EC and 78/2000/EC, which state that the principle of equal treatment shall not prevent any Member State from maintaining or adopting specific measures to prevent or compensate for disadvantages⁸⁹ linked to any of the grounds referred to in Article 13, since it does not allow measures, which aim at preventing, in addition to removing or reducing disadvantages.

⁸⁷ e.g. Opinion 2004-36 (according to M. H. S. Gijzen (2006): Selected Issues in Equal Treatment Law: A multi-layered comparison of European, English and Dutch law, Intersentia Antwerpen-Oxford, Chapter 5, footnote 211.) in which the disadvantaged position of persons belonging to an ethnic minority group was proven by providing data showing that only 5% of the workforce of the relevant employer were of this specific ethnic groups whilst they constituted 16,9% of the general labour force in the region.

⁸⁸ According to M. H. S. Gijzen (2006): Selected Issues in Equal Treatment Law: A multi-layered comparison of European, English and Dutch law, Intersentia Antwerpen-Oxford, Chapter 5, pp. 257ff.) the ETC in Opinion 2005-225 assessed an application of a female on social security claiming accessibility to specific training courses provided by a public welfare organisation exclusively for Turkish and Moroccan women, arguing that she found herself in an underprivileged position herself, by ways of a dismissal holding that 'the disadvantaged position of Turkish and Moroccan women was . . . not primarily determined by their financial position but rather by their position in the Netherlands and by their specific cultural and social background position.' Furthermore the ETC considered the measures provided as appropriate and necessary in terms of proportionality for the purpose of reducing the disadvantaged position of this specific group in Dutch society.

⁸⁹ Article 5 (2000-43) and Article 7 (2000-73)

Positive action

1. With a view to ensuring full equality in practice, the principle of equal treatment shall not prevent any Member State from maintaining or adopting specific measures to prevent or compensate for disadvantages linked to any of the grounds referred to in Article 1.
2. With regard to disabled persons, the principle of equal treatment shall be without prejudice to the right of Member States to maintain or adopt provisions on the protection of health and safety at work or to measures aimed at creating or maintaining provisions or facilities for safeguarding or promoting their integration into the working environment

6.3. Findings from consensus workshops, interviews and documentary analysis

6.3.1. Data Collection

Two consensus workshops were carried out in the Netherlands, on the 9th of September 2008 in The Hague and on the 10th of September 2008 in Utrecht. The locations were chosen following extensive literature and web-research on positive action measures in place in the Netherlands. The Dutch Equal Treatment Commission provided the venues for the workshop in Utrecht and Article 1 Discrimination Office in The Hague was very helpful in organising workshop facilities in The Hague. Both offices, as well as the office of Article 1 in Rotterdam, helped in spreading information to potential participants via mailings, and by promoting the workshops on their websites. Nonetheless, preparation of the workshops was very intense as motivating people to participate turned out to be very difficult. In the course of the preparation the organisers learnt that a European training project that had been conducted the previous year (2007) on the topic of 'Anti-Discrimination and Diversity Training' had faced similar problems. The causes seemed to be located on the one hand in the overflow of training on the wider topic of anti-discrimination and on strategies to combat discrimination, and in the poor image of positive action in the country. The latter aspect will be elaborated further below.

The organisers intensified their efforts by sending targeted reminders urging people to apply and by phoning selected addressees. Finally 12 participants applied for the Hague workshop and 10 for the workshop in Utrecht, and in total 14 participants attended the two workshops. People that had decided to participate however were very engaged in the debate and contributed extensively to the aim of the workshops.

Participants represented a broad diversity of approaches and working fields. Diversity managers from private companies met consultants on issues of diversity management and equal opportunities, there were participants from ministries, the Commission for Equal Treatment, people from a youth organisation and participants based in the academic world. This heterogeneity led to very fruitful discussions and helped to develop a comprehensive picture of the relevance of positive action measures in place in the Netherlands.

Given the low level of participation in the consensus workshop the focus on the follow-up interviews was intensified and people that had signalled interest in participating, but could not manage to attend, were included in the sample. Data Collection was completed by using research material provided by participants in the workshops and by interviewees. Based on the discussions in the workshops and the information provided by the interviews, recommendations for future activities in the field of implementing positive measures were elaborated.

6.3.2. Findings

The findings of the data collection mirror the reluctant attitude of the Dutch towards positive action measures as a strategy to combat discrimination and to promote

equal opportunities. On the other hand they reflect the need for positive action measures as preferential treatment to overcome barriers and institutional discrimination in Dutch society.

Understanding of positive action

Participants in the Hague in their initial introduction clarified the low interest in the workshop topic. They considered positive action as an old-fashioned strategy. They reiterated that no one used this term anymore, even if they admitted that there was need for it. During discussion it became evident that participants' connotation towards positive action measures was quite narrow, and that it was really the translation in the Dutch context that was the problem. Diversity management or inclusive management are terms that are used and widely accepted.

Some participants openly admitted that when receiving the invitation their first thoughts were: Why have they come up with this old-fashioned approach and admitted that they had decided to come out of pure curiosity. Understanding of positive action varied from legalised preferential treatment, to window shopping, to strategies towards a more inclusive society. Further discussion showed that the common understanding and the first associations were very much connected with quotas and other forms of preferential treatment.

Participants in the Utrecht workshop were less sceptical, there was almost common agreement that positive action measures were a necessary and important tool in combating discrimination and promoting equal opportunities. They struggled however with defining the term as such. Even if the first association was that positive action has something to do with legislation, most participants went for a broad definition, considering positive action as an important tool within a diversity management strategy. One participant, who was experienced in Roma issues in Eastern Europe, which had led her to a high level of scepticism towards the usefulness of positive action, kept the debate going. In the end this led to questioning what equal opportunities really meant and on the importance of being aware of the power of definition.

Participants reported a recent case of a quota system, which had implemented preferential recruitment of persons with a migrant background, even if that had not been necessary and which was categorised as unlawful by the Commission of Equal Treatment. The critical attitude was stressed again by bringing the question of representation into discussion when one participant asked: *if a woman really would be represented better by a woman, a Bangladeshi better by a Bangladeshi.*

There was common agreement in both workshops that the aim of positive action measures should be inclusiveness, creating an inclusive culture and that this should go further than mere prevention of discrimination. Furthermore the importance of the business case for diversity was stressed as the only tool participants considered as successful. The problematic role of so-called 'quota' people was discussed with a two-fold outcome; as prejudices towards people who had been employed, or are suspected to have been employed according to a quota system were considered

as a barrier towards equality within an organisation. Subsequently, people who would be employed preferentially within this system became reluctant to apply, it was reported. On the other hand the importance of quota systems and the need for it was highlighted giving the example of women in public services. Neelie Kroes, the European Commissioner for Competition was cited as having said: *I am a quota girl, and I am proud of it.* If there had been no quota system for women in the public service, highly qualified women like her would not have made it.

The Hague participants finally agreed to broaden their concept of positive action measures for the purpose of the workshop to include *all methods designed to counteract the effects of (past/current) exclusion/discrimination and of stereotyping of specific groups [using] legislation, training, organisational development and coaching.* This should be in the form of a *temporary measure* and with the aim of creating an *inclusive society.*

Participants in the Utrecht workshop agreed on splitting the concept of positive action measures in different aspects; *the attitude towards any measurements* - be it a positive approach towards diversity or a negative one ('there are no opportunities anymore for white, non-handicapped, heterosexual men') - was considered as the basis. In this regard the need not to consider positive action measures as an ideology, as something magic but to consider it as common sense was stressed. Another aspect would be the definition of targets followed by action, in the phrase '*walking the talk*'. Concrete measures that are implementing a target-oriented strategy and reflecting the attitude, completed the group's understanding of positive action measures.

Impetus for positive action

The business case was stressed as the most important factor of motivation (the word 'impetus' needed a 'translation' into 'motivation' as it was unknown). Discussion was very intense on the various potential elements of the business case. Changes in society that lead to more diversity in all its meanings were considered to be the core factor that is motivating organisations to mirror this diversity in their internal structures - and for this aim to implement positive action measures. Reaching new markets by attracting a diverse clientele was considered as equally attractive as reaching new groups of qualified people by changing the recruitment procedures. It was pointed out that population developments have been changing the workforce and that future recruitment policies will be facing the situation that the number of qualified people will be lower and that the challenges of Human Resource policies over the coming years will be how to keep people. In this latter respect, one participant even said they experienced a certain sense of urgency within human resources departments.

'Classic' - and often criticised - arguments for implementing positive action measures or diversity management strategies, like using the publicity effects of being diverse and colourful, of being 'the good ones' and of profiting from different cultural competencies were deemed as minor factors. Employing people because of their cultural background with the aim to

better understand the needs and interests of their cultural peer-groups, according to the workshop participants had been practised in the 1990s with doubtful effects. As an example, the creation of special police departments corresponding to ethnic-cultural groups in society - with the aim to enhance effectiveness to intervene in conflicts within specific ethnic-groups was discussed. It was considered as a misleading concept as it maintains stereotypes and does not dispose employees according to their vocational qualification, but according to their background.

The discussion in The Hague was very much determined by a common reflection on the need to merge the self interest and the general interest in equal opportunities policies. One participant reported his experience as a participant in a workshop in South Africa, where the so-called 'Ubuntu' attitude was very present, an attitude towards society that much more is focussing on the 'we' than individual European societies; and that he considered as a precondition for implementing a system of equality within a society. In this way the creation of an organisational identity (not 'them' - but 'we') was also considered a motivating factor. Struggling towards a change of society providing equal opportunities for everyone was unanimously considered as the most important motivating factor in the long run as only with an entire societal commitment, would single measures have the chance to achieve sustained success.

What was mentioned as an important motivational factor in both workshops, was the moral argument. This was considered to be relevant for both public bodies and government departments to a higher extent than for private companies, as they need to represent the diversity of society in the organisation, to be legitimised and as it is considered part of their public duty to act as a role model. Recent initiatives in the judiciary to raise the number of judges with a migrant background (see good practice) were reported as motivated by the awareness that *allochtoon* minorities were not represented in the judiciary and that this factor could lead to failures in perception, lack of knowledge about structural discrimination and to prejudice, influencing the attitude towards clients and even court rulings.

Less influence was ascribed to legal risks. Most participants thought that legislation in the Netherlands would be obeyed only if companies agreed to the objectives. Experience had shown that disobedience to legislation in the field of positive action measures was quite common (e.g. regarding the provisions of the Wet Samen, see above) and that laws were not executed properly either. To a certain extent participants believed that even merely aiming at feeling good could be a reason for implementing measurements to meliorate the situation of others. This was mentioned in line with the ambition to build up a good image and to avoid social shame.

Effectiveness of positive action

There was a very lively discussion on what - if not positive action measures - would be the right strategy to combat structural discrimination in an effective way- and there was no doubt that the latter did exist in Dutch society. Furthering a feeling of belonging, changing peoples' attitudes and changing the mindset of society,

were seen as the only solutions. Legislation was not considered as a useful tool by the majority of participants (there were strong dissenting opinions in this respect, explicitly concerning the effectiveness of the Wet Samen) - not because it would not have been necessary but because it simply would not be obeyed.

The Wet Samen (for more information see above) had been in force between 1998 and 2004 and had obliged companies to collect and register data on the ethnic background of their employees. It had caused the introduction of data collection in many companies, definitely not everywhere - it did not have any remarkable effects in terms of increased equal representation of people according to their ethnic background. Most of the workshop participants assessed the effectiveness as quite low. The government had reacted the same way in 2004 and with the approval of employers' organisations, had decided not to follow the strategy. Other participants argued that the obligation to collect data on the ethnic background of employees had contributed to awareness raising on diverse backgrounds, and to the reality of unequal representation of people with different ethnic backgrounds in companies, in the labour market and in society. Moreover it was argued that the Wet Samen had been *a law of parliament and not from the cabinet, the government never wanted it*, so the political will to enforce the legislation in practise had been lacking. This is evidenced by the fact that no sanctions had been foreseen for not acting according to the law. This, and the short time the provisions had been in force, according to some participants, had been the real causes for the apparent ineffectiveness. Implementing concrete strategies to change the statistics within a company would have been and is, a time-consuming procedure, so success could have been assessed only after a longer period.

Nonetheless there was common agreement on the *awareness raising factor* of legislation, which in the long run, was regarded to be the most important guarantor for an equality based society as it could *stimulate change in society*. And as one participant admitted: *Change does not come from legislation, but it's nice to have it as a background*.

In the short term, workshop participants agreed that concrete measures privileging certain groups, (in case they are far removed from the labour market), could have positive effects for single members of these groups and for the group as a whole. It was argued however that the effectiveness would be dependent on many different factors. It would be dependent on the target group, positive action measures that had worked out favourably for women, would not necessarily be appropriate for migrants or people with disabilities. Any kind of positive action measures have to be done *in the right way* to be successful, which meant the need for tailor-made concepts that would be flexible, depending on the target group, the sector or the organisational culture, etc. Participants estimated the *percentage of effective measures as very low*. This is due to the complexity of the topic and the difficulty of finding the best strategy. To search for the best way is considered as the key to success; and if implemented incorrectly there would be the *risk of backlash*.

Participants reflected on the various risks of positive action measures. According to the experience of most participants *adverts addressing preferential treatment do not work, because individuals do not want to be 'quota people.'* Actively approaching specific target groups to apply can even *discourage* people who would want to avoid the risk to be considered as someone, who was not qualified but merely born with the right colour for the job. This fear has to be met by creating a climate of approval within an organisation. People have to feel welcome and acknowledged regardless of their background and because of their various backgrounds, and that should be valid for everyone and not only for those that are treated preferentially in terms of recruitment. Otherwise jealousy and prejudice would undermine any well-intentioned equality-targeted initiatives.

In the Utrecht workshop special consideration was given to positive action measures that have been and could be implemented for equal access of Roma people in education and in the labour market. Even if the examples given were from Hungary and Slovakia and not from the Netherlands they served as examples for positive action measures for the Dutch context as well. The relevance of structural discrimination and its strong impact, if it is perpetuated demonstrated the need to counteract these systems of inequalities incorporated in society. The implementation of positive action measures and the removal of the barriers that confront single measures would contribute to change if embedded in a whole society approach.

There was common agreement that positive action measures have to be implemented as *part of a multi-angled strategy* to be successful and effective in the long term. *If not supported by the whole of society* any measurements aiming at more equality were considered useless. According to the participants *to make a difference needs a critical mass.* Furthermore it was stressed that positive action measures could never be successful if implemented as a single measure. Positive action measures were considered as having to be part of a coherent permanent procedure following a target-oriented strategy open for change. There must be the awareness that *'you have to continue working'* and that it is not time to stop, when a certain sub-goal is achieved. This in line with the argument that positive action measures should never be implemented within one department or one hierarchical level only, but that they have to be *implemented in all business areas.* Furthermore the importance of evaluation tools for measuring effectiveness was stressed as well as the need to adopt a learning attitude.

A *diversity of strategies* implemented with the clear commitment of every level of an organisation, with the strong commitment of Chief Executive Officers and informal leading personalities, and a process-oriented approach completed with the readiness to develop tailor-made solutions for each single context, can be summarised as the most important factors for effectiveness.

Impact of positive action

Positive action measures according to the participants did have impact within the organisations, they had worked with. The impact was effective on the level of the organisational structure, in terms of changes to procedures and the composition of the staff members. One participant put it very succinctly as he experienced the change: *"They (qualified applicants with migrant background) are suddenly there."* The capacity to find qualified people from groups that were not attracted before, was considered to be the most important and most desirable impact for companies and organisations currently.

More diversity in the company mirroring diversity in society was reported as a concrete outcome of positive action measures. The level of people with migrant background in this concrete example could be increased from 0 to 10% within three years. Experience with another company showed that mere preferential treatment aiming at representation of specific groups with the aim of attracting specific clients can lead to clear discrimination as well. In the case reported veiled girls were hired for specific districts of Amsterdam and not for others to attract Muslim clients.

There was a general discussion on the reasonableness of employing people just because of their ethnic background. Participants stated that Dutch police forces have been encouraging members of ethnic minorities for two decades to pursue a career in the police, and many did enter - but many went again. The 'culture' of the Dutch police service, which had been very much shaped by white male Dutch citizens, was not fitting for them and was not ready for a change. The ones that had stayed in the service increasingly organised themselves on ethnic lines - creating the Moroccan, the Turkish and the Antilles brigade, responsible for solving conflicts within their 'own' communities. This approach was openly criticised as very risky, the impact of which is two-fold. The 'face' of the Dutch police is very diverse, which is important for being recognised and legitimised by society. On the other hand the creation of ethnic-based departments reinforces up stereotypes and barriers within the organisation and in its perception by the population. The high level of fluctuation showed that the strategy did not work out.

There was common agreement that the way to promote the attractiveness of an employer for all was a better approach. Changes in recruitment procedures have been crucial for reducing barriers and for creating more equal access to employment in all the cases that were discussed. Cultural biased tests, traditions to hire people via specific students associations, language barriers or simply prejudice had been influencing engagement of personnel. Analysis of these procedures, followed by the development and implementation of adapted procedures had changed the scene completely and had led to a more heterogeneous workforce. The creation of networks of certain groups targeted by positive action measures, have become independent from their founding objectives and have developed their own agendas, in addition to representing the company's identity in its diversity, which was regarded as very important in terms of sustainability. Structural changes

have led to the representation of more diverse people within the various organisations, but they did not completely have the capacity to break the glass ceiling in most cases. One participant referring to this expressed the attitude of most towards the whole topic

6.4. Examples of positive action measures

Name of the Initiative: *More Diversity in the Rechtspraak*

Sector/institution: Public sector: Judiciary

Reasons for the initiative: Representation of diversity in the judicial structure was considered as necessary in terms of legitimacy. The judiciary had realised that they met people with a multi-cultural background only in court and mostly in the role of the accused. The application rate from people with a migrant background was very low.

Purpose: The aim is that in 2011 10% of all the judges will be of Moroccan, Turkish, Surinamese, Antilles, etc. origin.

Process: The process started in early 2007. Recruitment procedures for the judiciary are being scrutinised with the aim to analyse why people with migrant background do not apply - and if they apply barely manage to pass the introductory tests. Furthermore organisational development is searching for ways to change the ways of recruitment to create a more diverse judiciary force. A direct approach via students' organisations, law firms and head-hunters was instituted to find out what hindered people with a migrant background from applying for the judiciary. The selection commission has to be composed of a board with at least one representative with a migrant background to avoid biased decisions on admission to the judiciary.

Outcome: At the time of this report the procedures are still in the phase of being implemented. It is too early to assess the outcome.

Name of the Initiative: *Diversity and Inclusion*

Sector/institution: Postal Sector

Reasons for the initiative: Representation of diversity in society within the company, aiming at attracting a broader workforce and new clients.

Purpose: Creating a more diverse workforce and an atmosphere that makes the company an attractive employer for all.

Process: A variety of instruments were implemented to realise more diversity and equality of opportunities within the company. As part of a managing diversity strategy a manager for Diversity was installed in 2004, recruitment strategies were changed, empowerment of women, people with a migrant background and LGBT people was promoted by introducing employee-networks and Diversity marketing was set on the agenda. Working is characterised by a process-based and context-focused approach.

Outcome: Top management level recruitment of people with a migrant background rose from 0 to 10 % in 3 years. New ways of getting in contact with the labour market were created. The networks are booming and are joined by employees who not part of the target group as well.

of positive action measures: *'The glass ceiling remains, but we decided not to talk, but act.'*

The LGBT network has participated in the Amsterdam Gay Parade communicating their company identity with the slogan 'personal pride = company pride'

Name of Initiative: *Non-discrimination and diversity in the Police*

Sector/institution: Public sector: Police Forces

Reasons for the initiative: Criticism from the office of the UN Commission for the Elimination of Racial Discrimination (CERD), the European Monitoring Centre on Racism and Xenophobia (EUMC) and the national anti-discrimination office motivated the Board of the Chief Commissioners of the Police Forces (Raad van Hoofdcommissarissen), to initiate a national bureau for discrimination issues for the police and a national expert centre for diversity in the police.

Purpose: To combat discrimination within and by the police forces and promote diversity within the police.

Process: Based on a variety of initiatives that have been implemented since the 1990s to attract more people with a migrant background to apply for the police force and on success and failures that had been experienced. The Dutch police forces are trying to coordinate anti-discrimination and diversity policies on a national level with the introduction of national structures. It uses various initiatives to raise awareness about diversity in society and within the police forces, according to gender, ethnic origin (*allochtoons*), sexual orientation, disability and age in combating discriminatory incidents and structures.

Outcome: Raising awareness of the need for diversity within the police forces, development of strategies to combat discrimination in recruitment by changing recruitment procedures and certain requirements (such as the body/height minimum)

Name of the Initiative: *Roze*

Sector/institution: Trade Union

Reasons for the initiative: LGBT people are being recruited less often and are not being able to live their identity at work. The need for joining forces to act against harassment and face problems actively was identified.

Purpose: Empowerment of LGBT people in the labour-market in terms of standing up for their rights.

Process: A network of LGBT people was organised within the trade union. A website and a web based forum were set up to facilitate the exchange of experience. People can post their problems and find common solutions. Furthermore the platform can be used for the organisation of public events and campaigns to enhance visibility of LGBT people in employment.

Outcome: Strengthening of capacities of LGBT people to stand up for their rights themselves, contribution to visibility of non-heterosexual people in society.

Name of the Initiative: *Dutch Association of Sign Language Interpreters*

Sector/institution: Civil Society

Reasons for the initiative: More equality in society for people with a hearing impairment can be achieved by strengthening the quality and quantity of sign language interpreting services. In 2008, 250 registered interpreters were available for an estimated number of 5,000 - 10,000 sign language users in the Netherlands. Only approx. 3.500 sign language users are engaging interpreting services.

Purpose: To strengthen the quality and quantity of Dutch sign language interpreting services and as such reduce barriers for people with hearing impairments in equal participation in society.

Process: The Dutch association of sign language

interpreters is trying to influence government policies regarding the funding of sign language interpretation. Furthermore the association is aiming at assuring a high quality of sign language interpreters and at raising the number of interpreters available, this by negotiating the number of interpretation hours that are paid for by the state per person, per year, and educational requirements for registered interpreters. Awareness raising of the role of sign interpreters in communication procedures with and in reducing barriers for people with a hearing impairment, is promoted by information initiatives.

Outcome: Sign language interpreters have to be registered, if their interpretation service is paid for by the state, a four years bachelor programme for sign language interpreters has been introduced at the University of Amsterdam. 25 students are graduating each year.

6.5. Key statements identified from consensus workshop grouped by theme

(a) The Hague, 09.09.2008

Emerging theme	Key statements	Rank (score)
Understanding of positive action	<ul style="list-style-type: none"> • Creating Diversity, A Business Case, Connecting Leadership, Diversity and Team-Output • Inclusiveness, creating an inclusive culture • A correction for inequalities rendering more chances - supporting underprivileged groups • Takes a backward position into account • Temporary Measure • Sustainable Development of Workforce • All methods designed to counteract effects of (past/current) exclusion/ discrimination or stereotyping of specific groups, e.g. legislation, training, organisational development, coaching • Nelie Kroes: I'm a quota girl • Stressing the extra quality of bicultural workers • Window Dressing • Legalized preference • Humanity/human rights 	1 (4) 2 (2) 2 (2)
Impetus (Motivation) for positive action	<ul style="list-style-type: none"> • Business Case (change of clientele, labour supply changes, needs of the workforce, need for cultural competences, sense of urgency) • Merging of self interest and general interest ('Ubuntu') • Moral argument, legitimacy, role model (valid for government departments) • Courts are implementing positive action measures for legitimacy • Creation of an organisational identity - not 'them' - but 'we' 	1 (2)
Effectiveness of positive action	<ul style="list-style-type: none"> • To be effective positive measures has to be implemented - don't name it, do it • Positive action measures have to be carried by whole society - to make a difference, it needs a critical mass • PAM is just a nice word • The percentage of effective measures is very low • Yes, because enough people want a change • You have to do it the right way • Can discourage people from applying • What about evaluation? • New talents are actively sought for • Is contra-productive, if legal measure 	1 (2) 1 (2)
Impact of positive action	<ul style="list-style-type: none"> • Changes in culture of recruitment • The glass ceiling remains, but we decided not to talk about it, but act • 'They (qualified applicants with migrant background) are suddenly there' 	
Groups targeted for positive action initiatives	<ul style="list-style-type: none"> • Migrants • People with disabilities 	

(b) Utrecht, 10.09.2008

Emerging theme	Key statements	Rank (score)
Understanding of positive action	<ul style="list-style-type: none"> Attitude (common sense = no magic or ideology, a positive approach to diversity, 'there are no opportunities anymore for white, non-handicapped, hetero-sexual men') Targets (setting a target of (for example) 10% of graduate recruitment to be multi-cultural, giving employees space and opportunities to enter and excel in the workplace, quotas, Human Resource Policy, to positively discriminate or NOT to positively discriminate, Managing Director has to propose women, ... for the next...positions (all levels and functions) Action ('walking the talk', action is not prescribing or forbidding, the top of the organisation and anyone in a leading position has the responsibility) Measures (a fair reading of one's qualifications and experience, arranging budget for meetings etc. to shape better conditions in the workplace, increase visibility of multi-cultural networks. 	
Impetus (Motivation) for positive action	<ul style="list-style-type: none"> Business Case (profit, creativity, CSR motives, quality, new markets, new clients) Representation of diversity of society in organisation - legitimacy Change of society Equal opportunities for everyone Obey the law/ legal risks Avoiding social shame Feeling good/ image building 	1 2
Effectiveness of positive action	<ul style="list-style-type: none"> Awareness Raising (long term effect) - can stimulate change of society As part of a multi-angled strategy You have to continue working - implement PAM in all business parts On the short term for groups targeted (group with the longest distance from labour market) Depends on the target group Can be a back-draft (e.g. Roma) Useless if not supported by society 	1 2 3
Impact of positive action	<ul style="list-style-type: none"> Representation (e.g. veiled girls were hired for specific districts of Amsterdam and not for others to attract Muslim clients) Diversity in society is mirrored within the company (e.g. level of migrants raised within 3 years from 0 to 10%) Broadening of employers' minds Changes in recruiting methods leads to finding more qualified people with migrant background Networks of groups targeted by PAM represent company identity 	
Groups targeted for positive action initiatives	<ul style="list-style-type: none"> Migrants LGBT People with disabilities 	

6.6. Key summary

Positive action measures are considered as an old-fashioned approach in the Netherlands. Nonetheless there are a broad variety of strategies in place that aim at reducing barriers for underrepresented people in access to employment and education. Concrete measures are predominantly targeted at raising the representation of Dutch inhabitants with a migrant background - so-called *allochtoon* minorities - in the labour market. Another focus is set on the inclusion of people with disabilities in employment as well as in education. Policies for LGBT people are concentrating more on empowerment and strengthening the ways to combat discrimination and fight for recognition by ways

of networking rather than on adequate representation. Participation is the topic young people in the Netherlands are aiming at. We could not find representative information on specific activities for older people and for people according to their religion. Our findings do reflect a wide-spread commitment towards a multiple identity oriented diversity approach.

Diversity policies have been implemented for over two decades in the Netherlands in the public sector, and for several years in the private sector too. The public sector had been characterised by the implementation of preferential treatment for specific target groups aiming at mirroring ethnic composition of the Dutch population within public authorities. This has led to a more diverse workforce in some parts like the police forces and many

public authorities. The tendency to organise employees according to their ethnic backgrounds with the idea of providing experts for specific 'cultural' topics has led to the retention of stereotypes and to conflicts within the organisation. There is a change management process towards a more diversity-oriented approach implemented. Private companies have limited this approach to affirmatively encouraging certain groups to apply, which was of limited success because people were reluctant to be labelled as '*quota people*.' Motivation to implement positive action measures for companies in the private sector is mainly to attract qualified people and to keep them, and to a certain extent, to attract new clients by being able to provide a diverse workforce. Strategies to achieve these objectives are changes in recruitment procedures, providing a working atmosphere that is attracting people to stay and enabling employees to study further and to be promoted.

Tailor-made concepts for each target groups, for each sector, for each single context were identified as the key factor of success for positive action measures. A diversity of strategies implemented within a broader strategy that is based on a commitment towards a procedural approach, an attitude of mutual learning and the commitment at all levels of the hierarchy within organisations were also stressed. Furthermore, there was common agreement among both the participants of the workshops and with the interviewees, that any measures had to be implemented by society as a whole, with its own commitment towards achieving greater equality in society and that the permanent changes in society had to be taken into account. Evaluation of positive action measures is done by ways of data collection, surveys on the representation of specific groups within an organisation according to their percentage in society and by analysing the effectiveness of concrete measurements by comparing these data.

The political context has been highly influential for the attitude towards positive action measures in the Netherlands by policy makers as well as by the population. The multi-cultural approach of the 1990s had brought a climax in developing and implementing a variety of positive action measures for *allochtoon* people. Failures with some single strategies and the success of the right wing *Vlams Belang*, and growing scepticism within the Dutch population towards Dutch integration policies, led to greater caution around preferential treatment strategies. Nonetheless the level of equal opportunities for people regardless of their ethnic background and the commitment towards promoting diversity is comparably high in the Netherlands. Recent initiatives in both the private and public sectors, show the need for positive action measures and the success of a changed approach that takes into account multiple identities of all.

6.7. Implications for policy and practice and recommendations

Implementation of positive action measures in the Netherlands seems to be a necessary strategy to combat structural discrimination and to enable citizens with a migrant background to break the glass

ceiling they are facing. Discussion with the consensus workshops participants and interviewees leads us to the conclusion however, that a creative terminology to describe positive action measures will be inevitable.

Positive action measures are associated with affirmative action and with quota regulations as such are seen as a tool that has already been tried and did not work. People working in the field of anti-discrimination practice and diversity management for many years, admit that there were good developments that can be traced back to the implementation of positive action measures, such as the introduction of data collection on ethnic origin and a certain awareness raising effect. They made clear that any kind of legal obligations put in place would cause a counter-reaction and as such would be counter-productive. This together with the reported experience that members of a minority group would hesitate to apply for a job their group is actively encouraged to apply for; clearly shows that the path that should be chosen to promote more equality within society, should definitely include business case arguments.

The Dutch labour market is in a search for qualified people that stay within the companies and the jobs for which they are hired. According to the experts that were involved in the research, *what they want to hear is how they can implement policies to motivate people to stay*. If opening an organisation to a more diverse workforce would be one of the ways towards answering this question, this could be a very important clue.

Commitment to diversity is generally high. The question still remains about how to represent diversity within companies and public institutions. There are still branches (such as the judiciary) that remain far removed from reflecting the diversity of society, even slightly. The will for a change is there within certain institutions, though not yet there in the general public.

Legislation does not seem to be the right strategy on the way to more equality of opportunities; positive action strategies however could be an important tool and they could work. Always provided that they are developed after having analysed both failures and the contributing factors of success in the past; and are set in place within a whole organisation change management process.

The solution seems to lie in changing the attitude from talking about positive action measures into implementing them, and becoming active in the fight against (structural) discrimination and in the promotion of equal opportunities. As one participant of the workshops has put it, *we never had positive action measures in place, we just talked about it*. If this is reversed, without neglecting the importance of evaluation and dialogue, the Netherlands could become the role model again they had been for a long time in terms of positive action measures and inclusive society.

References

Abell, Paul (1997): Case Study for Good Practice for the Prevention of Racial Discrimination and

Xenophobia and the Promotion of Equal Treatment in the Workplace. European Foundation for the Improvement of Living and Working Conditions. Netherlands. Dublin.

<http://www.eurofound.europa.eu/pubdocs/1997/44/en/1/wp9744en.pdf>

Act on Equal Treatment on the ground of Age in Employment (Wet gelijke Behandeling op Grond van Leeftijd bij de Arbeid) of 1 May 2004.

<http://www.cgb.nl/legislation.php>

Act on Equal Treatment on the ground of Disability or Chronic Disease (Wet gelijke Behandeling op Grond van Handicap of chronische Ziekte) of 3 April 2003.

<http://www.cgb.nl/legislation.php>

Act on the Reintegration of Disabled People in Employment ('Wet op de (re)integratie Arbeidsgehandicapten, REA) of 23 April 1998, last amended by Act of 15 December 1999, Staatsblad 2000,462.

Caruso, Daniela (2002): Limits of the Classic Method: Positive Action in the European Union after the New Equality Directives. Jean Monnet Working Paper 10/02.

<http://www.jeanmonnetprogram.org/papers/02/021001.pdf>

De Vos, Marc (2007): Beyond Formal Equality: Positive Action under Directives 2000/43/EC and 2000/78/EC. European Communities, 2007.

Commissie Gelijke Behandeling (2004): Commentary of the Netherlands' Equal Treatment Commission on the fifteenth and sixteenth Periodic Report of the Kingdom of the Netherlands on the implementation of the Convention on the Elimination of all forms of Racial Discrimination (CERD/C/452/Add.3)

[http://www.cgb.nl/_media/downloadables/advies%2004%2002%20\(EN\).pdf](http://www.cgb.nl/_media/downloadables/advies%2004%2002%20(EN).pdf)

Dronkers, Jaap/ Lancee, Bram (2008): Ethnic diversity in neighborhoods and individual trust of immigrants and natives: A replication of Putnam (2007) in a West-European country. Florence: European University Institute.

EQUAL-Entwicklungspartnerschaft „Gleiche Chancen im Betrieb“ (Hg.). Gleiche Chancen im Betrieb. Das Handbuch zur Gleichstellung von MigrantInnen. Wien: http://www.gleichechancen.at/manual/equal_manual/

European Commission (2007): Putting Equality into Practice. What role for positive action? Luxembourg: Office for Official Publications of the European Communities.

European Commission against Racism and Intolerance (2008): Third report on the Netherlands. Adopted on 29 June 2007. Strassbourg.

General Equal Treatment Act (Algemene Wet Gelijke Behandeling, AWGB), 2 March 1994, last amended 2004.

<http://www.cgb.nl/legislation.php>

Gijzen, Marianne H.S. (2006): Selected Issues in Equal Treatment Law: a Multi-Layered Comparison of European, English and Dutch Law, Intersentia Antwerpen - Oxford.

Holtmaat, Rikki (2007): Report on Measures to Combat Discrimination Directives 2000/43/EC and 2000/78/EC Country Report the Netherlands. Report for the European Network of Legal Experts in the non-discrimination field. Human European Consultancy/Migration Policy Group, 2007. http://ec.europa.eu/employment_social/fundamental_rights/pdf/legnet/nlrep07_en.pdf

Van Noort, Loek/ Pelgröm, Carla (2008): Op zoek naar de kracht van verschil. Verkenning naar diversiteitsbeleid bij provincies en gemeenten. FORUM, Instituut voor Multiculturele Ontwikkeling. Utrecht.

<http://www.forum.nl/pdf/krachtvanverschil.pdf>

Perchinig, Bernhard (2003): Politische und rechtliche Rahmenbedingungen für betriebliche Antidiskriminierungspolitik in ausgewählten Ländern. Erstellt im Rahmen des EQUAL Projektes „Gleiche Chancen im Betrieb“ Wien. http://www.gleichechancen.at/presse/Perchinig_2003.pdf

Simon, Patrick (2004): Comparative Study on the collection of data to measure the extent and impact of discrimination within the United States, Canada, Australia, Greta-Britain and the Netherlands. European Commission: DG for Employment, Social Affairs and Equal Opportunities. http://ec.europa.eu/employment_social/fundamental_rights/pdf/pubst/stud/compstud04_en.pdf,

Sohler, Karin/Trauner, Helene (2007): Betriebliche Maßnahmen gegen Diskriminierung und zur Gleichstellung von MigrantInnen und ethnischen Minderheiten im europäischen Vergleich. Modellbeispiele aus der Praxis in den Ländern Großbritannien, Belgien, Deutschland, Irland, Niederlande und Schweden. Erstellt im Rahmen des EQUAL Projektes „Gleiche Chancen im Betrieb“ Wien. http://www.gleichechancen.at/down/M1_Endbericht_EU.pdf

Vries, Sjiera/Pettigrew, Thomas F. (1994): A Comparative Perspective on Affirmative Action: Positieve Actie in The Netherlands. In: Basic and Applied Social Psychology (1994), 15(1&2), Lawrence Erlbaum Associates, Inc. p. 174-199.

Waddington, Lisa/Gijzen, Marianne (2004) Dutch Report on the Implementation of the Disability Provisions of the Framework Employment Directive. Report for the European Network of Legal Experts in the non-discrimination field.

http://ec.europa.eu/employment_social/fundamental_rights/pdf/aneval/disabfull_nl.pdf

Relevant legislation can be found in English on the Website of the Dutch Equal Treatment Commission

<http://www.cgb.nl/legislation.php>

7. PAMECUS Country Report: Slovakia

The Slovakia country report was prepared by consortium members at the European Roma Rights Centre Budapest, in partnership with the Milan Simecka Foundation. This report on positive action measures targeting Roma in Slovakia is part of a larger research study on positive action in the European Union, Canada, United States and South Africa (PAMECUS). The report begins with an analysis of positive action in this country in light of the current Slovak legislative framework followed by a presentation of the main findings that emerged from the consensus workshop. In addition, the main findings from the follow-up interviews have been incorporated.

7.1 The context of positive action targeting Roma in Slovakia

Roma are the second largest national minority in Slovakia and are recognised as the group facing the most extreme exclusion from society. According to a mapping of communities conducted in 2004, there are approximately 350,000 Roma living in Slovakia. Many reports and studies have proven that various forms of discrimination against and segregation of Roma exist, in all areas of society.

Roma have become the target group of many governmental and municipal policies which may be considered as positive action in recent years, although usually considered as a social group rather than an ethnic group. The matter of positive action was first raised approximately ten years ago, even prior to Slovakia transposing the European Racial Equality Directive. Despite the time that has elapsed, the discourse cannot be seen as very developed or professional and there have always been harsh limitations used, either using the name of “positive discrimination” or understanding the concept to mean only quotas.

Therefore we can analyse positive action towards Roma in two lines – *de facto* measures and *de jure* measures. *De facto* measures are justified by the fact that even in the time when there was no anti-discrimination law, several public policies specifically targeted Roma with the aim of achieving goals identical to those associated with positive action theories (e.g. preventing or compensating for disadvantages and discrimination; promoting substantive equality; redressing under representation and promoting diversity). Programmes like the Roma teaching assistant or social fieldwork in Romani communities have existed for several years. Furthermore, we can also mention similar programmes designed and run by NGOs, enterprises or municipalities that have also contributed to positive action practice for several years.

Such practice was later strengthened with the adoption of the “Main Thesis of the Slovak Government Conception on the Integration of Romani Communities” on 23 April 2003. The Conception expressly mentions positive action⁹⁰ several times and even advocates the

⁹⁰ In the Slovak language, the most common term for positive action is “dočasné vyrovnávacie opatrenia”, that can be translated as “temporary affirmative measures”.

implementation of such.⁹¹ However, despite this strong commitment of the government to undertake various programmes under the frame of positive action, the broad acceptance of this philosophy was not reached. The legitimacy and legality of such measures were repeatedly undermined both by the legal situation and by some politicians denying this concept.

De jure positive measures can be seen as those developed within the framework of the law. However, it is not really possible to analyse such initiatives yet as the legal amendment allowing for positive action was adopted only in March 2008 and entered into force on 1 April 2008.

7.2. Legal analysis

The Slovak government decided to transpose the EU anti-discrimination directives into one core law and also to amend several acts with specific antidiscrimination provisions.⁹² The Act on Equal Treatment (Anti-discrimination Act) was adopted in June 2004, soon after Slovakia entered the EU.⁹³ However, two previous efforts to pass such law in Parliament had failed due to resistance within the major political parties, which is indicative of the general attitude towards the issues of equality and anti-discrimination policies in the country.

During Parliamentary proceedings regarding the adoption of the anti-discrimination law, Hungarian Coalition Party MP Edit Bauer proposed the inclusion of a provision on positive action, recalling Article 5 of the EC Racial Equality Directive. She presented the amendment stating: ‘With the purpose of achieving equal opportunities in practice and following the equal treatment principle, temporary affirmative measures aiming to prevent disadvantages linked with racial or ethnic ground might be adopted,⁹⁴ and despite some serious disagreements it was accepted by the Parliament.

However, very soon after the law entered into force, the government requested that the Constitutional Court review the provision on positive action for conformity with the Constitution of the Slovak Republic. In the end, the Court made the rather controversial decision that this paragraph of the law is in the breach of Article 1(1) (rule of law) and Article 12(1 and 2) (equality and ban of discrimination) of the Constitution, providing confusing justification, the main arguments of which were:

- the lack of specification of subject, aim, criteria, range and scope of positive action that could lead to an arbitrary and undesired application;
- the absence of a specification of ‘temporality’ that could lead to reverse discrimination;
- the absence of concrete methods of positive action;

⁹¹ The document explains positive action as a tool of achieving equal opportunities in practice and quotes the UN Human Rights Committee, the UN Convention on the Elimination of All Forms of Racial Discrimination, Council of Europe’s Framework Convention on the Protection of National Minorities as well as the EU Race Equality Directive. Throughout the whole document various positive action measures are listed which the government should implement.

⁹² For example, the Labor Code, Schools Act, etc.

⁹³ Act number 365/2004 Coll.

⁹⁴ Article 8(8)

- the fact that the Constitution allows preferential treatment only towards women, minors and disabled persons; and
- that positive action measures would constitute advantage to persons on the basis of their racial or ethnic ground, which is not allowed.

A consequence of this decision was the spreading of very strong opinion that positive action is illegal, but several experts, mainly from NGOs, have challenged this decision in written articles and were advocating for another amendment.

The present Deputy Prime Minister for Human Rights and Minorities, Dušan Čaplovič, has repeatedly stated in public that Slovakia must reconsider positive action legislation and when addressed by NGO representatives agreed to include it in the recent law amendment. NGO expert Jarmila Lajčáková drafted the text of the amendment, attempting to take into consideration the arguments of Constitutional Court. Her concept was based on the broad approach allowing all stakeholders to adopt positive action targeting all grounds (race, ethnicity, sex, disability, religion, sexual orientation and age). The draft also defined that such measures must aim to achieve equal opportunities in practice and that they have to be abolished after fulfilling this goal. It also foresaw regular monitoring and evaluation of positive action measures and authorised the Slovak National Center for Human Rights (national equality body) to elaborate expert opinion if asked.

During the phase of adoption of the amendment, the Office of the Government unfortunately narrowed the eligible bodies which could carry out positive action to state authorities only. During proceedings in parliament, the proposed amendment and the range of positive action was significantly reduced, which seriously threatens its practical implementation.

The adopted amendment entered into force on 1 April 2008. Law Amendment 85/2008 (to Law 365/2004 Act on Equal Treatment (Anti-Discrimination Law) states,

“Article 8(a)

1. Adopting temporary affirmative measures is not discrimination if done by public authorities and if focused on the elimination of social and economic disadvantage and disadvantage stemming from age and disability. These measures must have as their goal the achievement of equal opportunities in practice. Such temporary affirmative measures are mainly measures:

- a) encouraging interest of members of disadvantaged groups for employment, education, culture, health care and services,
- b) aiming to create equality in access to employment and education, especially through targeted preparatory programmes for members of the disadvantaged groups, or through disseminating information about such programmes or about job opportunities or learning opportunities.

2. Temporary affirmative measures mentioned above can be adopted only if:

- a) there is existing provable inequality,

b) the goal of the measures is decreasing or eliminating these inequalities,

c) the measures are adequate and necessary for achieving that goal.

3. Temporary affirmative measures can be adopted only in the areas defined in this law. Such measures can function only as long as inequality, that initiated it, exists. Once this goal has been achieved, the measures must be ended by bodies mentioned in para 1.

4. The bodies mentioned in para 1 have to regularly monitor, evaluate and publish the adopted temporary affirmative measures, with the aim of re-assessment of necessity of continuing the measures, and they must report to the Slovak National Centre for Human Rights.

5. Provisions of para 1 to 4 do not affect provisions of § 7 a § 8 (3) of this act”

Analysis of the legal amendment reveals the following principles and potential problems:

a) positive action measures **does not constitute discrimination**;

b) **only bodies of state authority** are allowed to adopt them;

[Meaning that there is no obligation for them to do so. It is also disputable why only state authorities should implement positive action. It puts other actors like municipalities, private companies, universities and NGOs into a difficult situation. Many such organisations are carrying out initiatives that can be perceived as affirmative programmes for Roma and it is unclear whether these are illegal or not at the moment. Furthermore, state authorities are generally considered less flexible, so there are some concerns about putting this law into practice.]

c) such measures must aim to **eliminate social and economical disadvantage and disadvantage based on age and health disability**;

[Meaning that eligibility of all grounds of discrimination was replaced by a very confusing and elusive definition that might be considered in contradiction with the philosophy of positive action. Elimination of disadvantage based on social and economical status is not the common approach of anti-discrimination policy and furthermore it is disputable whether measures targeting particular ethnic groups could be accepted according to this wording. Finally this text implies that all four disadvantages must exist together to be allowed to undertake some measures, that would limit almost any action.]

d) such measures should **mainly** be oriented to support the interest of disadvantaged groups for employment, education, culture, health service and other services or to create equal access to employment and education;

[This specification indicates the preference for ‘soft’ measures.]

e) such measures can be adopted **only if**: 1) there is evident inequality; 2) the goal is to decrease or

eliminate this inequality; 3) and they are adequate and necessary;

- f) such measures **must be terminated** by bodies of state authorities when the proposed goal was achieved; and
- g) implementing bodies **must** regularly **monitor, evaluate** existing positive action measures with the aim of assessing its further necessity and **report** about this to Slovak National Center for Human Rights.

To conclude the assessment of positive action legislation in Slovakia, some concerns should be expressed: The lack of clarity of the basic scope of this paragraph may cause troubles with its implementation or even stop any initiative.

There are no other specific provisions about positive action in Slovak legislation. However Article 2(3) of the Act on Equal Treatment states: 'Following the principle of equal treatment means also to adopt measures for the prevention of discrimination.' According to some experts, this paragraph provided a mandate for positive action in the period in which there was no specific definition of it. However, in the present situation it is questionable whether this provision could be used as justification of broader positive action measures.

7.2.1. Does legislation establish any positive action measures for Roma? E.g. mandatory quotas for disabled persons?

The content of this analysis focuses only on positive action measures towards Roma. In this respect, the sole positive action measure established in law is the Act on Equal Treatment as mentioned above; there is no other provision in this law establishing measures for national or ethnic minorities.

There are several government strategies that call for temporary affirmative measures, or in other words, positive action. In the introduction of the government strategy from 2003, the principle of positive action was openly declared as being a key approach of the strategy. However, in 2008 a new government strategy was adopted,⁹⁵ replacing the previous one. The new strategy contains a much retracted reference to positive action, mentioning it only once, stating in particular that measures should '*legislatively tackle compulsory preschool preparation for 5-years old children before 2013 and consecutively implement temporary affirmative measures for 4-years old children.*'

7.2.2. Does legislation establish any obligations on public or private sector organisations to take positive action for Roma?

There is no obligation on public or private sector organisations in the Act on Equal Treatment or any other law to take positive action generally or especially towards Roma.

However, in several laws in the section regarding the right of national minorities, there are some provisions that may be considered positive action measures *sui generis*. For instance, the Act on Slovak Radio lists

among the main activities of Slovak Radio "*broadcasting of regionally and contently balanced program(me)s in the languages of national minorities and ethnic groups living in Slovakia*".⁹⁶ Similarly, the new School Act (of 2008) mentions several duties with regard to national minorities, including that '*children and pupils of the citizens belonging to national minorities and ethnic groups are guaranteed, besides the right to learn in the state language, also the right to education in their own language*'.⁹⁷ Another example may be found in the Act on the Use of National Minorities Languages, which, for instance states '*If citizens of the Slovak Republic belonging to national minorities constitute according the last census at least 20% of inhabitants of the municipality, they can use the language of the minority in the communication with official authorities.*'⁹⁸

However, it is important to bear in mind that these provisions fall within legislation on the protection of national minorities rather than the anti-discrimination law itself.

7.2.3. What forms of positive action are permitted, but not required, by legislation for Roma?

To answer this question we may either talk about grounds for discrimination or about the range and nature of measures.

The aforementioned provision of Article 8(a) of the Act on Equal Treatment sets out that any positive action measure must focus '*on the elimination of social and economic disadvantage and disadvantage stemming from age and disability.*' Such measures are permitted by legislation. This wording sets the ground for fundamental problems with regard to interpretation, in particular how to understand social and economic disadvantage, as long as this is not a common ground of discrimination but rather its form or impact. It can be seen that this formulation was motivated by efforts to prevent eligibility of positive action measures based on racial, national and ethnic grounds since these are both controversially perceived and also once rejected by Constitutional Court. However, replacing this ground with social and economic disadvantage did not lead to any improvement in the provisions contained in law.

From the perspective of range and nature of the measures, the law states: '*Such temporary affirmative measures are mainly measures: a) encouraging interest of members of disadvantaged groups for employment, education, culture, health care and services, b) aiming to create equality in access to employment and education, especially through targeted preparatory program(me)s for members of the disadvantaged groups, or through disseminating information about such program(me)s or about job opportunities or learning opportunities.*' Measures explicitly falling under this framework are therefore permitted. The demonstrative character of this provision however raises the question whether any other measure would be allowed or only similar measures are permitted. This is discussed further in the following section.

⁹⁵ Government Resolution Number 183/2008

⁹⁶ Article 5(1)(a) of Act number 619/2003 Coll.

⁹⁷ Article 12 (3) of Act number 245/2008 Coll.

⁹⁸ Article 2(1) of Act number 184/1999 Coll.

7.2.4. Are any forms of positive action for Roma prohibited by legislation?

To answer this we can apply two approaches. First, on the basis of the above mentioned provision on positive action in antidiscrimination law and on the basis of the decision of the Constitutional Court on positive action legality we may assume that any positive action measure focusing on something different from 'the elimination of social and economic disadvantage and disadvantage stemming from age and disability' could be considered to be prohibited. This is not expressly stated in the law, but using *argumentum a contrario* such a conclusion could be made. On the other hand, some experts say that it is very questionable whether any concrete measure could merge the elimination of social and economic disadvantage with disadvantage stemming from age and disability, therefore they suggest using a more progressive interpretation of this provision.

Time is needed in Slovakia to test this new law in practice in order to generate enough concrete experiences and to assess how this provision is going to be used by state authorities. Another option would be to amend this law as soon as possible and make positive action definition clear and undisputable.

However, it seems quite unlikely that provisions allowing positive action for Roma solely on ethnic grounds will be adopted any time soon. Any provision based on the elimination of social and economic disadvantage would of course target Roma also, but only those facing social and economic disadvantage and such measures arguably would not have the capacity to eliminate marginalisation due to the racial aspect of prevailing discrimination.

Another limitation of present law might be found in the range and nature of particular measures. The new provision of the Anti-Discrimination Act includes a demonstrative list of measures, mentioning mainly measures such as: 'a) encouraging interest of members of disadvantaged groups for employment, education, culture, health care and services, b) aiming to create equality in the access to employment and education, especially through targeted preparatory programmes for members of the disadvantaged groups, or through disseminating information about such programmes or about job opportunities or learning opportunities.' These measures may be considered soft measures, implying that 'hard' measures such as quotas could be seen as illegal. However, the courts will have to decide that.

7.3 Findings from consensus workshop and interviews

The workshop was held on 16 September 2008 in Bratislava and 40 participants attended. The workshop was held in accordance with the methodology proposed by the University of Bradford. Upon completion of the workshop, 12 individual interviews were carried out.

Understanding of positive action

At the beginning, it should be said that a general understanding of positive action, especially targeting Roma, is very different in Slovakia, when compared to 'Western' understanding. Initiatives are not driven by

business entities but rather by NGOs, municipalities or state authorities. The policy of equal opportunity is slowly spreading throughout the private sector and there are some first outputs of such practice, but business enterprises tend to focus positive action measures mainly on gender equality; balancing working and private life; or inclusion of disabled persons. Very few Slovak companies have ever targeted Roma for positive action. Where these have taken place, measures are more oriented towards supporting some external programme (for example, financial support for the education of talented Romani children). We can also see that the basic vocabulary used during the workshop was quite different from the experience of the UK.

Most workshop participants and interviewees had heard of the term 'positive action' before. However, it can not be said that they had any in-depth understanding of its definition or that they could easily distinguish positive action from positive discrimination. Recalling the legal situation mentioned above, it is essential to realise that all initiatives carried out in Slovakia are not designed under any legal provision and do not usually have any theoretical basis. Stated another way, positive action programmes targeting Roma are rarely justified from a human rights or equality perspective but are more often based on an understanding of the poor social conditions which exist within Romani communities. This tends to reflect the prevailing confusion about the Romani population in Slovakia caused by the combining ethnicity and social status.

The workshop revealed how some participants understood positive action as any initiative helping Roma. Participants admitted that such measures could address all Roma as an ethnic group. However when talking about concrete examples, the focus tended to be on tools for overcoming social exclusion. On the other hand, participants realised that not only poor or socially excluded Roma face discrimination and that some attention should be paid to other marginalised groups. However, participants did not have much experience and knowledge about these types of measures. Workshop participants also felt that the Government should define a typology of eligible positive action measures. This would ensure that the range of actions which may be undertaken could be more complex and indisputable.

During more theoretical discussions, some more specific definitions were mentioned. These were usually based on the principle of equality. Workshop participants expressed the view that positive action should: 'bring equal chances to everyone'; 'overcome or ease existing inequalities'; 'embrace an equal treatment approach'. In that sense, it can be seen that some pattern of 'formality' is used. It is unclear whether participants understood the concept of equality properly, since it is heavily used in public policy discourse and even in the media, people have a tendency to talk about equality as one of the key values of Slovak society. As the discussions revealed, this term is seen as very abstract, immeasurable and unachievable.

During the workshop the issue of 'temporality' was raised and respondents wondered as to the extent to which positive action could be seen as temporary.

Finally, during discussions around the understanding of positive action measures, the issue of 'quotas' was raised. 'Quotas' are perceived to be quite controversial. During the workshop, some participants accepted the legitimacy of quotas. There were, however, serious doubts expressed about their effectiveness.

During discussions about particular positive action measures, all of the following were mentioned:

- targeted training;
- targeted recruitment;
- various assistance and mediation posts (Roma teacher assistant; social fieldworker; health assistant);
- house construction;
- integration programmes;
- scholarships, stipends and subsidies;
- re-qualification, tutoring and internships;
- support for the use of the Romani language;
- micro loans; and
- quotas.

However, it should be added that the lack of legal provisions on positive action meant that there was no common understanding in Slovakia and that almost any initiative could be understood or labelled as positive action regardless of its goals. One interviewee mentioned that new legislation may also have the side effect of raising awareness about the concept of positive action among many actors, so they can much better define and assess whether their actions are meeting basic criteria.

Impetus for positive action

During discussions on the impetus for positive action, two broad opinions emerged: general causes and individual motivation. The following emerged as common themes.

General causes

◦ **philanthropy**

Since there was wide consensus about the disadvantaged position of many Roma communities in Slovakia, many programmes were felt to be justified. Some respondents specifically disliked the historical and present discrimination and segregation against Roma and felt a personal obligation to help overcome this inequality.

◦ **respect for human rights**

From both the perspective of state authorities or activists, it is obvious that an important motivation for implementing positive action was respect for human rights and the particular need to guarantee the human rights for every person. For those working in state authorities, it was expressed as a commitment to existing obligations from an institutional perspective. Among activists participating in the workshop, it was more of a personal commitment based on the culture of human rights.

◦ **threat(s)**

For some the impetus for positive action came from the threat of either expansion of the Roma population or budgetary impacts (in other words, the cost of not taking appropriate action can be very high).

◦ **pressure**

The pressure of EU or other international bodies was also mentioned; meaning either pressure of existing obligations (EU directives, UN conventions, etc.) or pressure of various reviewing mechanisms.

◦ **pragmatism**

This cause could be understood in several ways. The demand for an increasing labour force is forcing enterprises to be much more open to employing Roma. Another, rather sad example of pragmatism noted how the availability of funding for Roma programmes, 'motivates' some organisations to start working for them.

Individual motivation

Often there is no single motive explaining adoption of positive action.

According to the results of the discussions, the impetus for positive action in Slovakia for individual persons or institutions often reflects one or usually several of the general causes mentioned above. It is important to say that in some cases, it can involve a strange combination of motives. For example, a private company working within the framework of its 'corporate social responsibility' strategy, but which also feels threatened by local Romani communities, can launch some positive action measure aiming to fulfil mixed goals. It was also mentioned that the motivation of state authorities was usually based on legal obligations.

Effectiveness of positive action

Questions of effectiveness led to a rather complicated discussion. All agreed on the usefulness of positive action. However, participants mentioned that it was rather hard to assess effectiveness. Participants also emphasised how various measures should have a long term perspective, and be assessed continuously. As it was said in one working group: 'Positive action is and might be effective, but...'

The whole debate about effectiveness appeared to be rather subjective, particularly since there was a general lack of evaluation mechanisms for existing programmes. In all three working groups, some general preconditions of failure in effectiveness were analysed. These can be summarised as follows:

◦ **inadequacy**

According to the workshop participants, some measures and initiatives are badly planned from the very beginning, such as, tackling a problem that is not seen as a problem, or implementing tools that cannot help. In the period in which European funds have been increasingly available in Slovakia, it was noted that one encounters more and more such projects, including training programmes that do not result in anything, overestimation of the traditional values of Roma communities, or huge government work activation

schemes which do not activate anyone. Some also felt that some programmes may even have the opposite outcome of that intended and may reinforce segregation.

◦ **discontinuity**

The participants pointed out how it is rare to see projects and initiatives in Slovakia which last several years. This leads to inconsistency, especially at the level of public policy, since measures are developed spontaneously and might alter according to the different views of national, regional and local government. The dearth of monitoring and evaluation prevents efficient public policy cycles, in which lessons learned fail to influence future policies. From the perspective of NGO participants, discontinuity is further reflected in how funds are allocated. This makes it almost impossible to develop programmes and activities with longer term goals because donors demand innovation in funded programmes and are reluctant to support existing services.

◦ **insufficiency**

The workshop discussions revealed that many pilot projects contain effective methods and tools, but that these have not been mainstreamed. Funding is often the problem here too.

◦ **(non)participation**

The participation of Roma themselves at all stages of the various measures was seen as crucial in achieving effectiveness - Romani clients are often blamed for not collaborating with service providers. Those responsible for programmes do not always have adequate skills for achieving engagement and the participation of the target group.

◦ **resistance of majority**

Workshop participants and interviewees noted that in recent years, several examples of well intended programmes were rejected by the majority population in Slovakia. A lack of political will to engage effectively with Romani issues was also identified as a problem at both local and national levels. At the local level, it was stated that actions by the majority of NGOs may in fact be undermined by the local non-Romani population.

7.4. Examples of positive action measures

Name of the Initiative: *Teaching assistant*

Sector/institution: Public sector/schools

Reasons for the initiative: The programme began as an NGO initiative and was inspired by international experience. After some time, the programme was taken over by the government and it became a policy flagship for targeting Roma in Slovakia. It was gradually rolled out across the country .

Purpose: The purpose of this programme is for schools to have teaching assistants that help socially disadvantaged children to overcome existing barriers in the education system. This programme largely caters for Romani pupils, although it is not formally constituted as such, and assists them in areas requiring specific attention, such as

Interviewees rarely tended to assess their own past actions as ineffective, but some did engage in more critical thinking on the practical reasons leading to either limited success or failure of some positive actions.

Impact of positive action

Workshop participants discussed the impact of positive action and most concluded that the general situation of Romani communities had not improved much and some even said the situation had got worse. In all three working groups, there was some refusal to talk about impact because of the lack of precise data available. However, we still can highlight several interesting thoughts expressed during these discussions.

For example, in one group, the participants mentioned that it is possible to see some impact and that some Romani persons and families benefit from various programmes, mostly in the sense of improved life conditions. On the other hand, it was expressed that it is hard to determine whether this brings them greater equal opportunities in the broader context. Another known impact was the increased participation and engagement of the Roma themselves that can in some cases, bring higher acceptance of the measure by the local majority population. This can also build the potential for more continual and sustainable development.

In another working group, there was a discussion about the most successful positive action measure thus far. The programme of Romani teaching assistants received the most recognition for being a successful programme, mainly because it has existed for several years and some progress in the area of education is visible.

To conclude, there was clear opinion that only well designed, complex, adequately financed and participative initiatives will have significant impacts but, unfortunately, in Slovakia, this is rarely achieved.

language and individual teaching approach.

Process: The Ministry of Education allocates funds through the Regional School Offices to individual schools. Successful schools hire a teaching assistant that works in the school, either in one classroom or in a few of them, with the aim of generally helping Romani children during lessons to understand the lecture or work exercises.

Outcome: The outcome depends a lot on the particular school as well as the Roma community in that area. In some areas, very positive impacts were reported starting with increased school attendance, improved skills and higher grades for children, accelerated language skills, and preventing referral to special schools.

Evaluation: There has been some evaluation of this programme conducted and this has led to amendments of certain government policies.

Name of the Initiative: *Social fieldwork*

Sector/institution: Public sector/municipalities

Reasons for the initiative: Similar to the teaching assistant programme, this initiative was first implemented by NGOs and later became a country wide government programme. Today there are approximately 700 social fieldworkers and assistants operating throughout Slovakia.

Purpose: The main purpose is to provide clients living in socially excluded environments and Romani settlements with quality social counselling and assistance. Previous experience of mainstream social services (especially Labour and Social Affairs Offices) failed to satisfy the needs of this specific target group.

Process: The programme is managed by the Social Development Fund and is open to municipalities which have a Roma community. Based on its size, the village or city can apply for funding for one or several social fieldworkers. The workload is clearly defined and the fieldworkers serve individual clients or families.

Outcome: The positive outcome of this programme is undisputable. Furthermore, the outcome can be seen to be progressive. Initially the programme was seen to have mainly remedied existing social problems (assistance with applying for social benefits, etc.), but later it has been seen to achieve more systematic outcomes such as the empowerment and self sufficiency of the client.

Evaluation: There has never been a comprehensive evaluation of this programme, a fact which has been regularly criticised.

people to almost 200 Roma employees since it started.

Evaluation: The evaluation is based a rather on a subjective assessment of the involved subjects (US Steel, municipalities and clients), however all these actors expressed satisfaction with the achieved impact.

Name of the Initiative: *Scholarship programme Divé maky*

Sector/institution: Voluntary sector/NGO Pro Donum

Reasons for the initiative: The NGO Pro Donum promotes the idea of individual and corporate philanthropy and several years ago developed a programme to build a system of support for talented Romani children.

Purpose: The purpose of the programme is to guarantee equal opportunities for Roma children and to fight against prejudices and stereotypes.

Process: The NGO searches for Roma children with different kinds of talent (music, dance, singing, painting, but also maths and languages) which they match up with an individual donor, who supports each child. Furthermore, the NGO organises many supportive activities, as well as PR events, for the children.

Outcome: Around 50 Roma children have benefited from this programme, all of whom have had the opportunity to develop their talent which would not otherwise have been possible.

Evaluation: The evaluation is focusing mostly on the progress of individual child.

Name of the Initiative: *Employing Roma*

Sector/institution: Private and Public Sector/US Steel and municipalities

Reasons for the initiative: US Steel, an American company and the biggest investor in Slovakia, has a clear corporate social responsibility commitment. Furthermore its factory in Eastern Slovakia neighbours one of the largest Romani settlements in Slovakia, and in the past, US Steel has reported experiencing some problems with the community (trespassing, criminality). As a result, the company decided to launch a programme to assist local Roma to obtain employment.

Purpose: The purpose of this programme seems to be mutually beneficial. Local Roma can increase their income and gain practical working skills, while at the same time US Steel increases the availability of the local labour force.

Process: The initiative is based on partnership with three local municipalities (village Veľká Ida and Košice city districts Šaca and Lunik IX). US Steel provides an employment opportunity for some Roma within a temporary working scheme, and the recruitment and management of these positions is outsourced to the municipalities. The most successful participants of the programme may be employed on a regular full time contract with US Steel.

Outcome: The programme has expanded from several

7.5. Key statements identified from consensus workshop grouped by theme

Emerging theme	Key statements
Understanding of positive action	<ul style="list-style-type: none"> • Positive action is creating equal starting position • Positive action shouldn't focus only on socially excluded or disadvantaged groups but on Roma as such • Positive action means equal treatment • Positive action are tools of equality for socially disadvantaged people • Positive action for Roma should help them escape poverty • Roma are a specific group because it is a combination of ethnicity and concentrated poverty
Impetus for positive action	<ul style="list-style-type: none"> • Often it's about personal motivation of someone • Positive action is frequently initiated by organisations that work with Roma long-term • State authorities are mostly driven by legislative obligations • Some people feel responsible for the reality of society • Pressure from abroad • Roma are a 'popular' target group for fundraising reasons as well • Sometimes Positive action for Roma are justified by (financial) threats for society (cost of doing nothing due to demographical development) • Pragmatism - we need labour force, so we should help Roma to get to labour market; if we help them now, it will cost us less in the future
Effectiveness of positive actions	<ul style="list-style-type: none"> • Positive action is and might be effective but... • The problem is often not in motivation of people, but rather in bad conditions • Positive actions are necessary, effectiveness is relative since there will always be inequality • It's the most effective tool so far, but they should be better monitored and evaluated • PA has to involve Roma to be effective • The problem with effectiveness lies often in discontinuity of action • Various programmes are usually implemented only in limited insufficient scale • The majority population might be a barrier for many good initiatives
Impact of positive action	<ul style="list-style-type: none"> • Positive action can improve the social situation of individuals and groups • Positive action can help increase the representation of Roma • The most successful programme so far is Teacher's Assistant • Social fieldwork can significantly help improve the situation of the Roma community

7.6. Key summary

- Despite the fact that the approach to positive action is based on equality and its practice is not widespread, those involved in Roma issues admit its legitimacy and believe that it should be used broadly.
- It seems that there is political will to implement positive action measures and the existing legislation seems to be rather vague and weak, which restrains the practical realisation of positive action.
- The complexity of the problems linked with Roma communities demand a complexity of measures for tackling and eliminating discrimination and segregation. This is not currently the case.
- Examples of best practice exist and we can learn from these. Such examples are not widespread.
- Better understanding and planning is required for positive action initiatives to be effective.
- Systematic monitoring, evaluation and ethnic data collection are essential for measuring the impact of positive action on the Roma population in Slovakia.

7.7. Recommendations

For *de jure* positive action measures, it is recommended that:

- Slovak anti-discrimination legislation should be revised to avoid ambiguity and provide clear guidance for the implementation of positive action. Such measures should be linked strictly to the grounds of discrimination and not to any other preconditions.
- As soon as possible, the eligibility to undertake positive action should be legally widened from state authorities towards other public and private organisations. There is even opportunity to

define some obligations that will enable certain institutions to act proactively.

- State authorities need to be encouraged to launch new programmes, set up within the framework of recent legislation. These programmes would define precisely all requirements demanded by the law and advocate the duty of monitoring and reporting.
- There is a need for methodological guidance when implementing positive action measures.
- To be able to demonstrate 'evident inequality' as per the law, it is necessary to collect ethnic data.

For *de facto* positive action measures we can recommend:

- Due to existing legal restraints it is obvious that many positive action measures will continue to be undertaken beyond the legislative mandate. However, even in such a situation it could be useful to justify such *de facto* measures by legal definition (meaning to set the goals in line with the law; to prove inequality, adequacy and necessity; to monitor, evaluate and report the goals).
- There is an overwhelming need for awareness raising about positive action, and in the larger context, human rights, discrimination and equality too, especially among Roma communities.
- Tools for measuring the impact of various types of projects on eliminating discrimination should be developed, so that even if this is not the main objective of the project it could be assessed.
- There is a need for long term financing of various measures.

8. PAMECUS Country Report: South Africa

The South Africa country report was prepared by the PAMECUS country expert for South Africa. South Africa, post apartheid from April 1994, will generally be recognised as the most contemporary laboratory for race relations and the development of measures to manage diversity. While the use of the term 'positive action' is not particularly common in South Africa, the term 'affirmative action' however is well used and it portends of the same intention for the people of South Africa in the same way that positive action is used elsewhere in Europe and other parts of the world. Therefore in this report, positive action and affirmative action will be used interchangeably within the context of South Africa.

8.1. Context of positive action in South Africa

South Africa went through a formalised apartheid system of government from 1948 until the apartheid government was replaced in 1994 by a democratically elected government. Before 1994, a series of about 25 statutes⁹⁹ enacted between 1948 and 1974 institutionalised racial discrimination, classified the people of South Africa racially into either white, coloured, Asian or Indian and black (African), in that order of importance and allocated benefits within the apartheid system. The apartheid legislation specified where and how the different races could live, travel, work, be educated, get married and mingle. The legacy of apartheid deeply entrenched segregation among different race groups, resulting in glaring imbalances and inequities in all facets of life including the type of housing, jobs, education, medical care and other public services available to the non-white population in South Africa. Blacks during the apartheid era were not allowed to run businesses or professional practices in areas reserved for white South Africans. Certain jobs were designated 'white only' jobs. Black education was specifically designed to prepare the blacks for the labouring class. Ownership of land was such that the whites, about 10% of the total population, owned more than 80% of the land.¹⁰⁰ Women under apartheid suffered both racial and gender discrimination. African women had few or no legal rights, very limited access to education, and generally had no right to own property. Affirmative Action was therefore introduced after the dismantling of apartheid by the subsequent government of South Africa to redress the injustices and racial imbalances perceived to have been the result of the systematic impact of apartheid in the country. It was believed that affirmative action would ensure that the formerly disadvantaged population (also regarded as designated groups in Section 1 of the Employment Equity Act No.55 of 1998¹⁰¹) of South Africa enjoyed the same benefits and opportunities guaranteed to all in the post apartheid Constitution.

⁹⁹ Apartheid legislation in South Africa: available on <http://africanhistory.about.com/library/bl/blsalaws.htm>

¹⁰⁰ The History of Apartheid in South Africa: available on <http://www-cs-students.stanford.edu/~cale/cs201/apartheid.hist.html>

¹⁰¹ Department of Labour Republic of South Africa *Basic Guide to Affirmative Action* May 2008 accessed from <http://www.labour.gov.za/legislation/acts/basic-guides/basic-guide-to-affirmative-action>

By legal definition, the designated groups recognised as disadvantaged in South Africa and/or beneficiaries of Affirmative Action include: Black People - a generic word which means Africans, Indians, Coloured (persons of mixed race descent) and most recently ethnic Chinese following the High Court ruling in June 2008; women (White and Black); people with disabilities and people living in rural areas. Out of the population of 44 million South Africans from the 2001 census, 77% are indigenous African with 52% women, 11% percent are White, 9% are Coloured with 3% Indian and Asian. The Employment Equity Act (EEA) 55 of 1998 and the Broad Based Black Economic Empowerment (BB-BEE) Act of 2003 and the series of amendments thereafter, provide the main legal frameworks for the implementation of affirmative action in South Africa.

Prior to the enactment and implementation of affirmative action measures, unemployment rates amongst men and women were widely differential and disproportionate to the races. The South African Institute of Race Relations (SAIRR) 1993 statistics revealed that black women were over-represented in the domestic work sector, and more women were unemployed in all the race categories than men. Indian, Coloured and Black women were employed in lower paid and menial jobs. In specific occupations coloured women were not represented in the public sector. However, white women had access to better paid jobs, and enjoyed higher status with benefits.

Table 8.1: Unemployment statistics in South Africa before affirmative action¹⁰²

Unemployment Rates, 1993 - Men	Unemployment Rates, 1993 - Women
African men - 31.6%	African women - 43.9%
Coloured men - 21%	Coloured women - 26.4%
Indian men - 12.5%	Indian women - 23%
White men - 5.3%	White women - 12.9%

The SAIRR 1995 statistics revealed that 3.1% of judges were women and 9.6% of magistrates were women. While 14% of white women had higher certificates from a University or the highly respected Technikon in South Africa, only 4% of Indian women, 2% of Coloured women and 1% of African women had the equivalent higher certificates. SAIRR stats of 1996 disclosed that in the public service 85% of senior managers were white men, 10% were African men, 2% were white women, and 0.6% were African and Indian women, while Coloured women were not represented at all. In a survey conducted with 657 South African companies in 1995, 89% of senior managers were White men, 6% were Black men, 5% were Asian and Indian men, while 1.9% of Directors were women and 3.14% of executives were women. It is presumed that affirmative action in South Africa will succeed in transforming society following successive years of Apartheid governments, and thus bring about equality and social justice for all.

¹⁰² South African Institute of Race Relations (SAIRR) 1993

The policy of affirmative action is applauded as it recognises disadvantaged groups, but the implementation thereof has been criticised for giving preferential treatment to non-White people at the expense of White people. The African population has benefited the most from affirmative action in contrast to other race groups categorised as Black. Critics see affirmative action as reverse discrimination and racism, without a specified timeframe for the discontinuance of the policy.

8.2. Legal analysis

Specific statutes are involved in taking steps to improve the representation of Black people, women and persons with disabilities in the workplace, and to promote equal protection for all designated groups against unfair discrimination in all employment policy and practice in South Africa. The Constitutional Act of 1993¹⁰³ presents the foundation for gender equality, non-racialism and non-sexism. The Bill of Rights enshrined in Chapter 2 of the Constitution guarantees freedom from discrimination on the grounds of race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.

The Employment Equity Act (EEA) No. 55 of 1998 was passed by Parliament on 21 August 1998 to address disparities in access to jobs, skills and education for previously disadvantaged groups, namely Black people, women and persons with disabilities.¹⁰⁴ On December 1, 2000, the Code of Good Practices on key aspects of HIV/AIDS was added to the Employment Equity Act of 1998 because of the serious public health problems presented by HIV/AIDS with respect to human rights and employment. Many lives were lost to the disease, especially amongst the workforce¹⁰⁵. South Africa has one of the highest rates of infection in the world. The EEA was subsequently amended in May 2006 and the Employment Equity Regulation of 18 August 2006 was enacted to complement the EEA, which sought to improve the reporting of companies and small businesses regarding the implementation of affirmative action as required by law.¹⁰⁶ Under the new regulation, large companies with over 150 employees are required to report within the first six months of being a designated employer, and thereafter annually on the first day of October each year. While small businesses with less than 150 employees are required to report annually and thereafter on the first day of October each year. The report covers the number of staff employed up to the management level, the breakdown of designated groups, employment equity plans on how to improve the representation of designated groups, and relevant information in the workplace, such as procurement from black-owned businesses and social investment programmes. In addition, organisations with operations in different geographical areas or workplaces have to submit individual reports. Designated employers must notify the Director General (DG) of the Department of

Labour and provide valid reasons for not been able to report by the first day of October. The notification must reach the DG at the latest by August of the same reporting year.¹⁰⁷ As a result, Statistics South Africa publishes quarterly reports on the contribution of affirmative action to changes in formal and informal work, employment of designated groups, and the total employment growth by sector and gender.

The Regulation also further clarified additional criteria that the individuals in the designated groups must:

- Be citizens of the Republic of South Africa by birth or descent, or
- Be citizens of the Republic of South Africa by naturalisation before the commencement date of the Constitution of the Republic of South Africa act of 1993, or
- Have become citizens of the Republic of South Africa after the commencement date of the Constitution of the Republic of South Africa Act of 1993, but entitled to citizenship by naturalisation prior to the commencement date of the constitution in 1993.

Other legislations enacted to support and implement affirmative action policies include the controversial Broad Based Black Economic Empowerment (BB-BEE) Act of 2003.¹⁰⁸ The BB-BEE was initiated by Government to redress the country's historic inequalities by helping previously disadvantaged individuals start their own businesses or become part of existing companies. In order for a company to meet its legal commitments, each company is required to meet minimum requirements in terms of representation by previously disadvantaged groups. Through Transformation Charters¹⁰⁹ and Codes of Good Practice, there has been a promotion of black economic empowerment in businesses across the country. However, the implementation of BB-BEE has been criticised for benefiting the Black elite, while the majority of the black population are yet to tap into and realise the opportunities available within BB-BEE.

The legal analysis of positive action in South Africa presented here uses the template produced by the legal team for the PAMECUS report. The four key questions addressed are as follow:

8.2.1. Does legislation establish any positive action measures? E.g. mandatory quotas for disabled persons?

The application of the Employment Equity Act (EEA) applies to all employers, workers and job applicants. The provisions apply to employers with 50 or more workers, municipalities, organs of State, employers

¹⁰⁷ Section 6 of the EE Regulation in compliance with Section 21 of the EEA (Duty to Report)

¹⁰⁸ Broad Based Black Economic Empowerment Act No. 53 of 2003 accessed from www.info.gov.za/gazette/acts/2003/a53-03.pdf

¹⁰⁹ Transformation Charters is a proactive response to address the inequalities in specific sectors - such as health, mining, ICT, Tourism, Property, Petroleum, Financial and Construction sectors - in an effort to actively promote a vibrant, transformed and competitive sector that provides adequate services to the domestic economy that reflects the South African nation as a whole and contributes to the establishment of an equitable society. As a result, industry scorecards are created to address industry specific issues with regard to implementing BBBEE.

¹⁰³ Constitution of the Republic of South Africa 1996

¹⁰⁴ Employment Equity Act No. 55 of 1998

¹⁰⁵ South Africa Department of Labour *Code Of Good Practice: Key Aspects Of HIV/AIDS and Employment* of 1 December 2000

¹⁰⁶ Employment Equity Regulation of 18 August 2006

ordered to comply by a bargaining council agreement, or any employer(s) who volunteer to comply. Chapter 3 of the Act provides for affirmative action and requires legal compliance by companies to ensure their workforce is representative of the South African population. Affirmative action ensures qualified designated groups (black people, women and people with disabilities) have equal opportunities to get a job, and promotes equal opportunity and fair treatment through the elimination of unfair discrimination for workers and job seekers.

Affirmative action measures

The EEA provides the framework for the implementation and monitoring of affirmative action measures to redress disadvantages in employment. According to Section 15 of the Act, employers have to comply with prescribed measures:

- identify and eliminate barriers including unfair discrimination which adversely affects designated groups;
- support diversity through equal dignity and respect to all people;
- make changes to ensure designated groups enjoy equal opportunities and are equitably represented in the workplace;
- ensure equitable representation of designated groups in all occupational categories and levels in the workplace; and
- retain and develop designated groups.

Examples of Affirmative Action Measures

Some examples of positive action emanating from the above general requirements include:

1. Setting priorities to hire people from the designated group and deliberately seeking to employ people from the designated group to change the human resource profile of a company.
2. Making it easier for an equally qualified or even less qualified person from a designated group to be appointed to a job than a white male.
3. Establishment of mentoring or leadership development acceleration programmes for people from the designated group in an organisation.

EEA Employers are required to discuss employment equity issues with their workers from designated groups. According to Section 16 of the Act, consultations include regular meetings and feedback to employers and management regarding the proper implementation of the Act. An employer is designated to report on the preparation, implementation and monitoring of employment equity plans and other relevant codes as required by the EEA.

Chapter 4 of the Act established the Commission for Employment Equity (CEE), responsible for monitoring, evaluating and advising the Minister of Labour on the implementation of the Act. Designated companies are required under Section 21 of the Act to report annually/biannually on the characteristics of their employees. Large employers with over 150 employees

are required to submit their reports within six months of being designated, while small companies with less than 150 employees are required to submit within one year of being designated. Companies which fail to comply with these provisions are deemed not to have reported, and the Act prescribes heavy penalties for companies which fail to abide by these directives and contravene certain provisions of the Act. Schedule 1 of the Act imposes maximum permissible fines from R500,000 to a million Rands (about 50,000 - 100,000 Euros). The Department of Labour has developed an Employment Equity database, which houses the data submitted by both large and small employers available from Statistics South Africa.¹¹⁰

Mandatory Quotas

The EEA is silent on quotas for designated groups. What most employers have interpreted, rightly or wrongly, to imply a quota obligation is found in s. 15:

"15(1) Affirmative action measures are measures designed to ensure that suitably qualified people from designated groups have equal employment opportunities and are equitably represented in all occupational categories and levels in the workforce of a designated employer..."

The above does not in any way suggest quotas, though it may include preferential treatment or reasonable accommodation, and the setting of numerical goals (equally represented) for as long as these are designed to ensure equitable representation of suitably qualified people from the designated groups.

However, quotas and salary packages for senior, middle and junior management have been incorporated in the Transformation Charters and Codes of Practices. The Charters for the Financial and Construction Sectors have been published as an official publication by government, but yet to be enacted as a legally binding document. Previously, Black people could not own their own companies, but in accordance with the BB-BEE Act, Black people can now establish their own companies and can own 50% shares in other companies which are not wholly Black owned. The Act now requires a minimum of 25% shares to be owned by Black people in existing companies. Previously, women were not allowed to own businesses, but within the current Act, 30% of Black women can now own and control an enterprise. This has proved successful in the South African Wine Industry.¹¹¹

According to the Financial Sector Charter of February 2007, at least 25% of executive positions must be for Black people and a minimum of 4% should be held by Black women. Similarly 30% of Black people should be employed in middle management, out of which 10% should be Black women. At least 40-50% of Black people should be employed into junior management and 15% should be black women. These proposed targets should have been met by 2008. Key findings of the Quarterly Labour Force Survey, Stats South Africa 2008 show that more women were employed between the ages 15 - 64 years. The number of unemployed persons fell by 3.6% largely among men and the community and business

¹¹⁰ Statistics South Africa online accessed from <http://www.statssa.gov.za/>

¹¹¹ BEENEWS.CO.ZA SA's First All-Female BEE Wine Producer Launched April 6, 2006 accessed from http://www.beenews.co.za/archives/cat_wine.php

services industry saw the largest increase in employment of 22.8%.¹¹² ABSA and Standard Bank, where 56% of workforce is black with about 28% of these in executive positions, are examples of organisations that have recorded positive percentages of Black people and women employed in their workforce.¹¹³

Similar targets are within the construction sector Charter of February 2007, which should be met by 2010 and 2013 respectively. At least 30% of Black people in South Africa should have economic interests and voting rights and 10% should be Black women. By 2010 the construction sector should have at least 25% of Black people at executive management level, with 10% Black women at the same levels. By 2013, in the sector 40% of Board and Executive members should be Black people, with an overall target of 16% of Board and Executive members being Black women.

8.2.2. Does legislation establish any obligations on public or private sector organisations to take positive action?

There are no separate legal instruments for the private sector regarding affirmative action. The EEA applies across the public and private sectors. However, affirmative action applies only to “designated employers” i.e. according to s. 1 of the Act as including an employer who employs 50 or more employees or less than 50 but with an annual turnover set out in Schedule 4 of the Act. Section 5 specifically mandates that ‘every employer must take steps to promote equal opportunity in the workplace by eliminating unfair discrimination in any employment policy or practice’. Employment policy or practice includes recruitment, job classification, remuneration, employment benefits and terms and conditions, promotion and dismissal.

Private sectors are also required by law to meet reporting standards, employment of designated groups and should be BB-BEE compliant. However, small enterprises with an annual turnover of R5 – 35 million (about €500,000 – €3.5million) are exempt from BB-BEE and considered to be fully compliant.

The Labour Court in South Africa nevertheless has the power to direct any employer, even if they do not fall within the definition of ‘designated employer’ to comply with the requirement of Chapter 3 of the EEA that demand affirmative action measures.

8.2.3. What forms of positive action are permitted, but not required, by legislation?

Though not required by the law, s. 14 of the EEA provides for employers who do not fall into the designated employers group that they may voluntarily agree to comply with affirmative action requirements of chapter 3 of the Act as if they were designated employers. Organisations have been known to make decisions on which designated group they want to

increase or decrease in terms of proportion in relation to the designated groups, and this must be clearly motivated in their Employment Equity Plans (EEPs). EEPs, under s. 20 are additional requirements of affirmative action. Organisations are expected to have an EEP that may not cover a period shorter than a year or longer than five years.

Reading into the measures on affirmative action in South Africa, it can be concluded that preferential treatment, fair discrimination, or ‘any modifications or adjustment to a job, or to a working environment that will enable a person from a designated group, to have access to, or participate or advance in employment’ (s. 1 of the EEA) are permitted.

Black women have gained major strides in the political sphere. In recognition of the contribution of South African women during the liberation struggle against apartheid rule, the women succeeded in ensuring the equitable representation of women in the Convention for A Democratic South Africa (CODESA) negotiations that led to the transformation of South Africa to a democratic society. In addition, the African National Congress Women’s League included mechanisms to implement affirmative action policies to institutionalise 30% representation of women at all levels of decision-making within the African National Congress (ANC) party structures.

In South Africa’s first democratic election in 1994, the ANC adopted a 30% quota for women on political party lists. As a result, the representation of women increased from below 3% to 27% in one election, and in the 1999 election, women were placed in every third position on the national party list. At the local level (with a mixed electoral system) the ANC adopted a 50% quota for women on party lists. Women were appointed into key positions holding portfolios in Finance, Foreign Affairs, Defence and Intelligence, Housing, Public Works, Public Enterprise, Trade and Agriculture, Health, Communications, Justice, Local government, Constitutional Affairs, Tourism, the Environment, Science and Technology. The quota representation has been increased to 50% following the equitable representation of women required by the African Union. At the last 2004 election, the ANC ruling government reached 46% representation of women in national government following the appointment of Phumzile Mlambo-Ngcuka as Deputy President, the highest position ever held by a woman in the country.¹¹⁴

Looking at the dismal representation of women in Local Government, Section 11:3 under Schedule 1 of the Municipal Structures Act of 1998 specifies that every political party should ‘seek to ensure’ that 50% of candidates at the local level are women. Although there is no penalty or legal sanction if this is not adhered to, it has seen the appointment of more women ministers responsible for local government affairs, female executive mayors, deputy mayors, district and ward councillors.¹¹⁵ Notably, the ANC is the only party that has

¹¹² Statistics South Africa *Quarterly Labour Force Survey: Quarter 1 & 2 of 2008* August 28 2008 accessed from www.statssa.gov.za

¹¹³ ABSA: Facts and Current Status accessed from <http://www.absa.co.za/absacoza/index.jsp>. See also, Standard Bank, *Sustainability & Black Economic Empowerment Report: Stakeholders Review Report* 2005 accessed from www.standardbank.co.za/site/investor/sr_2005/stakeholder/employees.htm

¹¹⁴ Mavivi Myakayaka-Manzini *Political Party Quotas in South Africa - The Implementation of Quotas: African Experiences* Pretoria, South Africa, 11-12 November 2003

¹¹⁵ Local Government: Municipal Structures Act No.117 of 1998 (Schedule 1 Section 11:3)

introduced quotas as part of its policies, and now requires ANC affiliates, namely the ANC Youth League, the South African Communist Party and the Congress of South African Trade Unions (COSATU) to implement 50/50 representation of women at all levels of decision-making by 2015.¹¹⁶

8.2.4. Are any forms of positive action prohibited by legislation?

The Act exempts members of the National Defence Force, National Intelligence Agency, and the South African Secret Service from affirmative action policies and BB-BEE. According to the Codes of Good Practice on Broad-Based Black Economic Empowerment Notice 783 of May 2008, the tourism sector with an annual turnover below the R5 million threshold has been exempted from the principles and objectives of BB-BEE, but the sector is still bound by the policy of affirmative action under the EEA.

In light of the recent judgment by the Supreme Court of Appeal in South Africa on the limits to affirmative action,¹¹⁷ the Court resolved inter alia that within the regulations and law of South Africa, arbitrary or ad hoc decisions, not backed by policies or employment equity plans to appoint people when they are not the most suitable candidate among others in a selection process, but selected on the basis of meeting the representativeness of designated groups, is an unfair labour practice, and therefore not permissible in law. According to the judgment¹⁶

'there is clear emphasis ...that suitable candidates cannot be denied the appointment if they comply with stipulated requirements, even though representivity is the objective. Therefore, in the quest to attain representivity, efficiency and fairness were not to be compromised. To justify the failure to appoint a candidate who complied with stipulated requirements it had to be shown that that action was not unfair. The evidence at our disposal is clear that the respondent did not have an affirmative action plan or policy in terms of which it appointed Mr It is also common cause that the appellant complied with all the requirements for the post in terms of s 11(1)(b) of the PSA. In the light of all these facts it was clearly unfair not to appoint him. The Labour Court was therefore incorrect to conclude that it was not a requirement for the respondent to have had a plan or programme first before appointing Mr In the circumstances, the appellant has succeeded in showing that the failure to appoint him was inherently arbitrary and therefore amounted to unfair discrimination which is an unfair labour practice as contemplated in Items 2(1)(a)'

The implication from this text is that it is possible to fail to hire suitable (white) candidates, and to give preference to members of designated groups, even if they are not the most suitable or most qualified candidates, for as long as this is provided for in an employment equity plan. Whereas any form of positive action that can be interpreted as unfair labour practice,

or unfair discrimination will not stand a test on the basis of affirmative action, on the other hand, positive action is less likely to be regarded as unfair or discriminatory if it is provided for in an EEA mandated employment equity plan.

8.3. Findings from consensus workshop and interviews

The consensus workshop in South Africa was held in the first week of September, following a series of flyers, and invitations sent to identified people from various sectors including public and private organisations, government and non-governmental bodies. Specifically targeted were managers, as well as those involved in human resource management, policy makers, in health, education, social welfare, labour, business and finance industry sectors in South Africa. The workshop was held in Johannesburg considered central for travel purposes from different parts of South Africa. The invitation was followed up with phone calls to confirm attendance. Twenty-four (24) hours to the date of the workshop on the 3rd of September, records showed 38 participants had confirmed attendance by phone or email.

8.3.1. Data collection

On the 3rd of September, contrary to expectations, 16 participants turned up for the workshop. The participants were from health, education (higher), farming, industry, business and voluntary/community sector organisations, including faith based organisations, and represented all the racial groupings in South Africa: Black African, Coloured, Asian and Whites. They also came from central and provincial governments, as well as private and non-governmental organisations. While it was not specifically intended, the participants themselves made the observation that the participants were diverse enough to include male and female, differentially-abled people, and those people of different sexual orientation. The facilitators believed that the low number of participants might have been as a result of the possible confusion relating to the use of the term positive action instead of the much more familiar affirmative action.

A general understanding of the purpose of the workshop by the participants was facilitated with a keynote presentation by the Principal Investigator on "Positive Action and the Europe Experience" followed by a presentation on the employment equity legislation and affirmative action in South Africa; and a more detailed introduction of the PAMECUS project to the participants.

All participants were further requested to sign a voluntary consent form to participate and to be interviewed if necessary with clear options to opt out if need be, while assuring anonymity in reporting and confidentiality of information. All participants completed the consent to participate. Participants were divided into two groups, with three facilitators in each group. One facilitator to lead, the second to record verbatim participants' contributions, and the third facilitator to extract key points or concepts for further discussion and agreement with the participants. However, the facilitators in each group, essentially enabled the process, kept it on track and jointly intensified dialogue whenever necessary. These

¹¹⁶ ANC Election Manifesto 2004 accessed from <http://www.anc.org.za/elections/2004/manifesto/manifesto.html>

¹¹⁷ Supreme Court of Appeal (17 September 2008) *Martin Gordon v Department of Health KwaZulu-Natal* (337/2007) [2008] ZASCA 99

activities were rehearsed in a previous nights' facilitator briefing by all the assigned facilitators in the groups.

The two groups came together after about 90 minutes of different groups' consensus discussions for a plenary to share what transpired in the groups, and to further reach consensus on the ideas generated in the different groups. Key statements emerging from both groups were put up for members to read and confirm agreement through use of tokens to indicate extent to which they agreed with the key statements.

Twelve workshop participants agreed to be interviewed for further information on positive action measures in their various organisations. The reports from these interviews form part of the findings reported in the following section.

8.3.2. Findings

Specific findings are presented under the following sections.

Understanding of positive action

Generally as will be noticed in table 8.2, participants understood affirmative action to mean affirming and

promoting equal opportunities for people in order to empower them so as to have full engagement in society. Understanding included their interpretation of affirmative action as *development of the previously disadvantaged individuals through systematic inclusion in the society through various efforts directed at correcting the disadvantage*. To the participants, it was viewed as fair discrimination, as opposed to unfair discrimination. However, through the various ways that the participants have experienced affirmative action, to some, it might also mean window dressing, disempowerment of certain categories of people in the population, exclusion and a whole lot of backlash if applied inappropriately.

Participants agreed to the following keywords or terminologies (table 8.2) as representing their understanding of positive action. These keywords were extracted from various statements, descriptions and explanations provided by the participants either verbalised or in writing on the cards provided for each participant at the workshop.

Table 8.2: Keywords or terminologies used by participants to describe affirmative action

Keywords or terminologies used by participants	Representative statements
Affirming people	A person must understand the true value of himself. We have a ... who has been working with us ...able, and responsible; we have helped him open his own business... I am not affirmed in the business, they say I am young. I feel that I will always be young and need to be affirmed. To bring a change of life to the people who have been disadvantaged during the apartheid system; Ensuring that everyone who has been put down is raised
Correction of disadvantage/corrective measure	Designed to right the disparities of the past with regards to race, disability, and gender inequalities
Disempowerment of a category	Means disempowering men
Empowerment of a category	Empowerment of women
Equal opportunity, equality, equity	Affirmative action is not unfair discrimination; it is about equal opportunities; in my organisation, I was the first person who was physically disabled but now we have a deaf person and are even conscious about age. It does not mean that if a person is above a particular age, they must be told to go. Give people equal opportunities. Brings equality to women and disabled group; addresses inequality in race and gender; equalising opportunities for all; equality is sought to redress past imbalances; To bring equality to all, particularly to previously disadvantaged people, i.e.; women and disabled people. Equality of opportunity for all races and genders and a balance in educational opportunities, therefore greater job opportunities.
Exclusion	It also means excluding some people.
Fair discrimination	This is not unfair discrimination; it is about equal opportunities.
Justice	Issues of justice are also addressed.
Provision of opportunity	Allows previously disadvantaged groups to take advantage of new opportunities; is designed to allow previously disadvantaged people to be given a better position in the workplace based on their qualifications. Gives opportunities for those with qualifications and skills.
Reaction to a precondition of disadvantage	Consideration of previously disadvantaged individuals.
Recognition of competence	During apartheid, our families had low bracket earnings, but they managed to walk to school. When you got to the workplace, you worked hard and were not recognised, but with the introduction of affirmative action, people are beginning to be recognised.
Redress inequities	Affirmative action measures are taken to redress present and past inequities/imbances in a particular society; address disparities of the past. Sought in order to reverse or address imbalances of the past
Systematic inclusion	Recognising previously disadvantaged individuals and systematically including them into mainstream business activity.
Training and skill development	Affirmative action goes together with training and development...we have been trained in order to be affirmed but on the basis of skills. Development of quality, competency; currently we can appoint people in terms of competencies.
Uplifting designated group	Affirmative action in my organisation means uplifting disadvantaged groups to a better standard or position in an organisation Uplift designated groups, upgrade disadvantaged groups.
Window dressing	Reaching employment targets without a principle to establish that there is a precondition for disadvantage. Is there a minimum or a maximum disadvantage instead of trying to achieve targets in terms of a number? There should not be blanket disadvantage.

Impetus for positive action

Emerging from the workshop as the impetus for affirmative action in South Africa, participants' responses were analysed resulting in the keywords or terminologies in table 8.3. Legal obligation appears to be a major driver of affirmative action, though participants further agreed that organisational core

values, including justice, fairness, inclusiveness, emancipation, progress and wealth also drive the process. Negative and positive dynamics of emotions, agitations from the grassroots, political motives, need for wealth are other factors seen as the impetus for affirmative action.

Table 8.3: Impetus or drivers for affirmative action

Keywords or terminologies	Representative statements from participants
Legal obligation	Bill of rights; therefore legislation was the driver. Driven by emotions, quality, justice, quest to adhere to laws and Acts and also by favouritism and discrimination. Government through affirmative action legislation are pushing affirmative action in my particular organisation. Government policies/Acts and legislation are drivers. Government and management both internal and external. Legislation.
Corporate social responsibility	The desire to develop and empower people is an obligation of a socially responsible institution; corporate core values, everybody must feel as if they are empowered.
Organisational core values	Fairness, inclusiveness, progress and emancipation.
Negative impetus	Dynamics of affirmative action need to be considered to understand the drivers, like the fuel that moves a car. There are positive and negative dynamics. A negative driver is the greed and self interest of some people behind it, the desire to achieve at the expense of others e.g. the desire to be wealthy. Wealth is a negative driving force. Self interest to me is negative, with a lot of emotions, hate, feeling of revenge, anger, payback feelings. These are all negative, but they are the drivers. Affirmative action to some people is not guided by principles, but emotions rather than reason. My drivers are justice and adhering to laws, but favouritism obstructs justice.
Desire to develop and empower	Empowerment and stability, skill development of disadvantaged groups e.g. Blacks, Indians and Coloureds.
Will or resolve to change	The will for change, people have the will to monitor [affirmative action] in order to achieve. The will for change in a diverse society.
Justice	My drivers are justice and adhering to laws.
Recognition	Recognition of gender and sex.
Disadvantageism	Disadvantageism and feeling of inequalities serve as impetus.
Politics	Mainly people who are politicians at the top hierarchy of government drive the implementation of affirmative action.
Policies	Government policies attempt by all means to introduce affirmative action to each and every company here in South Africa.
People	People in key leadership positions are driving. Mainly people who are politicians drive the implementation of affirmative action. Legislators or policy makers are the drivers.

Effectiveness of positive action

Responding to whether affirmative action has been effective or not in South Africa, participants' responses fall into four categories: Yes, it is effective, yes but..., no not at all, no but... (table 8.4). Respondent's key statements indicated a belief that affirmative action is only effective in terms of numbers as quality has not been emphasised in the implementation. While respondents believe government is trying, and appears to be addressing some of the dynamics of the past, this has not been effective enough, though one could sense a paradigm shift from how things used to be. Reasons advanced for why affirmative action had not been effective included widespread malpractice and

inappropriate behaviour as well as sabotage by previous beneficiaries [of apartheid]. There is also a feeling that it has not been effective because previously disadvantaged people were not well equipped to take up new challenges, as the process allows unqualified people to hold key positions based on gender and race. One other reason why affirmative action was said not to be working is that it leads to a brain drain, and some minority groups are still disadvantaged. To some of the participants, affirmative action may have been effective, but it leaves casualties behind, with bitterness and anger.

Table 8.4: Participants' response on effectiveness of affirmative action in South Africa

Response categories	Defining statements
Yes, it has been effective	<p>Yes, people of colour now hold key positions and women have been mainstreamed into the workforce.</p> <p>Yes, in statistical terms within South Africa.</p> <p>Yes, in stopping discrimination.</p> <p>Yes, because policies changed to accommodate women who are competing for positions.</p> <p>Yes, the company's employment policy has changed to accommodate women; positions previously occupied predominantly by male have changed and now women are competing for those promotions. Now management positions are also being occupied by people of colour.</p>
Yes it has been effective but...	<p>Yes, but it leaves casualties behind. Apartheid brought some casualties, this led to affirmative action, and affirmative action is also leaving casualties behind with bitterness and anger. It is like going round in circles.</p> <p>Yes, but only 30% effectiveness because of the manipulation of implementers and malpractice.</p> <p>Only about 30% of our procurement in rand value is from genuinely previously disadvantaged individuals or business.</p> <p>Effective only where there is commitment.</p> <p>Yes but more education is needed especially at the top management to avoid abuse of the system.</p> <p>Affirmative action leaves casualties behind; (with bitterness) and disaffected people working against affirmative action. It focuses only on quantity.</p> <p>Yes, but it focuses on short term quantity i.e. correct numbers, gender, race, empowerment of individuals and individual empowerment.</p> <p>It has built up confidence in individuals, groups and societies, though still hiccups here and there.</p> <p>It leaves casualties behind and the pains it caused individuals which make some to be miserable and aggressive.</p> <p>Disability still very marginalised across board in the working sector.</p>
No, it has not been effective at all	<p>No, people living with disabilities heavily marginalised; there is stereotyping, corruption, lack of monitoring, favouritism, and the top has not changed.</p> <p>Places only people who are highly skilled in top positions.</p> <p>Challenges of affirmative action undermine its intended objectives. Implementation is a critical problem to make it effective too.</p> <p>No not working, people were not properly consulted before affirmative action was introduced. The negative consequences include brain drain and consequently top positions are taken up by unskilled people.</p> <p>No because affirmative action has driven away white colleagues who are afraid of competition, so because of incompetence they decided to leave companies.</p>
No it has not been effective but...	<p>No, but there has been a paradigm shift; it is addressing previous dynamics of society. Government is helping.</p> <p>No in terms of long term sustainability, but there is a paradigm shift toward transformation, ability, enlightened society, in terms of social response and empowerment.</p> <p>No, in the Church there is only one woman Bishop out of the 12 or so provinces. The State has no influence on Church policies, unless human rights are violated, but few Black males have benefitted from clerical-based positions still held by majority Whites.</p>

Impact of positive action

The impact of positive action was viewed in terms of people targeted and benefitting or none benefitting in the structure. There is consensus on the groups not targeted in South Africa's affirmative action. These are identified as gay people, transgendered people, hardworking white men, religious groups and age groups, who are therefore not benefitting in affirmative action. Groups targeted but are not benefitting from affirmative action were identified as people living with disability, as they are still poorly represented in the

working population. The participants agreed that the groups who were targeted and are benefitting the most include women across the board, black men, 'the king makers' further described by the participants as the dynasties, politically affiliated members or families of managers. The impact of affirmative action was also seen in the following lights:

That black women have been given opportunities to empower themselves

Productivity has increased and reporting structures improved

Table 8.5: Beneficiaries of affirmative action in South Africa

Categories	Defining statements
Not targeted, not benefitting	Whites don't benefit as much as other groups from affirmative action, therefore when they encounter the process, they sabotage success. Not benefitting are hard working white men, competent youth. SMMEs by blacks and whites, gay people.
Targeted not benefitting	Not benefitting are societies in rural areas, the disadvantaged, disabled groups, poor, low socio-economic groups. Not benefitting are those who are not linked with high placed managers or not befriended (sic) with them. Also some of those who do not support the ruling party, those who were working for the previous dispensation.
Targeted and benefitting	Affirmative action has benefitted those who are close to the people implementing the policies, e.g. friends, relatives, and people who share similar languages. Some people are discriminated against as a result of affirmative action without necessarily being aware of it, because they don't have access to the information. Individual: Women, dynasties, African Black. Organisation: (Ed) Historical white institutions. Societies: Communities - African black, societies or communities from which political figures emerged. Few disabled people benefit and most black people do, but unqualified Black females are always in the picture being empowered with less males participating. Affirmative action benefactors are White women, Black women, Black men, Black businesses (big) and White businesses (big). Relatives of top officials. Politically connected. People holding high positions. Policy makers and decision makers. People groping for their own personal gains and personal interests. Top managers, friends and or families but sometimes those that are skilled.

Measures to make affirmative action work

Participants made recommendations that they felt would make affirmative action work. These are set out in table 8.6, and include making the targeted population clearly aware of the advantages of affirmative action, by operatives or management. This should be achieved through continued sensitisation. Implementers were urged to de-emphasise statistics, and integrate quality of able skills rather than concentrating on quantity. Honest and truthful dialogue was viewed to be essential by all persons involved in the process and implementation of AA. Intervention of AA was deemed

to be proactive, and that government should put in place measures to deal with instances of (unintended) marginalisation when they occur. Government will have to address poverty and turn the brain drain agenda into circulation of knowledge and expertise where people's services are remunerated. There should be proactive identification and the management of backlash from affirmative action. It is expected that the government would consider sustainability and introduce this into affirmative action, because according to the participants, sustainability must be part of the process.

Table 8.6: Recommended measures by participants to make affirmative action work

Categories of recommendation	Recommended measures
Communication and awareness of target	In any company, just keep awareness about where you are going to. Even in the big companies if people do not know where we are going, keep on reminding groups of where we are going. Clear awareness to target the advantages of affirmative action by operatives or management, achieved by continued sensitization.
Honest communication	I think honest and completely truthful dialogue, where you say what you mean so that people should not think that this is what you say. Honest and truthful dialogue by all persons involved, on the processes and implementation of affirmative action.
Based on skills and competence	Affirmative action should include the measurement of people skills and measure competencies. It should be related to the performance of individuals.
Sustainability	Sustainability needs to be introduced into affirmative action; sustainability must be part of the process.
Quality and not just quantity	De-emphasise statistics and integrate the quality of able skills rather than concentrating on quantity.
Proactive management of unintended negative effect of affirmative action	Intervention of affirmative action is pro-actives and government should put in place measures to deal with instances of marginalisation when they occur. Address poverty and turn the brain drain agenda into circulation of knowledge and expertise where one's services are remunerated.
Plan for sustainability of positive effect of affirmative action	Sustainability of affirmative action policy: positive action vs. positive discrimination should be considered for the future of the policy in South Africa.

8.4. Examples of positive action measures

Name of the Initiative: Targeted recruitment for management and supervisory level.

Sector/institution: Electricity company owned by Government (ESKOM).

Reasons for the initiative: As part of the requirements of EEA and AA initiatives, ESKOM noted that in 1993/4 only 5% of management and supervisory level staff were from the designated groups. The organisation therefore instituted targeted recruitment of members of the designated group to reach 27% for this level of staff by 1995.

Process: The process included formal mentorship programmes for lower level personnel to be able to move into management positions, where existing white post holders were encouraged to serve as mentors, and later offered heavy severance packages once they had appropriately mentored individuals to take over from them. More women were recruited into technical posts, and a number of people from the designated groups were specifically sponsored for further education at appropriate universities within and outside of South Africa to be able to take over from existing White post holders.

Outcome: The programme has assisted in changing the top management level of the organisation to include people from the designated group, though the 27% equity target was not achieved in all business departments of the organisation, there were plans in place to prioritise the recruitment of members of the designated groups to meet the set target.

Name of the Initiative: Leadership & Equity Advancement Programme (LEAP)

Sector/institution: Education (University)

Reasons for the initiative: In a National Research and Development strategy published by the Department of Science and Technology, it was reported that black and female scientists, technologists and engineers were not entering academia and that the key research infrastructure was composed of people who would soon retire. Statistics showed that the existing scientific population was not only ageing but shrinking as well. Publications generated by black scientists numbered only one in ten, and women's participation totalled only 10% of the total output. LEAP is therefore one of the University's key mechanisms for recruiting and nurturing Black and woman academics and integrating them into the establishment's academic staff.

Process: The programme addresses capacity building at virtually every level- from the Graduate Scholarship Scheme at entry level to the LEAP Residential Workshops aimed at middle to senior level academics at the higher end of the spectrum. Aspects of the programme include: 1. a mentoring programme, 2. a professional development programme, 3. Confirmation of appointees to permanent academic posts and 4. a Post-Doctoral Fellowship Scheme specifically made available to members of the designated

groups.

Outcome: The scheme has assisted in creating a pool of Black and female academics to take over from the retiring white and male dominated academics for the future. It has increased representation and retention rates.

Name of the Initiative: Broad Based Black Economic Empowerment (BB-BEE)

Sector/institution: Public and Private Business sector

Reasons for the initiative: This is in response to the criticism against an initial policy of a narrow based Black Economic Empowerment (BEE) first instituted in 2003/2004 which led to the enrichment of a few black (Black African, Coloured or Indian) individuals. BB-BEE is therefore meant to distribute wealth across as broad a spectrum of South African society as possible, in addition to equity ownership and management representation.

Process: BB-BEE is measured using seven items on the scorecard, divided into two aspects: Direct Empowerment and Indirect Empowerment

- Direct Empowerment:
 - Equity Ownership - 20%
 - Management - 10%
- Indirect Empowerment:
 - Employment Equity - 15%
 - Skills Development - 15%
 - Preferential Procurement - 20%
 - Enterprise Development - 15%
 - Socio-economic Development - 5%

Outcome: Current information on the impact of BB-BEE is not available but the Institute for Justice and Reconciliation's Economic Transformation Audit claimed that the number of Black management and professionals has increased from 216,772 in 1995 to 359,438 in 2005.

8.5. Key statements identified from the consensus workshop grouped by theme

Emerging theme	Key statements	Rank (score)
Understanding of positive action	1. Affirming and promoting equal opportunity for people in order to empower them to have full engagement in society. (3 dots)	3
	2. It is about sustained development of people through systematic inclusion in society by correcting disadvantage (7 dots)	7
	3. Applied inconsistently can lead to window dressing, disempowerment of people, exclusion and other backlash. (2 dots)	2
	4. Objectives of affirmative action are to redress the imbalances of the past (legacy of apartheid) regarding issues of justice, gender, race, disability and inequalities.	
	5. Provides opportunity for previously disadvantaged people with qualifications and skills, to gain access to jobs and form part of the workforce. (2 dots)	2
	6. The preference for quota system/proportionality test is prevalent in South Africa, yet it is determined by quantity and not by the qualitative contribution of people. (1 dot)	1
Impetus for positive action	1. Legal obligation is a key driver, which may be positive (in the sense that things get done) but may be negative (if people don't believe in it but compelled due to the legal incentive) (3 dots)	3
	2. Organisational core values including justice, fairness, inclusiveness, emancipation, progress and wealth drive the process. (7 dots)	7
	3. Driven by positive or negative dynamics e.g. emotions, agitation from grassroots, political motives and favouritism. (3 dots)	3
	4. The orientation of the mission and vision of the Church, policy and legislation serve as driving factors to implement affirmative action in the public and private sectors. (1 dot)	1
	5. Policy in the public sector - Government employees offered voluntary severance packages and many were forced to resign, as a result skills were lost, without adequate time for mentorship giving rise to poor service delivery. (6 dots)	6
Effectiveness of positive action	1. Affirmative action is only effective in terms of numbers as quality has not been emphasised in the implementation (4 dots)	4
	2. Not effective but government is trying and appears to be addressing some of the dynamics of the past.	2
	3. For now it is a paradigm shift (2 dots)	
	4. It has not been effective as a result of stereotyping, corruption; malpractice; favouritism; and lack of minority and sabotaging by previous beneficiaries. (6 dots)	6
	5. Affirmative action if properly implemented will help to deal effectively with discrimination and inequality. (7 dots)	7
	6. People of colour now hold key positions and women have been mainstreamed into the workforce.	
	7. Previously disadvantaged groups/people should be well equipped to take up new challenges, as the process allows unqualified people to hold key positions based on gender and race. (5 dots)	5
	8. Affirmative Action is not working as intended, brain drain is prevalent, and some minority groups are still disadvantaged. (4 dots)	4
Impact of positive action	1. Groups not targeted are gay people, transgendered people, hardworking white men, religious groups, elderly groups (3 dots)	3
	2. Groups targeted but not benefitting from affirmative action - disabled people (2 dots)	2
	3. Groups (targeted and benefitting the most from affirmative action - women across the board, black men, 'kingmakers' - dynasties, politically affiliated, families of managers (3 dots)	3
	4. Productivity has increased, body structures established to implement affirmative action with clear consultations at all levels. (1 dot)	1
	5. Blacks perceive affirmative action as a right and entitlement as being previously disadvantaged. (3 dots)	3
Groups targeted for positive action initiatives	1. <i>Groups most targeted</i> - women of all races, blacks (including African, Coloured, Asians and people with disabilities).	
	2. <i>Groups least targeted</i> - Lesbian, gay and bisexual people.	

8.6. Key summary

Buoyed by the provisions of the new constitution, and a series of Acts and regulations formulated after 1994, affirmative action in South Africa came on the heels of the dismantling of apartheid government in 1994. Affirmative action was one of several measures to address the systematic inequities brought about by racial segregation, unfair discrimination and the treatment meted on the women and people of colour during the apartheid regime. Participants' understanding of affirmative action vary, but are more directed towards provision of equal opportunities for those who may have been disadvantaged as a result of the apartheid system of government. Affirmative action was understood to be a way to correct and arrest the imbalances that existed before 1994. To the participants, it meant development of skills and recognition of competence in designated groups of women, disabled, black African, coloured, and people of Asian descent who are South African citizens.

The impetus for affirmative action in South Africa was agreed to be largely due to legislation, and the incentive that the beneficiaries will get from the affirmative action measures. In contrast to a sense of commitment on the part of the operatives of affirmative action, participants also believed that other positive and negative dynamics including emotions, politics, greed and favouritism drive the process.

Effectiveness of affirmative action was seen to be relative, as the objectives of affirmative action cannot be said to have been completely achieved in South Africa. Participants see the emphasis on numbers and proportionate representation at all levels and in all works of life, to be a deficit of the effectiveness of affirmative action. They were of the opinion that quality should be an issue, requiring that skills development and mentoring must be put in place in order to make affirmative action effective. Specifically, it was said that it had not been effective in providing opportunities for those living with disabilities and not enough women had been empowered and broken through the ranks that were generally reserved for men.

While affirmative action may have impacted the lives of South Africans, participants believed that the impact had not filtered down to the grassroots. Politicians, people who are connected, the dynasties, relatives of powerful people are still considered to be the main beneficiaries of affirmative action.

8.7. Implications for policy and practice and recommendations

Critics see affirmative action as reverse discrimination and racism, as it gives preferential treatment to non-whites at the expense of white people. Critics also believe affirmative action benefits only the Black middle

class, thus widening the divide between the rich and poor. Notwithstanding the criticism, affirmative action has improved the condition of Black women. The challenge for the country is how it can sustain the policy of affirmative action where, to many of the critics, people are appointed into positions based on gender and race rather than on their competencies. Fortunately, South Africa has adapted a parliamentary model of enacting and amending laws which provides for opportunities to revisit and amend laws as may be necessary, and for the purpose of affirmative action, there may be a need to modify some aspects of the EEA to improve the implementation of affirmative action policies where necessary. In particular will be those contentious sections of the EEA which may be seen to contract the letters of the Constitution of the Republic of South Africa of 1993. There is a need to revise the implementation process, and revisit the interpretations of the contentious clauses, or areas that lack clarity in the Acts and regulations. Issues like 'What constitutes unfair discrimination' must be dealt with. Definite pronouncements must be made on matters like the sneaking of quota practices into the implementation of affirmative action as a result of the clause 'equitable representation of suitably qualified people from designated groups in all occupational categories and levels'.

The government and the implementers of affirmative action policies, must deal with the issues of lack of awareness of the reasons for positive action, and should communicate with those people that will carry the brunt of affirmative action, about rationale for such measures.

In an effort to attain positive balance, there is a need to enhance social development in secondary and tertiary education, intensify the transformation of women participating actively in the workforce, and to continue with affirmative action policies until equality is achieved. Women and people living with disabilities should be facilitated to attain a proportionate share of leadership and decision-making roles at all levels. The inclusion, representation and participation of disadvantaged groups should not be after-thoughts or add-ons, but expected considerations in policy design and implementation in every organisation and all sectors of South African industry. Companies and organisations should be encouraged to document good practice as they develop programmes or implement measures to increase the number of suitably qualified people from the designated groups. Finally, the government must not shy away from developing and implementing measures to militate against the development of another set of casualties of affirmative action. There is a need for policies or measures to manage the emotions of the people, and particularly non-beneficiaries, and to continuously engage in debating the issue of the 'sunset clause', regarding when and where do we draw the line or draw the curtain on affirmative action?

9. PAMECUS Country Report: Sweden

The Sweden country report was prepared by consortium members at the European Roma Rights Centre Budapest, Hungary. This report presents the research undertaken during the period July to September 2008 by the European Roma Rights Centre (ERRC).¹¹⁸ After describing the legislative framework and the public policy in Sweden regarding positive action, the report presents some of the findings from the interviews conducted with relevant stakeholders and ends up with a set of recommendations stemming from the research findings.

9.1. Context of positive action in Sweden

In Sweden, domestic legislation provides a comprehensive protection against discrimination: constitutional, penal and civil law all provide anti-discriminatory measures on a number of grounds. The Instrument of Government, one of the four laws of the Swedish Constitution, specifies that 'public institutions shall combat discrimination of persons on grounds of gender, colour, national or ethnic origin, linguistic or religious affiliation, functional disability, sexual orientation, age or other circumstance affecting the private person' (Constitution, 1974). The Penal Code (1999) sanctions incitement to hatred,¹¹⁹ unlawful discrimination,¹²⁰ and considers it as aggravated circumstance if the 'motive for the crime was to aggrieve a person, ethnic group or some other similar group of people by reason of race, colour, national or ethnic origin, religious belief or other similar circumstance.'¹²¹

When it comes to civil legislation, the following legislation provides for explicit protection against discrimination: Equal Opportunities Act (1979, 1991), Sexual Orientation Discrimination (Employment) Act (1999), Prohibition of Discrimination in Working Life of People with Disabilities Act (1999), Law on Measures against Ethnic Discrimination in Working Life on Grounds of Ethnic Origin, Religion or Other Belief (1999), Equal Treatment of Students at Universities Act (2001), Prohibition of Discrimination Act (2003), and Act Prohibiting Discriminatory and Other Degrading Treatment of Children and Pupils (2006). This set of laws prohibits discrimination on the grounds of gender, ethnicity, religion, sexual orientation, and disability, but does not prohibit age discrimination.¹²² Some of these laws include obligations to take 'active measures' to achieve equality, and/or allow for positive action measures to be taken, yet under very limited conditions, as will be described in detail in section 9.2.

The authority of ensuring compliance with these acts is given to the four ombudspersons offices, founded by the Government, accepting complaints of discrimination,

and taking legal action where necessary:¹²³ the Equal Opportunities Ombudsman (JamO),¹²⁴ Disability Ombudsman (HO),¹²⁵ Ombudsman against Discrimination on Grounds of Sexual Orientation (HomO),¹²⁶ and Ombudsman against Ethnic Discrimination (DO).¹²⁷ Nevertheless, following the recommendations of the Parliamentary Commission on Discrimination, as of 1 January 2009, all of the existing ombudsman's offices will be merged into one - the Ombudsman against Discrimination. The existing legislation will also be replaced by a new comprehensive anti-discrimination law covering all grounds for discrimination, including age and gender identity/expression,¹²⁸ and it will also cover some additional fields, including education and health care (Ministry of Justice, 2006). Additionally, the National Action Plan for Human Rights 2006-2009 is also currently being implemented. It envisages a number of measures in the field of anti-discrimination; however, the information on the implementation of these measures is not available.

Though the anti-discrimination framework in Sweden is considerably stronger when compared to many other EU countries, the need for improvement is still present, especially regarding the following:

- Sweden is a country with a significant immigrant population: out of the total population of 9,182,927 in 2007, there were 1,227,770 persons who were born in a foreign country.¹²⁹ However, 22% of foreign-born persons surveyed experienced being discriminated at least once at the workplace in the year 2005 as a consequence of their foreign background, 16% claimed they experienced it when shopping, and 14% experienced it in contact with the police (Swedish Discrimination Survey, 2006).
- Despite a formal environment strongly advocating equality of opportunity for men and women, men still have higher salaries than women in most occupations, and the average difference between the wages of men and women is 25 per cent (Equal Opportunities Ombudsman, 2008).
- Members of ethnic minority groups, including Roma, continue to be discriminated against in Sweden (Advisory Committee, 2008). Roma are discriminated against in all social and economic sectors, with as much as 90% of adult men without employment. Roma populations also experience difficulties in access to housing and social services, and more general, 'structural discrimination and

¹¹⁸ This report was written by Tatjana Peric and edited by Tara Bedard, on the basis of the desk research and/or interviews conducted by Lidia Bucur, Mihaela Yankova, Idaver Memedov, Tatjana Peric and Jessica Rubenstein.

¹¹⁹ Chapter 16, Section 8.

¹²⁰ Chapter 16, Section 9.

¹²¹ Chapter 29, Section 2.

¹²² It should also be noted that Sweden has not signed Protocol 12 of the European Convention on Human Rights, providing general protection from discrimination.

¹²³ Additionally, the Children and Students Ombudsman (BO) was appointed in 1993, established by the Children's Ombudsman Act (1993), however this office is not mandated to deal with complaints of discrimination.

¹²⁴ Established by Equal Opportunities Act, 1991.

¹²⁵ Established by the Disability Ombudsman Act, 1994.

¹²⁶ Established by the Sexual Orientation Discrimination (Employment) Act, 1999.

¹²⁷ Established by the Law on the Ombudsman against Ethnic Discrimination, 1999.

¹²⁸ At the time this report was written, the text of the new law was not yet available in English. The information on the new law provided here is based on the information received from interviewees, and will have to be checked once the official translation is available.

¹²⁹ Statistics Sweden, available at: <http://www.scb.se>.

marginalization [...] so widespread that the Roma for the most part, stand outside the democratic process.' (United Nations Association of Sweden, 2008)

As this data indicates, a strong legal antidiscrimination framework is very important, yet not enough to achieve equality in the everyday life of many Swedish marginalised groups.

9.2. Legal analysis

The legal analysis of positive action in Sweden was carried out using a template produced by the project's legal team, addressing the questions below:

9.2.1. Does legislation establish any positive action measures?

In Sweden, the current legislation, as well as the new Discrimination Act which will enter into force in 2009, do not directly establish any positive action measures.

9.2.2. Does legislation establish any obligations on public or private sector organisations to take positive action?

As the Swedish legislation does not establish any positive action measures, there are no obligations on public or private sector to take positive action. However, the Swedish antidiscrimination law establishes obligations to undertake 'active measures' and 'goal-oriented efforts', which create an environment allowing, to some extent, the application of positive action measures.

For instance, employers are obliged to undertake active measures under the Equal Opportunities Act (1991), promoting equal rights for women and men in work related matters. Primarily, employers and employees are requested to cooperate in 'pursuing active efforts to promote equality in working life', to work towards preventing and ending pay differences as well as differences in other employment conditions, and to promote the same possibilities for the growth of wages of women and men (Section 2). Furthermore, employers must take active measures in the form of 'goal-oriented work' to promote equality (Section 3). All of these provisions are also contained in the new Discrimination Act (Chapter 3, Sections 1-13).

The obligations in the field of working conditions set under the Equal Opportunities Act (1991) take the form of ensuring suitable work conditions for both sexes (Section 4), assisting in combining parenthood and employment (Section 5), and stopping or preventing any form of gender or sexual harassment or victimisation (Section 6). With regards to recruitment, employers should promote the equal representation of both sexes in various kinds of work and work categories (Section 7), and make efforts to enable both women and men to apply for vacancies (Section 8). Importantly, Section 9 deals with work situations where there is a gender imbalance and obliges employers to 'strive in particular to recruit applicants of the underrepresented sex', and 'seek a gradual increase in the proportion of employees of that sex' (Section 9). All of these conditions are included in the new Discrimination Act as well (Chapter 3, Sections 4-9). In relation to pay issues, employers are required to conduct yearly analysis of the conditions of

payment and other employment terms, as well as any gender-related pay differentials (Section 10). Employers also have to prepare yearly equality action plans and report on them, including the proposals on measures that should be undertaken in attaining equality, cost estimates, and the time schedule for pay adjustments, not to exceed three years (Section 11). Currently, this requirement is applicable to all employers with ten and more employees. However, according to the new comprehensive anti-discrimination law, to enter into force on 1 January 2009, this will be applicable only to employers with 25 and more employees, and the reporting on gender equality, as well as preparing action plans on equal pay, will have to be undertaken every three years. The new law will not extend this kind of requirement to fields other than gender. The current legislation gives the Equal Opportunities Ombudsman the power of monitoring compliance with this law, and employers who do not realize the requirements of the Act can be ordered to fulfil them or pay a fine (Section 35). According to Chapter 4, Section 5 of the new Discrimination Act, as of 2009 the Equality Ombudsman will be in charge of monitoring compliance with the law; those not complying with the obligations as described above may be ordered by the Equality Ombudsman to do so, subject to a financial penalty (Chapter 4, Section 5).

In the field of education, the Equal Treatment of Students at Universities Act (2002) obliges universities to take active measures and 'conduct goal-oriented work to actively promote the equal rights of students' (Section 3). In a similar fashion, the Act Prohibiting Discriminatory and Other Degrading Treatment of Children and Pupils (2006) requires all educational authorities in the field of pre-schooling, school age child care, primary and secondary schools, as well as municipal adult education, to take active measures by means of ensuring 'goal-oriented efforts' in promoting equal rights for children and pupils and combating discrimination (Section 5). These provisions are also contained in the new Discrimination Act (Chapter 3, Sections 14-16).

The Equal Treatment of Students at Universities Act (2002) demands that universities prepare annual plans reviewing the measures needed to promote the equal rights of students 'irrespective of sex, ethnic belonging, religion or other religious faith, sexual orientation or disability' and to prevent harassment (Section 5). The plan has to report on concrete measures envisaged to be undertaken in the following year, and the plans created in the following year need to report on the implementation of the measures proposed in the previous year (Section 5).¹³⁰ The active measures expected by this Act apply to all institutions of higher education, whether managed by the State, municipalities, county councils or private education providers (Section 2).

The Act Prohibiting Discriminatory and Other Degrading Treatment of Children and Pupils (2006) requires the

¹³⁰ These requirements are also contained in the new Discrimination Act (Chapter 3, Sections 14-16). As of 2009, the Equality Ombudsman will be in charge of monitoring compliance with the Discrimination Act in all fields, including education at all levels; those not complying with the obligations as described above may be ordered by the Equality Ombudsman to do so, subject to a financial penalty (Chapter 4, Section 5).

relevant authorities to draft annual equal treatment plans, promoting equal rights and preventing any degrading treatment in each individual activity of the institution (Section 6). The follow-up and evaluation of the measures from the equal treatment plan should be reported in the institutions' yearly written quality reports; the plans are meant to be 'living documents' which should be updated and improved continuously, remaining relevant to day-to-day activities (Ministry of Education, Research and Culture, 2005). The authorities are also responsible for taking precautionary measures to prevent the degrading treatment of children and pupils (Section 7) and - in cases of harassment - taking measures to prevent further harassment (Section 8).¹³¹ The active measures required by this Act apply to all educational institutions, whether municipal or private, including both employees and subcontractors.

In combating discrimination on the grounds of ethnicity in the fields of labour and employment, the Law on Measures against Ethnic Discrimination in Working Life (1999) stipulates that 'employers and employees shall cooperate in order to promote ethnic diversity in working life' and 'work against all forms of ethnic discrimination' (Section 1). The employers are also obliged to undertake active measures and 'carry out a goal-oriented work in order to actively promote ethnic diversity in working life' with regards to employment conditions and recruitment (Section 4). The new Discrimination Act also requires employers and employees to 'cooperate on active measures to bring about equal rights and opportunities in working life' (Chapter 3, Section 1), where employers are in charge of conducting 'goal-oriented work' (Chapter 3, Sections 3-13).

The obligations under the Law on Measures against Ethnic Discrimination in Working Life (1999) are elaborated in its Sections 5-7, specifying that:

- employers must ensure that the working conditions are suitable for all employees regardless of ethnicity;
- employers must take measures to prevent the ethnic harassment of employees who submit complaints of ethnic discrimination;
- employers must ensure that persons of different ethnic backgrounds have the same opportunities to apply for available vacancies.

Non-compliance with the regulations specified in Sections 5-7 can lead to the order to fulfil the particular duty, on penalty or fine, issued by the Office of the Ombudsman against Ethnic Discrimination at the request of the Ombudsman or the employee's association (Section 26).¹³² The obligations specified under this law apply to all employers, including the State (Section 26).

It is important to note that 'measures' and 'goal-oriented efforts' mentioned in the cases above are considered by experts to fall within the sphere of positive action, yet in a very general sense; though 'active measures' and 'goal-oriented efforts' are obligatory, there is no regulation on what precisely

these measures and efforts are, they are essentially created at the local level by employers implementing the law, and there is no case law that establishes the limits of these actions (Numhauser-Henning, 2007). There are also no special requirements that 'active measures' and 'goal-oriented efforts' must include any positive action measures, though they create a framework for certain types of positive action measures, to be discussed in the following section.

9.2.3. What forms of positive action are permitted, but not required, by legislation?

The Swedish Prohibition of Discrimination Act (2003) does not provide for positive action measures. It does, however, allow such measures to be taken. For instance, with regards to the labour market, the Act emphasises that the ban on discrimination presents no obstacle to the 'application of provisions that are integral to efforts to promote equal opportunities regardless of ethnic origin' (Section 5), and specifies that the ban on discrimination on the grounds of sex does not apply 'in respect of benefits that an organisation provides to the members of a particular sex as part of efforts to promote equality between women and men' (Section 8). With regards to the provision of goods, services and housing, the ban on sex discrimination is also not applicable if the different treatment of men or women is justifiable (Section 9). The new Discrimination Act deals with these issues in its Chapter 2, specifying that the prohibition of discrimination does not prevent measures undertaken to promoting equality between women and men in the following fields: working life (yet concerning matters other than pay and other terms of employment, Section 2), admissions to education (Section 6), membership in certain organisations (Section 11). The same applies to efforts to promote gender equality as well as equal rights and opportunities regardless of ethnicity in the fields of labour market policy activities (Section 9) and starting and running a business and professional recognition (Section 10).

In the field of employment, there is also some possibility for positive action measures to be taken in the case of applicants of the less represented sex, yet only in the areas of hiring, promotion and training for promotion, and under the strict condition that this is a part of systematic efforts to achieve equality, as set by the respective relevant laws on equal opportunities and ethnic/religious discrimination (*European Foundation, 2007*). On the basis of the framework set by the Equal Opportunities Act, the Higher Education Ordinance (1993) allows for the possibility that positive discrimination measures are applied by higher education institutions in their efforts to promote gender equality in the field of recruiting. According to Section 16 of the Ordinance, an adequately qualified person from the underrepresented gender may be given an appointment instead of the person of the opposite gender who would have been appointed otherwise, yet only if the difference in the persons' qualifications is not so great as to contravene the requirement of objectivity. For instance, in its procedures for the appointment of teaching staff, Lund University gives advantage to candidates of the underrepresented gender (Lund University, 2002). Umea University has also allowed the application of positive discrimination in the appointment

¹³¹ Ibid.

¹³² These requirements are also contained in the new Discrimination Act (Chapter 3, Sections 4, 6 and 7 respectively).

of professors, senior university lecturers, university lecturers and research assistants (Umea University, 2006) in order to achieve gender equality (Section 3.7).

In addition, some Swedish legal experts consider that the current antidiscrimination legislation allows for positive action measures for persons with disabilities, as it does not protect persons without disabilities from discrimination (Lappalainen, 2004).

The Swedish Government is also considering the introduction of a 'gender equality bonus in the parental insurance system' to encourage men to take more parental responsibilities with children under one year of age, as well as to share domestic duties with women (CERD, 2007). In reality, such bonuses are already a practice in numerous Swedish companies, particularly in Stockholm.

9.2.4. Are any forms of positive action prohibited by legislation?

At the moment, no positive action measures are allowed for any ethnic group in Sweden (DO, 2003). Quotas in particular are not permitted according to Swedish legislation, not only on grounds of ethnicity but with regards to any discriminated group. There are several court cases which fortified this principle. For instance, in 2003, Uppsala University decided to award 10% of its student places in the Law School to applicants of foreign background, in an attempt to remedy the situation where no more than perhaps 3% of persons of foreign background are employed within the Swedish court system. In January 2004, the university was taken to court by two unsuccessful ethnic Swedish applicants, and finally in December 2006 the Supreme Court of Sweden decided that such measures were unlawful.¹³³ The court found that the University's practice violated the ban on direct discrimination of the Equal Treatment of Students at Universities Act (2001), and that the Act's general exception regarding discrimination "did not [...] cover 'strong' positive action, i.e. giving preference to somebody with inferior merits" (European Network, 2007).

In another relevant case, the universities Orebro and Karlstad had also practised positive action for men applying for studies in areas with predominantly female students in 2005. The universities were taken to court regarding these practices, and following the 2006 Supreme Court decision on Uppsala University, the relevant district courts found their policies illegal (Holmlund, 2007). These decisions came as a warning to a number of other universities which considered implementing similar measures to diversify their own student body.¹³⁴

The Court of Justice of the European Communities also upheld the principle that quotas on any grounds are not lawful. In their 2000 judgment in the case *Abrahamsson and Anderson v. Fogelqvist*, with regards to the hiring procedures at a Swedish university, the court regarded

that positive action such as giving automatic preference to female candidates, in hiring procedures involving better qualified male candidates, violates the EC laws.¹³⁵

9.3. Interview findings

This section provides an overview of the findings from the interviews conducted in the course of this research, as well as the documentary materials provided by interviewees.

9.3.1. Data collection

This report is based on desk research as well as the information received by means of 48 personal interviews carried out by ERRC staff. Fifteen interviews were conducted on the phone, with persons based in Goteborg, Linkoping, Lund, Osterson, Stockholm, Umea, Vasteras, and Visby. Additional personal interviews were conducted with 33 persons in Stockholm and Uppsala. The interviewing thus covered a wide range of geographical area from the south to the north of Sweden, providing for a variety of locations that the information came from. The interviewees also came from diverse sectors of society - private and state-owned companies, state and municipal institutions, public services, educational institutions, trade unions and non-governmental organisations (NGOs), including persons from disadvantaged groups. The interviews were conducted using an interview guide produced within the project; where applicable, depending on the profile of the interviewee, the questions from the legal analysis template were also used.

9.3.2. Data analysis

The data collected in the abovementioned interviews was subsequently analysed around the themes previously agreed on within the project; understanding of positive action; impetus for positive action; effectiveness of positive action; and impact of positive action. This was to ensure consistency.

9.3.3. Findings

What follows is a presentation of the main findings of the interviews conducted by the ERRC on positive action measures in Sweden.

Understanding of positive action

'Positive action' is not a commonly used terminology in Sweden, and it is certainly not used in the relevant legislation, which speaks about 'active measures' and 'positive discrimination'. Most of those interviewed in the course of our research were unable to technically define positive action: it was considered a very complex issue for which it is quite difficult to provide a pinpoint definition. There was also a feeling of confusion, to some extent, as on the one hand, Swedish legislation and policy urges for achieving equality by taking active measures, yet on the other hand it also imposes a number of bans and restrictions, including a restrictive case-law. One interviewee regarded that positive action is 'something that is not only difficult, but almost impossible to do in Sweden.' However, the perceptions

¹³³ Swedish Supreme Court judgment T 400_06, *The State v. Lonn and Midander*. The text of the judgment is not available in English.

¹³⁴ The judgments on these cases are not available in English, and the available secondary literature in English does not specify whether Swedish courts have developed any criteria for testing the legality of positive action measures.

¹³⁵ For an overview of the case, see: <http://www.equalrightstrust.org/ertdocumentbank/Abrahamsson.pdf>.

of positive action measures in general were overwhelmingly positive.

Many interviewees' understanding of positive action related to Swedish society and its democratic political system, and it is considered to be 'a question of democracy to have all voices included'. In the opinion of many, Swedish society is not yet inclusive. For some interviewees, positive action is a human rights issue: a tool to use in standing up for human rights, and giving disadvantaged groups a real opportunity to enjoy their rights. Often, the understanding of positive action was directly related to the position of disadvantaged groups; in the words of several civil society activists, it is a way of dedicating special attention and giving special advantage to disadvantaged groups, in order to enhance their well-being and improve their livelihood. Positive action is also seen as a pre-emptive tool to prevent discrimination before it takes place, and to change the power balance and structures which cause discrimination.

With those working in the public sector, positive action was often considered as a matter of "working with both legislation and attitude towards a public service that is better for all people in Sweden.' In some cases, it was perceived as complementing other on-going discussions, such as the general long-term work on ethical issues in the case of law enforcing agencies, or corporate social responsibility in the case of businesses. In the private sector, the understanding of positive action was sometimes reduced to a 'question of human resources', yet at the same time there were companies insisting that positive action measures are an issue for the whole company, and not only their personnel management. Some businesspersons interviewed also spoke about positive action as an asset, in terms of being "a tool for competition, which gives us the edge over other companies."

Positive action was also spoken about as a necessity in order to address 'evident under-representation' of some groups. A public official expressed concerns about the omnipresent image of 'blue eyed, blond haired Swedes' which is hard to tackle, and which also forms the basis for the constant application of terms and corresponding policies referring to 'foreigners' and 'immigrants,' even though in some cases these persons are already the second or third generation of their families living in Sweden. There were also concerns that even positive action measures can be racialised, and that diversity can sometimes in practice mean simply 'hiring someone from Denmark or Norway.'

The history of importance given to equality in Sweden was also mentioned as an important factor when it comes to understanding positive action in Sweden. On the other hand, this was not necessarily perceived as a stimulus, as many of the interviewees thought that positive action was often seen as working *against* the principle of equality: with the need to 'treat everyone in the same way' often raised by opponents of positive action. A company contacted during the course of the research insisted that 'race, gender or name is unimportant, and it is the individual capacity that matters'. Some officials also spoke about their support to dropping) the idea of not giving any special treatment

to any group'. Further, there is a widespread belief that Sweden is very accomplished in terms of equality and by any means, 'a world leader in human rights'. Requests to take further steps were, therefore, seen as preposterous.

Most of the interviewees' understanding of positive action measures placed them in the context of employment, as, for example, 'all sorts of soft measures to help people get into the workplace'. A Roma activist also expressed concerns that positive action measures are very much needed for Roma in Sweden in all fields, but especially so in relation to employment and education.

Some interviewees also understood positive action as necessarily having to follow fairly substantial practical plans as well as the need of setting certain goals and making sure that these are carried out. Several interlocutors stressed that positive action always needs to be translated into practical work and very concrete tasks for staff, and also the need for continual education and training in this field. The interviews also indicated that there is a perception of improvements in achieving the goal of positive action, with the situation changing for the better and gaining more importance, followed by an increasing demand for more information on positive action.

With regards to types of positive action measures taken, many interviews touched on examples of targeted recruitment, for instance companies targeting women applicants for vacancies, or universities recruiting disabled students or students from non-academic backgrounds to apply. In a number of cases, training and leadership development schemes were implemented, particularly with regards to women employees. Target setting was also present, especially in terms of the representation of women in management, or the percentage of female professors in universities. Assistance in confidence building was also given: for example through communication courses for disabled persons, or Swedish language classes for staff of foreign background.

Mentoring schemes were implemented at a very high number of Swedish universities, benefiting various underrepresented student groups. There were also mentoring scheme implemented *by* students, who mentored children and high school students from disadvantaged urban areas, working class families and/or different ethnic background families. Some of the universities also championed diversity issues, for instance sexual orientation. There were also numerous examples of networks and forums used in positive action measures - supporting associations of women employees or LGBT employees, associations for disabled or LGBT university students, and forums such as diversity newsletters or websites for staff. Outreach was also a popular measure, especially, within the context of the legal bans on the quota system: a number of universities performed outreach efforts in high schools, trying to recruit 'diverse' students, by means of offering, for instances, information on support to students with a disability. There were also instances of special efforts made through the recruitment efforts of university staff, such as advertising in newspapers read by immigrants. In

a number of instances internships were given to young persons of foreign background or young persons with disabilities. Training on positive action was also given, especially in universities.

The Swedish working environment is well known for the attention given to work/life balance, so examples of such measures were given often. These included companies conducting anonymous annual mental environment studies by external experts, with management discussing the results and deciding on the measures that needed to be taken. Various other types were also mentioned; for instance, ethnic minority candidates for police schools were given assistance in preparation for physical tests by means of organising it in areas with a significant immigrant population. Universities also offered courses on the cultures and religions of ethnic minority/foreign background 'country of origin' cultures. Surveys were conducted in the workplace on discrimination issues, which were followed up with adequate measures to tackle discrimination. Some universities offered course evaluations on equality perspectives, where course results sometimes indicated discriminatory attitudes. It is also important to note that some of the measures were taken across sectors: such as universities working with local authorities and secondary schools for better recruitment in predominantly immigrant areas, or formally contracting immigrant associations to promote the values of academic education among these groups.

Most of the initiatives discussed targeted women, which reflects the legal protection of gender equality historically present in Sweden. Many interviewees stressed this as something 'that Sweden is known for'. A small number of cases relate to measures targeting men. A number of schemes also targeted persons of foreign origin, persons with disabilities, or sexual minorities. Some initiatives addressed multiple issues: for instance, police programmes benefiting groups or individual victims of hate crime because of their ethnicity, religion or sexual orientation. Some universities worked on gender, ethnicity/race, and religious diversity, with the awareness that they should also include social class, or sexual orientation, within the limitations that resources forced them to focus on in these initial groups. A number of institutions mentioned the need to include age as an issue of concern as of 2009, because of the new anti-discrimination law, yet admitted they did not know how to handle it, which clearly indicates the need for authorities to provide guidance on the new law. Interviewees stressed the importance of this, indicating that there is much age discrimination and a common attitude that persons over 50 are not considered employable any more.

Some participants noted that society was relatively enlightened when it came to gender equality and measures promoting it, yet much less so for other groups. Africans and Middle Eastern Muslims, as well as persons with disabilities, were often mentioned as being at the bottom of this 'hierarchy' among disadvantaged groups. It is important to mention that there was also no positive action for Roma, especially in the labour market. Generally, the interviewees spoke about the lack of minority policy in Sweden, apart from cultural and language issues. Having ratified the Framework

Convention on National Minorities in 2003, and having officially recognised its national minorities only at that point, Sweden was considered to lag behind in this area.

Impetus for positive action

Most of the interviewees singled out Swedish anti-discrimination legislation as the main motivator to introduce positive action measures, stressing that 'the law obliges almost everyone to have an equal opportunities plan'. There was also mention of various government policy documents, requesting gender targets within management levels or having more persons of foreign origin within the workforce, or strongly urging people of foreign background, to study at universities. The effects of these were especially strong within public institutions. Yes, as some participants stressed, the law is extremely important, but after all it is, as one interviewee said, 'just a lot of beautiful words'.

Important factors informing positive action measures also included the institutional setting, as well as a committed management, in both the state and private sector. For many, this was a matter of company culture and personnel policy. Companies spoke about equality and diversity as part of their mission and essential to their long term vision, illustrated by their plans of action explicitly talking about these matters. The type of work conducted by the institution also played a role, as some interviewees saw clear connections between positive action and their work duties. For instance, police employees spoke about their duty 'to serve the public', and public health officials emphasized that their work is 'to always improve the well-being of the population'. Similarly, trade unions stressed that their mission is to create a good working environment, without discrimination, just like positive action measures, and university teachers saw the responsibility of undertaking such measures in the belief that universities should be both an example to society, as well as a mirror of society. All of the interviewees singled out the factor of management support, and quite often it was the dedicated female leader at the top who sent very strong signals of support. Sometimes board members were also initiators of relevant efforts. In a small number of cases, however, all the initiative and responsibility lay with individuals, who sometimes had little support from their supervisors or colleagues.

In the private sector, interviewees mentioned the issue of competitiveness: their actions were motivated by the wish to be 'as diverse as our society'. Some also mentioned the expectations of clients, saying that 'it is no longer acceptable to present a white male team'. Competitiveness in recruiting is equally important, as companies strive to be 'perceived as one of the best companies to work for'. This applies to the public sector as well and a human resources specialist at a state-owned company also spoke about their wish to be a modern and attractive company in this context. Municipalities are also motivated by competition and some municipalities in the north of Sweden, faced with the population drain, work hard on introducing various measures to make them a better place to live. Much of the motivation for positive action stems from the reaction to the obvious inequality in the current

situation and making it more representative and inclusive. Financial reasoning matters too, as exclusion is expensive. Positive action as a tool for achieving diversity was also a point often raised: companies wanted to have diverse staff profile within universities as diversity was seen to 'improve the quality of education.'

Due to the requirements of policy documents on action measures set out by Swedish law, most interviewees spoke about the wealth of policy evidence: equal opportunities policies and strategies, plans for diversity, disability or gender equality, reports on implementing measures and similar documents.

Target groups were consulted in setting up initiatives in perhaps only the half of initiatives. In the cases where target groups were involved, this was done by means such as conducting meetings and mini-seminars with beneficiaries of a training project, discussing issues and obstacles; interviews with female students before they entered the mentorship schemes; discussing a women only leadership project with successful female managers; consulting or working with NGOs, trade unions, or specialised employee networks within the institution. This proved useful in numerous ways, for instance, a Romani educator who was informally consulted in setting up a university course on Roma, also encouraged a number of persons to register for this course. For one participant, the main learning point from this consultation was that 'we have to open our doors to other people and values, and broaden our views'. Another interviewee stressed the need for readiness to take a different course and be open to other solutions when consulting target groups. A police project with minority groups proved that such consultation is needed not only to increase the number of reported crimes against minorities, but also to gain the confidence of minority groups. In another case, such consultation was an eye opener for the target group as well, as they themselves learnt something new.

Effectiveness of positive action

Most interviewees who had experience of implementing positive action measures thought that their efforts were fruitful and that positive action represented a good tool. Their effectiveness was praised and such measures were considered to be very important in achieving equality. Reactions of others were also mostly positive. This encouraged staff involved in positive action measures. One interviewee, nevertheless, cautioned that in her opinion positive action measures are not automatically effective and need to be applied properly. Another participant's experience was that positive action measures applied by the public service where she worked were half-way effective. Yet she stressed that she was very happy with even the little achievement they made.

The methods for evaluating the effectiveness of positive action measures varied. The most common one was the yearly evaluation report, prepared following the requirements of Swedish antidiscrimination laws. In many cases, special evaluations were additionally carried out with regards to specific projects. Some were very detailed: for instance, a large international company evaluated its programmes for women

employees by means of a thorough process using instrumental measures, performed by a company which specialised in this field. The company reports their yearly figures to the evaluators, who provide them with a feedback report, including parameters that serve as a base for the company's equal opportunities programme, and inform decision making on future goals. These measurements have been carried out for the last three consecutive years, and they are considered to be an important part of the process, as 'only what gets measured gets performed', in the words of the project leader. Other types of evaluation included internet-based evaluation forms that had to be filled by all employees affected, and their results were compiled into the information database. A number of relevant programmes included written evaluations for beneficiaries at the end of the process.

Monitoring numbers and percentages relating to disadvantaged groups, such as for instance the gender balance in the company, was widely considered as a very useful tool of measurement, for a number of reasons. Primarily, monitoring numbers clearly indicates improvement. For instance, an internship scheme placing young disabled persons in IT companies hoped that 50% of the trainees would consequently get jobs with these companies, and were thrilled to see that the final percentage was as much as 80%. A mentoring course at a university encouraging women graduates to stay at the university, resulted in having all but one programme participant beginning their doctoral studies at the university. At another university, the diversity programme leaders achieved the percentage of foreign background students target of equality from the immigrant population in the city (15-20%). In addition to showing improvement, numerical measuring also emphasised the work that still remained to be done: at a large state-owned company, there were 29% of female managers in 2004, and after applying gender equality measures the percentage grew to 35% in 2007. However, women are 39% of the workforce of this company, which serves as a reminder that more effort is necessary.

A number of initiatives, however, did not include an evaluation component; quite a few of them, nevertheless, are aware of this deficiency, and plan to measure the future effectiveness of their measures. In some cases, measuring was done, yet the results might serve as a discouragement. For instance, the leader of the initiative trying to attract more foreign background students to their university, received 18 possible contacts from the student adviser, after which he managed to contact eight, four of whom visited the university, where only two eventually applied, and they were not accepted. These, however, should not necessarily be seen as disappointing, as they are the result of circumstances unrelated to the measures themselves (such as the relatively small size of the town where the university is located).

In discussing the effectiveness of positive action measures, all the interviewees spoke at length about the many major barriers they were confronted with in the course of implementation. Primarily, it was stressed, positive action is not seen as a priority, not understood as bringing any benefits, and there is a lack of awareness of its worth. Sometimes interviewees had no

support from colleagues, or met with opposition from management, who regarded their equality obligations as mere formalities and preferred efforts to attain only as far as the level of satisfying the legislation. Some employees are reported to believe that they only need to fill up diversity quotas to have the 'immigrant alibi'. In one particular case, the supervisor of a woman of foreign background recruited in this way expected her to be grateful for this employment, and denigrated the qualities she had. Interviewees also mentioned dealing with old-fashioned attitudes, prejudice and stereotypes, and insistence on traditional long-established ways of doing things. There is also a problem of closed structures such as the police force, where no external recruitment is done, which allows little opportunity for change. Respondents also felt there was little trust in Swedish institutions by some communities, such as Roma or immigrants, whose past experiences made them mistrust the police and the judiciary, or who had negative experiences with police in their own countries.

Swedish legislation was also mentioned as an obstacle, as it bans data collection. This makes needs assessment more difficult in some cases (such as actions targeting ethnic/religious minorities), and prohibits positive action on ethnic grounds. Inventive methods need to be applied; in the words of a university teacher, 'We cannot give advantage to ethnic minority students in the admission process, but we can help these students once they get to the university.' The state was also criticised for not tackling non-compliance with the requirements for active measures. It was noted in this context that politicians are neither interested nor required to work on antidiscrimination issues, and it would be good to persuade them to want to work on equality issues.

The principle of equality was mentioned as a barrier in this context as well. Many of the interviewees were constantly questioned as to why only a particular disadvantaged group was chosen 'when we should all be equal.' 'It is hard to work on positive action in such a meritocracy as Sweden, where we are constantly reminded that only merits should count', said a university gender co-ordinator. Unclear messages about actions also caused harm, and there is a need to clearly communicate and spread the message on the actions and their aims. The employee of a private company raised the issue of related psychological and social barriers, namely how to deal with emotions of dissatisfaction created by implementing positive action in our organisations. Several minority activists interviewed also expressed concerns that positive action might have a negative side effect, stigmatising some, as 'groups that need help'.

Resources, in terms of personnel, finances and time were perceived as another important stumbling block. Positive action was sometimes observed as an additional obligation; a university employee mentioned that their teaching staff were already overwhelmed with courses and research obligations, and had little time to devote to diversity. While many universities and large companies had staff members specifically in charge of equality issues, this was not the case with a large number of smaller companies and institutions, where staff members would often be additionally burdened with diversity or equality issues. In the field of

recruitment, some interviewees complained that their companies 'fire more than hire', creating an environment where it is very hard to recruit more women or minorities. It was also emphasised that most positive action measures were undertaken as projects, and that there was a need for long term commitment, as achievements took hard work and time. Money was also often at stake, as positive action was also considered costly particularly in the case of positive action for persons with disabilities, where enabling physical access was seen to involve significant investments.

Some professional branches had specific issues. The interviewees working in the media spoke about heavy competition for coverage among different issues: positive action and disadvantaged groups were not necessarily the most attractive news. Some professions were faced with generally low interest for employment in their field, such as teachers, where diversifying the workforce was even more difficult. Educators also spoke of a great need for specialised staff, such as gender educators. Some interviewees found it hard to promote issues such as positive action with their management. In their types of businesses ethical issues were not considered important by clients, compared to, for instance, investment funds, where clients often raised moral issues regarding the use of funds. Smaller companies also found it more difficult to work on positive action measures in employment: 'Sometimes we see [positive action] done by huge companies, employing tens of thousands of people of very different educational backgrounds; we are a small company with mostly highly educated employees, and this makes it harder for us to diversify our workforce, compared to them.'

Nevertheless, 'obstacles are challenges too', as stated by an interviewee. When asked what makes a positive action measure successful, the following responses were given:

- an institutional environment that is ready for positive action, with approving and passionate management;
- an improved legislative environment, accompanied by political commitment;
- committing adequate human and financial resources;
- consulting and including marginalised groups at all stages;
- long term approach;
- good communication and focus on the advantages and benefits of positive action;
- working together with other sectors and other groups;
- good practices;
- persistence, patience and flexibility; and
- evaluation and analysis of its results.

Impact of positive action

Positive action was considered to have a positive impact by all the interviewees. It was also noted that in some

cases, such as larger companies, it was hard to achieve an impact over a short time. Here are some of the statements made to illustrate the impact of concrete actions undertaken by interviewees:

- Our project had an impact on (the radio) audience, but also our own perceptions.
- (The police) are performing better, as we are able to resolve more crimes.
- We are even able to spread out our knowledge, we gave a presentation of our women in leadership project to a delegation of Japanese business women.
- Our organisation as a whole became more open and knowledgeable of gay issues.
- Having a course on Roma at our university had a strong symbolic value; the mere presence of Roma at the university had a positive impact.
- Our employees feel energised about their work and their workplace.
- Positive action creates trust between beneficiaries and those implementing these measures.
- Positive action raised our awareness and increased our knowledge.
- You can save money and increase the quality of services/products if you implement measures towards equality.
- Our employees are more aware both of their rights and the need for diversity; there is more knowledge on the obligations under legislation; the numbers of female managers increase yearly.

9.4. Examples of positive action measures

Name of the initiative: *LGBT and hate crimes*

Sector/institution: Public / Stockholm County Police (SCP)

Reasons for the initiative: The Plan for Diversity and Gender Equality of the SCP includes active measures for working with minority groups. Additionally, the SCP wanted to increase the level of knowledge of their staff on LGBT issues and stimulate them to learn more.

Process: This is an e-learning project for all of the SCP staff members, developing their competence on hate crimes against the LGBT community, and based on the SCP intranet. The manuscript prepared by external experts was presented in a graphic manner, by means of a very modern method, including illustrations from real-life situations, such as school bullying of LGBT persons. It was implemented by the Personnel Development Department, and the process involved consultations with the Network of Gay and Lesbian Police Officers as well as the Swedish Federation for LGBT Rights. Additionally, the SCP also issued brochures on crimes in same-sex couples, for the public, with guidance on police protection given in these situations.

Outcome: The e-learning process took place from November 2007 to February 2008, and the course was completed by 95% of the employees. Better results are evident in resolving hate crimes, and the organisation as

- Diversity creates a healthy environment, a better work place, where people feel good, communicate better, and where creativity is encouraged.
- Positive action introduces people who bring a new experience to the company.
- Our positive action had an impact, we received positive feedback. and people expressed their satisfaction with our work and the studies we produced.
- Through positive action, our university gains an intellectual profit from broadening its sphere of recruitment.
- We meet client expectations of age, gender and ethnic background of staff.
- Our positive action created positive role models for others.

The interviewees also firmly stressed the benefits of positive action for their institutions/companies and the society as a whole. In the words of an interviewee, it was a 'win-win situation for all'.

In numerous cases, interviewees have made future plans for similar actions, with improvements: enlarging the scale of their activities; expanding it to other fields and other disadvantaged groups. As possibly beneficial for their work, they listed networking with other companies/organisations (especially if similar type and size); hearing about best practices and learning from others, even other states; and receiving suggestions on evaluation of positive action measures.

a whole became more open and knowledgeable when it comes to LGBT issues. Following the success of this project, the SCP intended to launch a new education project for their staff, this time on racism.

Name of the initiative: *Open Up*

Sector/institution: Trade union / SEKO tele Stockholm

Reasons for the initiative: The project stems from the realisation that many persons with disabilities remain on the margins of society, despite their competences. SEKO was also inspired by a similar disability project implemented at Telenor Oslo.

Process: This development project created a working scheme for young persons with functional disabilities, with the goal of finding them a place in the IT/telecom sector. The project also helped companies recruit from this group, as well as generally supporting them to get in touch with persons with disabilities who are users of their services. The project started in December 2005. A number of participating companies made trainee posts available, and the Public Employment Service supported recruitment and review procedures. Together with a job, the young employees also got a better social life.

Outcome: At the end of the project in July 2007, nearly 80% of participants got jobs in the IT/telecom field, which was considered a huge success. The feedback from the programme participants was very positive.

Name of the initiative: *University course on Roma history*

Sector/institution: Public / Sodertorns University, Huddinge

Reasons for the initiative: The course wants to address the lack of knowledge on Roma in academia, and especially among future educators. It aims to achieve social justice, and challenge the stereotypical notions of Roma.

Process: This is a 10-week optional course within the Teacher Education programme, open to all students, on Roma history and culture. Roma lecturers are invited to make presentations, and Roma activists and organisations are consulted on the course contents. Roma students do not have to meet the formal academic requirements in order to be eligible for this course. The course has high symbolic value as it introduces Roma to university (as both lecturers and students), and the university to Roma. The mere presence of Roma at the university is very important.

Outcome: This course has been taking place for three years now and in this year they have the highest number of students so far. Its impact is considered much larger than anticipated, and the evaluation scores by the students were very high. The students obtain a diploma upon completion, which can help them in their future careers.

Name of the initiative: *Women to the Top (W2T)*

Sector/institution: Private / Ohrlings Pricewaterhouse Coopers, Stockholm

Reasons for the initiative: The project addresses gender segregation in management levels. Women make up 57% of the total staff, yet constitute make only 17% of partners.

Process: The project to recruit more women to managerial positions. It was implemented from December

2003 to February 2005 in 15 private and public companies (including PwC) in Sweden. This was an international project which included similar projects in Estonia, Denmark, and Greece. Each company identified two managerial candidates, provided each candidate with a mentor from another company, and assigned a project manager who worked together with all the other participants. In addition, companies developed action plans towards getting more women into senior managerial positions.

Outcome: The candidates have made progress in their careers and thus are new role models for other women. The company has also advanced from policy statements to measurable targets. The next step will be looking into ethnic diversity.

Name of the initiative: *Appointment Rules for Teachers at Umea University*

Sector/institution: Public / Umea University

Reasons for the initiative: Achieving gender equality, in accordance with the requirements of the Equal Opportunities Act, and the possibilities given by the Higher Education Ordinance.

Process: The University Board gives yearly guidance on recruitment objectives for women and men. From 2006, 'Appointment rules for teachers at Umea University' allow for positive discrimination with regards to the appointment of professors, senior university lecturers, university lecturers and research assistants. Positive discrimination may be applied in these cases if one of the sexes is underrepresented. The decisions are made on a case-by-case basis, and must be formulated and justified in all the relevant case documentation.

Outcome: The rules are in application as of 2006. There is no information available on the practical scope of application of positive discrimination.

- Various obstacles follow the implementation of positive action measures.
- Still, the impact of positive action measures was mainly considered to be notably positive.

9.5. Key summary

The findings of the ERRC research on positive action measures in Sweden can be summarized as follows:

- The perception of positive action measures in general was overwhelmingly positive.
- The Swedish anti-discrimination legislation was the main motivator to introduce positive action measures.
- Other very important factors are the institutional setting/culture, as well as a committed management and the allocation of adequate resources.
- In most cases, implementing positive action measures was fruitful and it was considered a good tool for achieving equality.
- The methods for evaluating effectiveness varied: some were very advanced, however many of the initiatives lacked a formal evaluation procedure.

9.6. Implications for policy and practice and key recommendations

In order to make positive action measures a fully effective tool for achieving equality and eliminating discrimination in Sweden, the Government should take the following measures:

- Data protection law should be amended to allow the collection of data that can enhance positive action measures, under conditions that fully prevent any abuse of the data;
- The existing legislation should be amended so that positive action measures are allowed, clearly defined, and mandatory;
- The context of positive action measures should be expanded from education and employment to all other fields, from gender equality to benefits for all disadvantaged groups;

- Non-compliance with these requirements should be monitored and sanctioned, and the Ombudsman institution should be given a wider mandate in this;
- The state should provide adequate resources, as well as political commitment, to public institutions implementing monitoring positive action measures;
- The state should also provide adequate guidance and training on the implementation of positive action measures, especially regarding the new requirements of the forthcoming anti-discrimination law;
- The state should launch long-term campaigns to educate the public on positive action and its benefits, together with programmes combating negative stereotypes against disadvantaged groups;
- The state should make efforts to create a climate of trust between state institutions and disadvantaged groups;

The practical implementation of positive action measures, regardless of field, target group or sector, should take into account the following elements:

- Adequate human and financial resources need to be committed;
- Disadvantaged groups should be consulted and meaningfully involved at all stages of the process;
- A long term approach is necessary for achieving a long term impact;
- The focus in advocating for positive action should be on its advantages and benefits;
- Positive action measures can strongly benefit from cooperation with other sectors and other groups;
- Exchange of information and relevant good practices of others are an important learning tool;
- Successful positive action requires persistence, patience and flexibility;
- Evaluation of the process should always be conducted, and analysis of the results should lead to reviews of policies and follow-up measures.

References

Advisory Committee on the Framework Convention for the Protection of National Minorities, *Sweden: Second opinion*, 2008, last accessed on 23 Oct 2008, available at:

http://www.coe.int/t/dghl/monitorings/minorities/3_F_CNMdocs/PDF_2nd_OP_Sweden_en.pdf

Equal Opportunities Ombudsman, *Fact Sheet: Wage Differences*, 2008, last accessed on 23 Oct 2008, available at: <http://www.jamombud.se/inenglish/docs/Wagedifferences.pdf>

European Foundation for the Improvement of Living and Working Conditions, *Sweden: Positive Action / Positive Discrimination*, 2007, last accessed on 23 Oct 2008, available at:

http://www.eurofound.europa.eu/emire/SWEDEN/ANC_HOR-POSITIVS-Auml-RBEHANDLING-SE.htm

Government of Sweden, *A National Action Plan for Human Rights 2006-2009*, 2005, last accessed on 23 Oct 2008, available at:

http://www2.ohchr.org/english/issues/plan_actions/docs/Swedish2.pdf

Holmlund, Bertil, "Comment on Harry J. Holzer: The economic impacts of affirmative action in the US", *Swedish Economic Policy Review* 14 (2007), 73-77, last accessed on 23 Oct 2008, available at: <http://www.regeringen.se/content/1/c6/09/76/18/65b941f1.pdf>

Lappalainen, Paul, *Executive Summary on the Framework Employment Directive - Disability Discrimination Law*, 2004, last accessed on 23 Oct 2008, available at:

http://ec.europa.eu/employment_social/fundamental_rights/pdf/aneval/disab_sv.pdf

Lappalainen, Paul and Christina Johnsson, *Executive summary on race equality directive: State of play in Sweden*, 2003, last accessed at 23 Oct 2008, available at:

<http://www.migpolgroup.com/multiattachments/2312/DocumentName/sweden.pdf>

Lund University Teacher Appointment Regulations, 2002, last accessed on 23 Oct 2008, available at: http://www3.lu.se/pers/Regler/aolu02_en.pdf

Ministry of Education, Research and Culture, *Security, respect and responsibility: A summary of Government Bill 2005/06:38*, 2005, last accessed on 23 Oct 2008, available at:

<http://www.sweden.gov.se/content/1/c6/06/42/83/225ed051.pdf>

Ministry of Justice, *Sweden's report to the Council of Europe on the Framework Convention for the Protection of National Minorities*, 2006, last accessed on 23 Oct 2008, available at:

http://www.coe.int/t/dghl/monitorings/minorities/3_F_CNMdocs/PDF_2nd_SR_Sweden_en.pdf

Ombudsman against Ethnic Discrimination, *Discrimination against Romanis in Sweden*, 2003, last accessed 17 Oct 2008, available at:

<http://www.do.se/upload/projekt/romarapporteng05.pdf>

Preliminary results from the First report from the Swedish Discrimination Survey 2006, last accessed on 23 Oct 2008, available at:

http://www.ceg.ul.pt/metropolis2006/WorkshopPresentations/Culturgest/JoseAlbertoDiaz_metropolis2006.pdf

Swedish Act Prohibiting Discriminatory and Other Degrading Treatment of Children and Pupils, 2006:67, last accessed on 23 Oct 2008, available at:

<http://www.sweden.gov.se/sb/d/5822/a/64475>

Swedish Constitution, SFS 1974:152, last accessed on 23 Oct 2008, available at:

http://www.riksdagen.se/templates/R_Page_____6357.aspx

Swedish Equal Opportunities Act, 1991, last accessed on 23 Oct 2008, available at:

<http://www.jamombud.se/InEnglish/laws/theequaloppo rtu.asp>

Swedish Equal Treatment of Students at Universities Act, 2001:1286, last accessed on 23 Oct 2008, available at:

<http://www.jamo.se/inenglish/laws/equaltreatmento.a sp>

Swedish Higher Education Ordinance, 1998:1003, last accessed on 23 Oct 2008, available at: <http://www.cepes.ro/hed/policy/legislation/pdf/sweden.pdf>

Swedish Law on Measures against Ethnic Discrimination in Working Life on Grounds of Ethnic Origin, Religion or Other Belief, 1999:130, last accessed on 23 Oct 2008, available at:

http://www.do.se/upload/Fler_sprak/eda-english.pdf

Swedish Sexual Orientation Discrimination (Employment) Act, 1999:133, last accessed on 23 Oct 2008, available at: <http://www.homo.se/o.o.i.s?id=1226>

Swedish Penal Code, DS 1999:66, last accessed on 23 Oct 2008, available at:

<http://www.sweden.gov.se/content/1/c6/02/77/77/cb79a8a3.pdf>

Swedish Prohibition of Discrimination Act, 2003: 307, last accessed at 23 Oct 2008, available at:

<http://www.ho.se/upload/The%20Prohibition%20of%20Discrimination%20Act,%20nyaste.pdf>

Swedish Prohibition of Discrimination in Working Life of People with Disabilities Act, 1999:32, last accessed at 23 Oct 2008, available at:

<http://www.ho.se/upload/Prohibition%20of%20Discrimination%20in%20Working%20Life%20of%20People%20wi....pdf>

Umeå University, *Appointment rules for teachers at Umeå University*, 2006, last accessed on 23 Oct 2008, available at:

http://www.umu.se/personal/umu_internt/Anstallningsordningeng.pdf

United Nations Association of Sweden, *Alternative Report to Sweden's Seventeenth and Eighteenth Periodical Report to the Committee on the International Convention on Racial and Ethnic Discrimination, 2008*, last accessed on 23 Oct 2008, available at:

<http://www2.ohchr.org/english/bodies/cerd/docs/ngos/UNASweden73.pdf>

United Nations Committee on the Elimination of Racial Discrimination (CERD), *Reports Submitted by States Parties under Article 9 of the Convention: Sweden*, CERD/C/SWE/18, 7 May 2008, last accessed on 23 Oct 2008, available at:

<http://daccessdds.un.org/doc/UNDOC/GEN/G07/416/18/PDF/G0741618.pdf?OpenElement>

United Nations Human Rights Committee, *Sixth Periodic Report: Sweden*, 2007, last accessed on 23 Oct 2008, available at:

<http://daccessdds.un.org/doc/UNDOC/GEN/G07/456/75/PDF/G0745675.pdf?OpenElement>

10. PAMECUS Country Report: UK

The UK country report for the PAMECUS study was prepared by consortium members at the Centre for Inclusion and Diversity, University of Bradford. It begins with an analysis of positive action in this country in light of the current UK legislative framework followed by a presentation of the main findings that emerged from the pilot consensus workshop for the study which took place in Bradford and the UK consensus workshop which was held in London. We have also incorporated findings from the follow up interviews that took place with workshop participants in Bradford and London.

10.1. Context of positive action in the UK

Within the United Kingdom, the consequences of past discrimination are recognised in law and allow certain steps to be taken to improve levels of representation from women, ethnic minorities, gay, lesbian, bisexual and disabled people (Race Relations Act 1976, Sex Discrimination Act, 1975; Disability Discrimination Act, 1995; Employment Equality Regulations (Sexual Orientation), 2003). Together with these pieces of legislation, the statutory bodies (now rolled into a single equality commission, Equality and Human Rights Commission (EHRC), established by the government, advance the positive action provisions as it affects issues within their mandates. The Race Relations Amendment Act (2000) introduced a new requirement into the equality legislation in its bold pronouncement of **positive duty**, requiring public authorities to pre-empt unlawful discrimination before it occurs. This has been extended to cover the disability equality duty (DDA 2005) which came into force in December 2006 and the gender equality duty (Equality Act, 2005) which took effect in April 2007. This takes the law a step further from previous legislation by requiring organisations not to simply *avoid doing something*, such as avoiding unlawfully discriminating on racial grounds, but to be *proactive* in promoting equality. This means that institutions must take steps to ensure that their policies and practices are fair and lawful from the outset. This has strengthened the need for transparent positive action measures for realising equality of opportunity in the workplace.

Whilst these legislative mandates, which have been developed over the last 40 years, have helped to create and respond to change in society and to promote civil rights and equality, inequality and discrimination persist today. For example:

- The gender pay gap, though down from 17.4% in 1997, still means that a woman's full time pay is on average 12.6% less per hour than a man's. Women working part time are paid around 40% less per hour;
- The rate of employment of disabled people has risen from 38% ten years ago to 48% today, but if you are disabled, you are still two and a half times more likely to be out of work than a non-disabled person;
- If you were from an ethnic minority, in 1997 you were 17.9% less likely to find work than if you were white. The difference is still 15.5%;

- 62% of over-fifties feel that they are turned down for a job because they are considered too old, compared with 5% of people in their thirties;
- 6 out of 10 lesbian and gay school children experience homophobic bullying and half of those contemplate killing themselves as a result.

(*Framework for a fairer future - The Equality Bill, 2008*)

There is widespread recognition that the problem of discrimination will not disappear on its own and that appropriate strategies are required in order to nurture a workforce that comprises a variety of talents and reflects the diverse community being served (DH, 2003; AUT, 2004; Archibong, 2006, Archibong and Burford 2006). Indeed the current projections (Framework for a Fairer Future - Equality Bill, 2008) show that if progress is not stepped up:

- the pay gap between men and women will not close until 2085;
- it will take almost 100 years for people from ethnic minorities to get the same job prospects as white people;
- disabled people will probably never get the same job prospects;
- it will take 20 years for women to achieve equal representation in the Senior Civil Service; and
- it will take 80 years to elect a representative House of Commons.

In the UK, positive action policy has been put in place to redress disadvantage, eradicate discrimination and guarantee equal opportunity for every member of society. At present there is no legal definition of positive action (Archibong et al 2007), however key equal opportunities legislation allow employers to target specific groups (including women, disabled people and ethnic groups) in legally acceptable ways (NHS Employers, 2005).

10.2. Legal analysis

The legal analysis of positive action in the UK was undertaken using a template produced by the PAMECUS legal team. It addressed four key questions as follows:

10.2.1. Does legislation establish any positive action measures? E.g. mandatory quotas for disabled persons?

In relation to the law applying in Great Britain (England, Wales and Scotland), positive action schemes are not established by legislation, although there are obligations on public authorities to promote equality (see answer to question 10.2.2).

The situation is different in Northern Ireland. In 1989, the law on religious discrimination was significantly revised and it is now found in the Fair Employment and Treatment (Northern Ireland) Order 1998 (FETO).¹³⁶ In general terms, there are several key elements to the legal framework:

¹³⁶ SI 3162 (NI 21).

- Employers with more than 10 employees are obliged to collect data on the religious composition of their workforce, as well as job applicants.
- At least once every three years, each employer must review the religious composition of those who are employed and determine whether: ‘members of each community [i.e. Protestant and Catholic] are enjoying fair participation in employment’ (Art 55(1)).
- If there is not fair participation of both communities, the employer must determine ‘the affirmative action (if any) which would be reasonable and appropriate’ (Art 55(2)). The Equality Commission can require employers to provide evidence of the reviews that they have conducted. Ultimately, the Commission can direct an employer to take affirmative action and set for the employer goals, and timetables for changing the religious composition of the firm. These directions are legally enforceable.

In order to redress the substantial under-representation of Catholics in policing, recruitment to the Police Service for Northern Ireland (PSNI) is governed by a special legislative arrangement. The Police (Northern Ireland) Act 2000 establishes a “50:50” recruitment scheme. Applicants to the PSNI are first sorted into pools of qualified persons (i.e. those who have sufficient qualifications to be considered for appointment). Two pools are formed: one consists of Protestant applicants (and any other non-Catholic applicant); the other consists of Catholic applicants. For every person appointed from the Protestant pool of applicants, one must also be appointed from the Catholic pool.¹³⁷

10.2.2. Does legislation establish any obligations on public or private sector organisations to take positive action?

There are no legal instruments in Great Britain which oblige private sector organisations to take positive action.

With regard to public sector organisations, there are a range of legal obligations which place public authorities under a duty to promote equality. Whilst these might not constitute positive action *per se*, they establish frameworks within which public authorities can be expected to take positive action.

The first duty to promote equality was created in Northern Ireland. Section 75 of the Northern Ireland Act 1998 places public authorities under a duty to ‘have due regard to the need to promote equality of opportunity-

- between persons of different religious belief, political opinion, racial group, age, marital status, sexual orientation;
- between men and women generally;
- between persons with a disability and those without; and
- between persons with dependents and those without.’

Schedule 9 of the Act specifies that all public authorities are required to prepare an ‘equality scheme’ setting out the detailed arrangements for complying with the duty.

In Great Britain, the Race Relations (Amendment) Act 2000 introduced an amended section 71(1), which states that a public authority:

‘shall, in carrying out its functions, have due regard to the need

(a) to eliminate unlawful discrimination; and

(b) to promote equality of opportunity and good relations between persons of different racial groups.’

The general duty in the Act was subsequently supplemented by a series of legally-enforceable *specific duties* set out in the Race Relations Act 1976 (Statutory Duties) Order 2001 (No. 3458). In summary, these create obligations for public authorities to collect data relating to the ethnic origin of their employees and, in relation to education providers, students. Most public authorities must also prepare a *race equality scheme* explaining the organisation’s procedures for taking race equality into account in policy-making. The race equality duty has now been complemented by further duties on disability and gender.¹³⁸ Both follow a broadly similar structure to the race equality duty, although there are differences in their detailed requirements. The government has expressed its intention to introduce a single equality duty covering also the grounds of gender reassignment, age, disability and sexual orientation.¹³⁹

10.2.3. What forms of positive action are permitted, but not required, by legislation?

Most of the British anti-discrimination legislation provides specific exceptions for two types of positive actions in relation to employment. First, there are exceptions for ‘outreach’ measures.¹⁴⁰ These are steps designed to encourage participation in the workforce from under-represented communities: e.g. advertising a job in ethnic minority newspapers. Secondly, there are exceptions for training schemes. This allows employers and other bodies to provide targeted training schemes for members of under-represented groups, either for job-seekers or for those already in employment.¹⁴¹ In addition, the Northern Ireland legislation allows employers to adopt criteria in redundancy selection which might indirectly discriminate against the over-represented religious community (Art. 73 FETO). Employers in Northern Ireland can also limit recruitment to persons who have been unemployed for a specific period of time (this would indirectly discriminate against Protestants because Catholics are over-represented in the long-term unemployed).¹⁴²

In relation to positive action outside the employment sphere, two provisions can be highlighted. Section 35 of the Race Relations Act 1976 permits measures ‘done in affording persons of a particular racial group access to facilities or services to meet the special needs of

¹³⁸ The disability duty was created by the Disability Discrimination Act 2005 and the gender duty is included in the Equality Act 2006.

¹³⁹ Government Equalities Office, ‘Framework for a fairer future - the Equality Bill’ (cm 7431, 2008) p. 15.

¹⁴⁰ eg s. 37 Race Relations Act 1976.

¹⁴¹ Ibid.

¹⁴² Art. 75 FETO.

¹³⁷ Section 46(1).

persons of that group in regard to their education, training or welfare ...'. This has been used for a wide variety of schemes, such as nursing homes for particular racial groups.¹⁴³ In addition, the Sex Discrimination (Election Candidates) Act 2002 permits, *inter alia*, the use of women-only shortlists when political parties select candidates for elections.

It should be noted that the Disability Discrimination Act 1995 forbids discrimination against disabled persons, but there is no corresponding prohibition of discrimination against non-disabled persons. This means that no exceptions are needed to justify positive action for disabled persons as this cannot be challenged as unlawful discrimination against non-disabled persons.

10.2.4. Are any forms of positive action prohibited by legislation?

With the exception of disability, anti-discrimination legislation applies in a *symmetrical* fashion. This means that positive action measures designed to assist groups vulnerable to discrimination (such as women, ethnic minorities, religious minorities) may constitute unlawful discrimination against members of the advantaged group (e.g. men, White British, Christians, etc). Unless it is protected by the specific statutory exceptions described above, positive action is vulnerable to legal challenge as direct or indirect discrimination. For example, *Lambeth v Commission for Racial Equality*¹⁴⁴ concerned a Council district where over half of all tenants were Afro-Caribbean or Asian. In order to make the housing service more sensitive to the needs of minority ethnic communities, the Council reserved certain posts for minorities. In relation to those posts which did not involve substantial contact with the public, this was held to constitute unlawful direct discrimination.

10.3. Findings from consensus workshop and interviews

This section presents the findings from the two UK consensus workshops and interviews undertaken with a selection of workshop participants. In addition, we provide an analysis of the documentary materials provided by workshop participants relating to positive action policies and practices within their respective organisations.

10.3.1 Data collection

Two consensus workshops took place in the UK. The first workshop was conducted on 10th July 2008 in Bradford and as the UK was the first country to organise its workshops, the first workshop served as a pilot from which we were able to check how smoothly the process of data collection took place and ensure that any lessons learnt were transferred to workshop facilitators in other countries. The pilot workshop was attended by 18 participants drawn from health, education (further and higher), business and voluntary/community sector organisations. An additional UK consensus workshop took place two months later in London on 24th September and

was attended by 33 delegates from health, education and voluntary sectors, central and local government and the private sector.

10.3.2. Findings

In this section we present the main findings from the thematic analysis based upon the data we have collected from the pilot workshop for the study which was held in the UK, the UK consensus workshop which took place in London and eleven follow up interviews. As with all qualitative research, the interconnected and cross-cutting nature of the themes will lead inevitably to a certain degree of overlap and cross-referencing in presenting these findings.

Understanding of positive action

Whilst all interviewees perceived positive action to be closely linked to the mission of their organisation, their understanding varied significantly across sectors. There was a general consensus that positive action was an effective way to change organisational practices in order to redress former injustice experienced by historically oppressed minority groups. Several interpretations of positive action were offered. These included '*taking actions to encourage under-represented people to achieve*' and '*actions to give employment opportunities to disadvantaged groups*' within the education sector and '*self determined reparation for global justice within the voluntary sector*'. Similarly within the health sector, positive action was seen as an important way '*for patients to take charge of their health through community outreach, feedback from patient groups and use of language translation resources*'. It was felt that positive action could be undertaken within the context of an organisation, community, region or globally. Whatever the scale of the initiative, it was felt that positive action could not be undertaken in an ad-hoc manner but required careful planning, critical reflection and realistic outcome measures. At the same time there was an awareness that positive action needed to be introduced into organisations with sensitivity as one individual explained '*it can be seen as negative ... colleagues may see [it] as positive discrimination and question why it is required*'.

The majority of participants talked about the use of positive action as a strategy to achieve a more representative workforce with respect to all of the equality strands. For those from the health sector, being able to attract people from all sections of the community through positive action schemes meant that they could provide a greater '*skill mix of people in health and social care*' and improve the '*choice of key worker for service users and their families*.' Strategies to achieve a more diverse workforce included raising awareness of non-traditional areas of work, through conducting outreach work and organising Open Days in venues such as schools and Job Centres.

Training and mentoring for individuals already working within organisations was also mentioned as a means by which positive action could help individuals from minority groups progress to a higher level as one individual stated '*it helps to have a good role model in [the] community for young people [and] for mentoring*'. Within higher education, there was also an appreciation

¹⁴³ Para 4.23, Department for Communities and Local Government, *Discrimination Law Review. A Framework for Fairness: Proposals for a Single Equality Bill for Great Britain*, (Department for Communities and Local Government, London 2007).

¹⁴⁴ [1990] ICR 768.

of the need to provide appropriate support, therefore in their efforts *'to encourage women, especially students who want to start research, [we]find some women lecturers [to] lead them'*.

For one representative from the voluntary sector, positive action was a reflection of their commitment to advocacy and self-empowerment of Africans living in the Diaspora. For this interviewee, positive action involved training, education and imbuing into the community a sense of pride as global citizens. To this end, one of the programmes that this organisation was most proud of was *'promoting global citizenship and lifelong learning'*, which was devoted to teaching proper education rather than perpetuating mis-education about Africa.

As was the case with the pilot workshop, amongst participants attending the London workshop there were slight variations in the way people interpreted positive action. Positive action was seen as a measure used by organisations to compensate for past discrimination suffered by groups who were described as *'marginalised'*, *'socially or economically disadvantaged'*. It was acknowledged that as a tool, positive action could help to create a more balanced and equal society through identifying unnecessary barriers and taking steps to eliminate them. Furthermore some participants emphasised the need for organisations to take a proactive approach in terms of identifying evidence to establish positive action and to implement appropriate measures. As such, carrying out *'impact assessments'* was felt to be an important way of ensuring equal outcomes.

Most people talked about positive action in relation to the recruitment and employment of disadvantaged groups rather than improving service delivery. Initiatives such as mentoring programmes and targeted management schemes were mentioned as ways in which organisations were attempting to improve the profile of their workforce. Our review of organisational policies also highlighted the importance placed upon targeted activity, particularly in relation to the recruitment of new staff. The following three examples reflect this shift in approach. First, when advertising posts a charitable organisation providing educational, care and employment services for people with complex learning disabilities stated that it was necessary to consider the most appropriate media to use *'particularly where there was under-representation of certain groups in the area in which a particular vacancy was based'*.

Similarly, as part of its anti-racist strategy, a public sector organisation had started to address the under representation of staff at various levels within the organisation by providing training in positive action to managers involved in the recruitment and selection process. Alongside this move, the organisation had made a concerted effort to ensure that the required monitoring systems were in place to comply with the requirements of the Race Relations Amendment Act 2000. This has helped to highlight where progress in meeting targets has been most marked within the organisation. Finally, a large public sector organisation that was having difficulty recruiting from its local Bangladeshi population, had developed strong links with

a skills brokerage service to help in its efforts to create a more representative workforce.

To a lesser extent, positive action was viewed as a way of targeting services to meet the needs of particular groups more effectively, particularly in relation to health. In this respect, the push within the National Health Service for individual patient profiling was seen as an example of implementing positive action in order to deliver more responsive health services. Also within the public sector, a local council had set up an employment service, one of the aims of which was to provide support for increased independence for disabled people. This initiative was funded through a variety of European grants and ran in partnership with local employers, a local authority, a health trust, Jobcentre Plus and the Learning and Skills Council. It was emphasised that staff running this initiative were trained to a high level of competence to identify barriers to employment for clients, and to deliver appropriate guidance about overcoming barriers

In addition to these initiatives, examples of positive action to improve service delivery were also witnessed within the voluntary sector. According to the director of one organisation supporting the provision of play facilities, there was evidence to suggest that its commitment to equal opportunities was not simply based upon the formulation of a policy but that this policy was implemented and used to identify where changes in service provision needed to be made in order to meet the needs of local communities. Strategies to achieve this included undertaking research to identify potential barriers, conducting sustained and progressive outreach work, impact assessing existing policies and taking steps to create a more welcoming and affirming environment.

Impetus for positive action

A number of reasons were identified as to why positive action had been introduced within organisations. Public sector interviewees consistently attributed the impetus for implementing positive action within their organisations, to legislation which *'makes organisations ... stand up and seem to be committed'*. In addition, this drove the need for internal auditing of workforce diversity. For example, an interviewee from the further education sector attributed their positive action strategy on staff progression to the analysis of data which highlighted the underrepresentation of black and minority ethnic groups at senior management level. Data generated as a result of meeting legislative guidelines therefore was being used to inform college policy and practices.

Similarly, an interviewee from the health sector tied their strategic corporate mission to elements of the Race Relations Amendment Act 2000. This piece of legislation coupled with leadership commitment were the drivers for implementing a particular *'mentoring of race equality action scheme'*. The scheme was described by the interviewee as *'one my organisation is most proud of'*. According to the interviewee, the Chief Executive Officer sat on the panel which supported this scheme as well as a wide range of stakeholders, such as the Equality and Diversity Manager, community and

carer representatives and members of disability and black and minority ethnic groups.

In addition to legislative requirements, the prospect of improving organisational business performance was also seen as a major driving force for the implementation of positive action measures. For some organisations positive action was also a logical extension of their corporate responsibility, something that linked closely to their organisational mission. Even so, it was sometimes down to the efforts and commitment of specific individuals within an organisation that ensured that initiatives were able to meet their objectives. In this way, an interviewee based in a primary care health setting, often went out of her way to engage the community through outreach work outside regular working hours. When asked why she went beyond her call of duty, she attributed it to her own '*passion to help patients*'.

For some individuals within the public sector there was a strong feeling that a top-down approach to implementation had been adopted whilst others described how their organisations had been infused with ideology underpinning positive action at all levels. In contrast, within the voluntary sector the impetus for a positive action project came more from grassroots movement fuelled by dissatisfaction with the existing status quo and a desire for change in the way certain groups were being treated within society.

As was the case in the pilot workshop, legislation was not mentioned as a major driver for positive action by participants attending the London workshop. Some individuals mentioned the need to undertake positive action in order to comply with legislation such as the Disability Discrimination Act whilst others recognised its importance in order to avoid '*the potential for expensive tribunals*.' The fact that some of these organisations were now undertaking ethnic monitoring also meant that they were more likely to be alerted to imbalances within their workforce which would need to be addressed.

For many of the public sector organisations attending the London workshop, considerable stress was placed upon the need to implement positive action in order to '*practice what we preach*' and '*ensure public confidence in the service*'. Furthermore, some of these organisations had established diversity policies and a strong corporate image promoting fairness and equality which the use of positive action measures helped to reinforce. Within the health sector in particular, positive action strategies were seen as a useful way to build up greater trust with local communities through targeting recruitment strategies at underrepresented groups. In addition, a primary care trust manager talked about how this was being achieved with accreditation through schemes such as 'Two Ticks', 'Stonewall Diversity Champions', 'Mindful Employer' and 'Age Positive'. Within the private sector, there was similar recognition of the need to change existing practices to be better placed to respond to the needs of local populations. Positive action was seen as an important way of attracting individuals drawn from local communities to work for businesses because of the insight and understanding they possessed about

customer needs. At the same time it was felt that the visual impact of a diverse workforce attracted a wider customer base and by doing so, improved the company's performance.

Effectiveness of positive action

The effectiveness of positive action as a tool to achieve sustainable change was unquestioned but appeared to be dependent upon a number of wider variables.

As stated earlier, given that positive action can be seen to have negative connotations, interviewees felt that organisations needed to communicate clear messages about the aims behind introducing such measures and how they would be operationalised in practice. Embedding positive action within the philosophy of an organisation with a genuine understanding and acceptance of its importance amongst all staff was considered to be key to successful application of positive action measures. Equally, it was felt that there needed to be a strong commitment and willingness within the workforce to change the existing organisational culture in order to achieve change. This was reflected by the comments of a representative from the health sector: '*There are about 60 initiatives in my organisation, but they are add-ons ... [needs to be] strategic engagement with BME ... it needs to be done along with changing peoples' value and attitudes.*' In summary, the ethos behind positive action was that it needed to be taken on board wholeheartedly.

For one individual who worked within the voluntary sector in the past, it was the fear of empowering one particular ethnic group that had acted as a barrier to implementing positive action measures targeting this community. Consequently, it was felt that groups being targeted through positive action needed to have some sense of ownership of the initiatives that were in existence through ongoing involvement with the projects.

On the whole, individuals were not able to provide a lot of information about the monitoring systems they used in relation to positive action. Within the public sector, there was greater appreciation of the need to provide evidence for the effectiveness of positive action initiatives; otherwise there was a danger that organisations would lose momentum to continue using this approach. For one individual working within the health sector, the response to implementation of any positive action scheme was that '*if it can't be measured, it can't be funded.*' An interviewee from the further education sector whose organisation engaged in recruitment efforts geared toward attracting black and minority ethnic students onto non-traditional courses, explained how monitoring progress in this area had led the college to win a regional award for engaging hard to reach communities.

In contrast, within the voluntary sector, one organisation had found it difficult to measure whether any change had come about as a result of their positive action project. To the extent that the organisation met the expectations of the community being served however, their efforts to empower people were described as effective. When asked how these efforts were measured, the interviewee stated that their

organisation did not rely on formal instruments used by large organisations for measuring success; rather their approach was based upon grassroots' accountability.

Participants attending the workshop in London also felt that positive action had the potential to be effective but cautioned that this was dependent upon certain factors. Organisational commitment and leadership were both considered to be vital ingredients for positive action to work, as one participant explained, 'it needs passion, hearts and minds.' This was exemplified by the mixed results achieved by the fire service where at the national level they were not managing to meet their recruitment targets but at one of their 46 stations, their target for recruiting from the local population had been met.

Having a sophisticated understanding both of the concept of positive action as well as the communities being targeted, was also considered to be crucial. One individual pointed out however that consulting with communities to engage them in positive action projects was not always possible. Some voluntary organisations highlighted the difficulties of collecting accurate information as *'during monitoring some people might be reluctant to state their sexual orientation.'*

Within organisations, the availability of resources for training and awareness building was also thought to be important in order to create a shared understanding of positive action. Participants from both the private and public sector talked about the danger of positive action schemes being tokenistic and the problem of 'the revolving door' whereby no real organisational change occurs and beneficiaries of positive action lack adequate support once a project comes to an end, in turn leading to attrition within the workforce. Conversely others pointed out that positive action 'can have negative ramifications for those not given those advantages', therefore it was stressed that positive action needed to be explained as a temporary measure which would no longer be required once a level playing field had been achieved.

Organisational leadership and commitment were also seen as key. For one individual who worked in the health sector, the current mandatory status of positive action in the UK was problematic, as was the observation that positive action was *'not strategically co-ordinated at national/sector level other than consciousness raising.'* A representative from the voluntary sector also described positive action as a *'conceptual mess'* and suggested replacing it with the term *'balancing measures'* as a definition that she felt would make it more easily understood and acceptable to the general public.

Impact of positive action

Within the pilot workshop, there were mixed results in terms of assessing the impact of positive action strategies across organisations. It was apparent that not all organisations felt confident about discussing the impact of their initiatives due to a lack of clarity about what their expectations had been from the outset in relation to their respective project outcomes. A number of groups had clearly benefited from the positive action programmes in the UK pilot workshop. Those that had

been identified as benefiting most included black and minority ethnic groups, women (particularly women of South Asian origin). However lesbian, gay and bisexual people were deemed to have benefited least from positive action initiatives. The groups focused on were driven mainly by local community needs, government grants geared towards underrepresented groups within organisations or internal audit within organisations. For representatives from the voluntary sector nevertheless, the worry remained that positive action schemes signalled no long term commitment towards achieving equality and asked *'How many black people are retained through years of "window dressing"?''*

While the majority of individuals felt that positive action was having a desirable impact, those who believed so couched their optimism with a degree of caution as most of their organisations had no clear mechanisms in place for assessing the effectiveness of their positive action initiatives. Hence, positive action initiatives related to employment were generally perceived to have had a beneficial impact in terms of improving peoples' chances of finding a job within organisations and helping to increase promotion prospects. In the health sector, one individual commented that positive action was beneficial in that *'black and minority ethnic staff started to go on courses where only white colleagues ... participate previously; and can now move on to bigger and better things.'*

Similarly in relation to service provision, changes to patients' lifestyles, wellbeing and access to healthcare services were considered to provide sufficient evidence for the success of patient education through outreach work with black and minority ethnic patients, (including recent immigrant communities from East Africa) in the Midlands. In addition the possibility of using positive action to introduce alternative psychological therapeutic approaches to treat minority ethnic groups was also considered to be a positive off-spin within the National Health Service.

On the whole, participants attending the workshop in London who had undertaken some sort of targeted action felt that this had had a positive effect, albeit limited. Most people mentioned the growth of staff networks, mentoring schemes and changes to the composition of the workforce. For example, positive action had *'encouraged black and minority ethnic groups to gain promotions [and had created] harmony amongst staff.'* It was felt that the introduction of positive action schemes to improve the recruitment of underrepresented groups into the workforce had been successful in providing access to employment opportunities at the lower grades within organisations, but less so within the higher levels.

A number of positive action projects that aimed to provide services in a more equitable manner were also thought to have met their aims. These projects tended to be health related projects targeting specific black and minority ethnic groups. Other service improvements that participants associated with positive action, included the transition to more localised health services and the introduction of interpreting provision within maternity services. The absence of any system to monitor the impact of positive action within the

organisation made it difficult for some individuals to say with any certainty whether any change had taken place. This was considered to be more of a problem for those working in the voluntary sector.

There was widespread agreement that positive action initiatives were more likely to get off the ground with involvement from the target group itself. In this respect, the Jewish community were identified as a highly organised group that had managed on a consistent basis to secure projects in order to further their specific needs. A participant from the health sector also provided the example of a group of Tamil parents who had managed to set up a bilingual advocacy service as a positive action project through their sustained involvement in a health project that was already established. A negative consequence of positive action within some organisations was a backlash from employees who did not understand the rationale behind positive action and saw positive action as 'favouritism' towards particular groups. Such was the case within a museum that had organised recruitment fairs and training with a view to up-skilling particular groups for specialist posts.

It was also noted that not all groups had benefited from positive action to the same degree. Disabled people were perceived to be the group that had benefited the most from positive action. The prescriptive nature of the statutory legislation in relation to disability, coupled with widespread acceptance within society of the disadvantages faced by disabled people, were felt to be significant factors. By the same token, it was thought that society would be less likely to challenge positive action set up for this group. Other groups identified as benefiting from positive action were women and black and minority ethnic groups who were thought to be more visible in non-traditional areas of work. Few individuals felt that the position of lesbian, gay and bisexuals had improved greatly through positive action programmes and transgender individuals were thought to have benefited the least. Some participants from the health sector talked about the difficulties faced by transgender nurses in applying for promotion within their organisation, mainly as a consequence of hostile attitudes displayed towards them by other employees. It was apparent that their status was currently unclear and that legislation was needed to clarify this issue.

10.4. Examples of positive action measures

Name of the Initiative: Black Leadership Initiative
Sector/institution: Public sector: Further Education College
Reasons for the initiative: As part of its efforts to achieve a more representative workforce in relation to disability, gender and ethnicity, the Race Equality Action Plan for the college identified an under representation of black staff at senior management level within the organisation.
Process: A programme to provide mentoring for black staff in the further education sector was set up to help them advance in their career paths. Some of the impetus for this initiative came from the Network for Black Managers which is an established forum that challenges racial inequality within the further education sector. Members of this network currently meet regularly and make presentations to minority ethnic staff based at the college.
Outcome: College restructuring took place two years ago and involved working with the Network for Black Managers to recruit more minority ethnic staff as well as to make recommendations.

as the Learning and Skills Council that are compliant with the legislation. There are also financial incentives for the organisation to recruit more disabled students onto courses as all these students have financial weighting attached to their disabilities.
Process: Recruitment and selection procedures are in place to encourage people with disabilities to apply for positions within organisation. There is a guarantee of an interview, once the minimum requirements are met by applicants.
Outcome: Comparisons are made by the Personnel department on a regular basis with figures held by the local authority to assess whether applications reflect the proportion of disabled people in the local population.

Name of the Initiative: Creating a more representative workforce
Sector/institution: Voluntary sector: Charitable trust
Reasons for the initiative: The organisation provides educational, care and employment services for people with complex learning disabilities and other disabilities. The Disability Discrimination Act and related legislation triggered the need to boost the number of disabled people in the workforce. Although the organisation is not a public sector organisation and therefore not beholden to its duties, it works with public bodies such

Name of the Initiative: Improving recruitment of people of Chinese and mixed ethnic background into the health service
Sector/institution: Public sector: Primary Care Trust
Reasons for the initiative: The Trust is committed to becoming an employer of choice and embedding equality into all its policies. It undertook a 'data cleanse' exercise in relation to its workforce in 2007 which provided a breakdown of the workforce by the different equality strands. The results of this exercise provided the Trust with an evidence base from which to set workforce targets. The Trust also introduced a number of initiatives to improve the representation of underrepresented groups into the workforce, including specific ethnic groups.
Process: In order to attract more applicants of Chinese and mixed ethnic background, job vacancies were emailed to 300 community organisations and also distributed through the organisation's weekly bulletin. A national website 'Ethnic Britain' was also used to advertise 80 posts. In addition guidance for potential applicants on how to access NHS jobs was translated into different languages.

Outcome: Workforce targets are reported on at the end of the year and those targets that are outstanding are rolled onto the following year's targets.

Evaluation: It was highlighted that the online process of filling in application forms for NHS jobs was far from straightforward.

organisation also teaches skills for overcoming day to day challenges, emphasises indigenous self-knowledge systems and encourages people to unify around a belief in common, human dignity.

Outcome: The success of the initiative is evaluated through satisfaction of community members with the initiative, measured by feedback from individuals, audio interviewees and suggestion box type forms.

Name of the Initiative: Promoting Global Citizenship and Lifelong Learning

Sector/institution: Voluntary sector

Reasons for the initiative: The initiative was developed in response to a need expressed by members of the African community, particularly young people and women, to learn more about their own history and identity.

Purpose: To raise community awareness about social (in)equality, including subjugation and marginalisation faced by African people.

Process: The organisation runs programmes to help teach about the history of Africa as part of a continuum of struggle dating back to the era of chattel slavery. The

10.5. Key statements identified from consensus workshop grouped by theme

(a) Bradford 10 July 2008

Emerging theme	Key statements	Rank (score)
Understanding of positive action	• Positive action is about (action) acting upon, being proactive and bringing about change.	1 (7)
	• Positive action is about achieving social justice and social inclusion	3 (2)
	• Positive action must focus on outcomes and not be informed by an ideology	4 (1)
	• Positive action is contextual and has an element of human rights, especially within the context of historically oppressed groups.	
	• Positive action has to be believed in hearts and minds.	
Impetus for positive action	• Positive action requires critical reflection and sensitivity. It is also extrinsically driven by legal requirements.	
	• Organisations adopt positive action because it is a legal responsibility.	1 (7)
	• Because of grassroots movement resulting from lived experience (agitation for social change) and service users' expectations.	2 (4)
	• To be successful, positive action needs to be understood and defined, operationalised in practice.	3 (2)
	• Positive action can lead to a more representative workforce in terms of all equality strands.	4 (1)
	• Positive action is driven from the top-down through policy/legislative initiatives and corporate mission and vision.	
Effectiveness of positive action	• There is a middle ground between top-down and grass-roots initiatives, whereby positive action permeates and infuses all levels of the organisation.	
	• Positive action is effective, but requires sustained effort and a cultural change (paradigm shift) in attitudes towards such measures.	1 (10)
	• Positive action is effective in raising community aspirations (awareness towards social inequality).	2 (3)
	• Positive action can be effective if people are committed to it.	3 (2)
	• Positive action can be seen to have negative connotations.	3 (2)
	• Positive action is a perfunctory exercise involving tick boxes and is tokenistic.	4 (1)
Impact of positive action	• Difficult to measure, but it is an initial platform for positive change.	4 (1)
	• Positive action has had a beneficial impact in terms of 'getting in', 'getting on' and out.	1 (5)
	• We don't know if positive action has had an impact because we struggle to define success.	2 (1)
Groups targeted for positive action initiatives	• Positive action can have a negative impact because it creates negative values.	
	• <i>Groups most targeted</i> - Intersection of groups - women, especially South Asian women, black and minority ethnic groups.	
	• <i>Groups least targeted</i> - Lesbian, gay and bisexual people.	

(b) London 24th September 2008

Emerging theme	Key statements	Rank (score)
Understanding of positive action	<ul style="list-style-type: none"> Removing barriers for disadvantaged groups to create a level playing field in order to create a more equal society. Assessing the impact of services to ensure equal outcomes and extending those benefits. Positive action is proportionate action to achieve greater equality and representation. Assessing the impact of services to ensure equal outcomes and extending those benefits to others. Positive action is proportionate action to achieve greater equality. Positive action is about allocating resources disproportionately to provide fairer services. Positive action is compensation for disadvantage of marginalised groups. 	1 (14)
		2 (5)
		2 (5)
		2 (5)
		2 (5)
		3 (3)
		4 (1)
Impetus for positive action	<ul style="list-style-type: none"> Positive action reflects moral and political commitment as well as organisational ethos to reduce inequalities. Positive action is about creating a more representative workforce that is better equipped to meet the needs of service users. Legislation drives workforce diversity and service delivery to reflect needs of community served. Positive action is a legislative requirement. The impetus is leadership (i.e. passionate individuals, staff and community). Organisational strategy - addressing evidence of inequality; meeting the vision of the organisation. 	1 (15)
		2 (6)
		3 (5)
		4 (3)
		4 (3)
		5 (1)
Effectiveness of positive action	<ul style="list-style-type: none"> Essential tool to achieve real equality - what else is there? Yes, but needs to be evidenced based and requires buy-in at all levels. Yes, but must be understood properly and communicated. Yes, but requires real understanding of the concept and sophisticated understanding of communities. Yes, but contingent on leadership and commitment. Yes, but must be mainstreamed. 	1 (9)
		2 (8)
		3 (5)
		4 (4)
		5 (3)
		6 (1)
Impact of positive action	<ul style="list-style-type: none"> Positive action is easier when there is a greater capacity among recipients to lobby for measures and when buy-in from employers/public is great. Likely to happen where there is a tight focus. Examples of positive action now tend to extend beyond 'traditional' groups to cover all groups. There has been impact at low-level. 	1 (11)
		2 (6)
		3 (3)
		4 (2)
Groups targeted for positive action initiatives	<ul style="list-style-type: none"> <i>Groups most targeted</i> - Disabled people, black and minority ethnic groups and women. <i>Groups least targeted</i> - Transgender individuals. 	

10.6. Key summary

- Positive action is viewed as an effective and legitimate tool to bring about change within organisations.
- Legislative mandate is a key driver for compliance with the utilisation of positive action in the public sector.
- Many organisations recognised the value of positive action as a tool to help them create a workforce that would better reflect and respond to the needs of local communities.
- Strong leadership and commitment is required for positive action initiatives to be effective.
- Organisations are generally satisfied with the progress they have made through their implementation of positive action measures and could see the benefits.
- Organisations have no way of measuring whether positive action has achieved its aims; consequently a more robust system of monitoring, evaluation and impact assessment needs to be built into positive action programmes from the outset.
- The terms 'impact assessment' and 'positive action' are used interchangeably by some organisations, others see them as different processes but achieving the same goals.
- There are issues relating to disclosure for the gay population.
- Some organisations felt that sufficient effort had not been made to mainstream equality internally.

10.7. Implications for policy and practice and recommendations

- There need to be greater links between positive action and human rights legislation.
- Any positive action strategy should address the needs of the gay population.
- There needs to be greater clarification in relation to the position and rights of transgender people.
- Current legislation in relation to positive action in the UK is too narrow and needs to be aligned with EU legislation.

References

Archibong, U. (2006). Capitalise on Diversity (Editorial) *Multicultural Nursing* 1(4):3

Archibong, U. and Burford, B. (2006) Embedding Cultural Understanding in Leadership and Management *International Journal of Diversity in Organisations, Communities and Nations* 6(3): 1-8

Archibong, U., Giga, S., Ashraf, F., Bucktrout, A., Jackson, H., Baxter, C. and Johnson, M., (2007) 'Representational Diversity: The Experience and Interpretation of Positive Action' in *International Journal of Diversity in Organisations, Communities and Nations* 6 (5):191-200

AUT (2004). *The unequal academy: UK academic staff 1995-96 to 2002-03*. London: *Association of University Teachers*.

DH (2003). *Equalities and Diversity in the NHS -Progress and Priorities*. London: *Department of Health*. Available

at http://www.direct.gov.uk/en/DisabledPeople/RightsAndObligations/DisabilityRights/DG_4001070

Cited on 30/05/08

Disability Discrimination Act (1995). Accessed on 30/05/08 Available at http://www.direct.gov.uk/en/DisabledPeople/RightsAndObligations/DisabilityRights/DG_4001068

Disability Discrimination Act (2005). Accessed on 30/05/08. Available at http://www.opsi.gov.uk/Acts/acts2005/ukpga_20050013_en_1

Employment Equality Regulations (Sexual Orientation) (2003). London: TSO

Equality Act (2006). Available at: http://www.opsi.gov.uk/acts/acts2006/ukpga_20060003_en.pdf

Framework for a farer future - The Equality Bill (2008) Accessed on 30/05/08 Available at <http://www.publications.parliament.uk/pa/ld200506/ldbills/002/2006002.htm>

NHS Employers (2005). *Positive Action in the NHS*. Available at <http://www.nhsemployers.org/excellence/excellence-494.cfm>

Sex Discrimination Act 1975. (c.65) London: HMSO

Race Relations Act 1976. (c.74) London: HMSO

Race Relations (Amendment) Act 2000. (c.34) London

11. PAMECUS Country Report: USA

The USA country report was prepared by the PAMECUS country expert for USA. This report begins with an analysis of positive action in this country in light of the current USA legislative framework followed by a presentation of the main findings that emerged from the first consensus workshop (14 participants), a follow-up conference call (3) and 13 follow-up individual interviews. The template from the UK pilot project was used to present the findings from the USA research activities completed for the PAMECUS project.

11.1. Contexts of affirmative action in the United States

Some accounts have traced the roots of affirmative action in America back to the 1930s when Interior Secretary Harold Ickes worked to ensure that Public Works Administration contractors made an effort to hire some percentage of African American employees in areas that had a significant African American population. The phrase itself was initially used relative to race, in New York's 1945 Law Against Discrimination.¹⁴⁵

However, affirmative action, as most understand it in the United States, was the result of the Civil Rights struggle of the 1960s. David J. Garrow explains how it was fashioned but not really planned by presidents, legislators, and activists who developed the initial responses of the federal government between 1961 and 1965. The policy was the fruit of the labour of these diverse actors who advocated and fought vigorously for fair employment policies.¹⁴⁶ Hence, many accounts will understandably place the birth of affirmative action as March 6, 1961 when President Kennedy issued Executive Order 10925, which created the President's Committee on Equal Employment Opportunity.¹⁴⁷ This order directed the committee to 'immediately scrutinise and study employment practices of the Government of the United States, and to consider and recommend additional affirmative steps which should be taken by executive departments and agencies to realise more fully the national policy of nondiscrimination within the executive branch of the Government.'¹⁴⁸ It also prohibited contractors from 'discriminating against any employee or applicant for employment because of race, creed, color, or national origin.' Additionally the order called for the contractor to 'take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, creed, color, or national origin.'¹⁴⁹ Contractors, as a result, were also required to post in conspicuous places the provision of the nondiscrimination clause that is common in many job advertisements today.

In order to help draft the Executive Order 10925, Vice President Lyndon B. Johnson recruited Hobart Taylor Jr., a young African American attorney from Texas.

Taylor actually was responsible for adding the now popular phrase 'affirmative action'. Taylor said he 'was searching for something that would give a sense of positiveness to performance under that executive order, and was torn between the words 'positive action' and the words 'affirmative action.'¹⁵⁰ He ultimately selected the term 'affirmative' because it was alliterative. While there are arguments that the initial intention of the order was solely to prohibit discrimination, there are also opposing arguments that the then new policy was expected to convey an intention of the government taking affirmative steps to address the historical inequities in this country for African Americans and other minorities. Whatever the original intention, Taylor's alliterative phrase certainly was one that would take on a deeper meaning in the days to come. In fact, one historian posited that affirmative action 'seemed self-defined to require more aggressive recruitment in hiring, and special training for minorities to encourage their advancement.'¹⁵¹

Key to the policy's development was a second Kennedy mandate, Executive Order 11114 issued June 22, 1963. This order, which amended Executive Order 10925, reiterated that it was federal policy 'to encourage by affirmative action the elimination of discrimination' in all federally-funded activities.¹⁵² A year later on July 2, 1964, the new President Lyndon B. Johnson signed into law the Civil Rights Act of 1964. Though the law is sometimes referred to as the most sweeping civil rights legislation since Reconstruction, an integral part of it relative to affirmative action was Title VII, which was focused squarely on prohibiting discrimination of all kinds based on race, color, religion, or national origin in employment.¹⁵³ This did not end the debate because supporters of the policy might argue that over time it would seem more reactive than proactive, meaning the statute by itself did not promote decisively and broadly any focused programmes or opportunities for African Americans and other minorities. However, the policy did create a climate conducive for developing voluntary affirmative action plans at the state, local, and federal levels. Additionally, contrary to the opponents' views of the policy, there clearly was no preferential treatment of one group over another written into Title VII. While Title VII gave the policy life, President Johnson seemed to give teeth to 'affirmative action' in a commencement speech at the historically Black Howard University on June 4, 1965. Incidentally, Howard had a distinguished list of civil rights lawyers who had taught in the law school there and/or were alumni, including Charles Hamilton Houston, James Nabrit, and Thurgood Marshall. A pertinent passage from President Johnson's speech is

You do not wipe away the scars of centuries by saying: 'now, you are free to go where you want, do as you desire, and choose the leaders you please. You do not take a man who for years has been hobbled by chains, liberate him, bring him to the starting line of a race,

¹⁴⁵ David J. Garrow, *The Evolution of Affirmative Action and the Necessity of Truly Individualized Admissions Decisions*, 34 J.C. & U.L. 1, 1(2007).

¹⁴⁶ Garrow, *supra* note 1, at 2.

¹⁴⁷ Exec. Order No. 10,925, 26 C.F.R. 1977 (1961), available at <http://www.eeoc.gov/abouteeoc/35th/thelaw/eo-10925.html>.

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ Terry H. Anderson, *The Pursuit of Fairness: A History of Affirmative Action* 60-61 (2004).

¹⁵¹ Hugh Davis Graham, *The Civil Rights Era: Origins and Development of National Policy* 42 (1990).

¹⁵² Exec. Order No. 11,114, 28 C.F.R. 6485 (1963), available at <http://www.presidency.ucsb.edu/ws/index.php?pid=59053>.

¹⁵³ Pub. L. No. 88-352, 78 Stat 242-268 (1964).

saying, 'you are free to compete with all the others,' and still justly believe you have been completely fair . . . This is the next and more profound stage of the battle for civil rights. We seek not just freedom but opportunity—not just legal equity but human ability—not just equality as a right and a theory, but equality as a fact and as a result.¹⁵⁴

While President Johnson seems to strongly suggest a more proactive type of affirmative action in this passage and throughout the entire speech, he clearly pointed to equality as a fact and as a result which is the practical realisation of equality versus just the abstract theory of it in the last phrase. Later that year President Lyndon B. Johnson issued Executive Order 11246 on September 24, 1965, which superseded 10925 and established a solid foundation for decades. Today the amended Executive Order 11246 prohibits federal contractors and federally-assisted construction contractors and subcontractors, who annually conduct over \$10,000 in government business from discriminating in employment decisions on the basis of race, color, religion, sex, or national origin. Additionally, it requires those government contractors to take affirmative action to ensure that equal opportunity is provided in all aspects of their employment practices. For instance, each contractor with over 50 employees must develop affirmative action plans for each of its establishments. These plans help them identify and analyse potential problems relating to the participation and utilisation of minorities and women in the organisation.¹⁵⁵

In summary, Title VII of the Civil Rights Act of 1964 essentially enacted into statutory law the anti-discrimination commands of Executive Order 11246. Currently, the Office of Federal Contract Compliance Programmes (OFCCP), which is within the United States Department of Labor, administers and enforces the amended executive order. While Title VII is the actual legislation that was written and passed into law by federal legislators, individuals or organisations with complaints of discrimination file those under Executive Order 11246 with the OFCCP office, which is part of the executive branch of the government. Indeed, in the US, the three branches of government are the executive, which enforces the laws; the legislative, which creates the laws; and the judicial, which interprets the laws.

Title VII, among other things, expanded the purview of these commands to all employers with twenty-five or more employees, and created the Equal Employment Opportunity Commission as a new executive branch enforcement agency.¹⁵⁶ Yet as the text of the important federal statute reveals, Title VII promulgated that '[n]othing contained in this title shall be interpreted to require any employer . . . to grant preferential treatment to any individual or to any group' on account of 'race, color, religion, sex, or national origin.'¹⁵⁷ Once again, it became apparent that the much needed and far

reaching legislation prohibited discrimination but also clearly barred any government-ordered preferential action on behalf of any group who had suffered discrimination in the past. In short, Title VII, the cornerstone of affirmative action, attempts to make hiring practices neutral but it does not require that the government gives preferential treatment to one group over another. In fact, the statute expressly prohibits it. Thus, in the United States, most voluntary affirmative action programmes tend to come from state and local governmental actors and are tested for lawfulness under Title VII, Title VI, and the Equal Protection Clause of the Fourteenth Amendment. To be sure, all of these governmental actions, efforts, and programmes must pass a legal test called 'strict scrutiny', and it tends to be difficult to overcome, primarily because all governmental classifications based on race are presumed to be suspect by courts.

In the United States, affirmative action usually refers to voluntary programmes established to address discrimination in the context of race, ethnic origin and gender issues (see definition below). Other types of discrimination due to disability, age, and religion are also prohibited in the United States, but these are not generally included when references are made to affirmative action. Discrimination based on sexual orientation is not explicitly prohibited by federal legislation or the Fourteenth Amendment. Cases concerning sexual orientation discrimination have, though, been brought under federal legislation prohibiting gender discrimination.

11.2. Legal analysis

The legal analysis of positive action in the USA was undertaken using a template produced by the PAMECUS project legal team. It addressed four key questions as follows:

11.2.1. Does legislation establish any affirmative action (positive action) measures? E.g. Mandatory quotas for disabled persons?

As stated earlier, affirmative action relative to employment has part of its strength in Title VII, a broad statute under which government agencies or courts address actual intent of employers to discriminate. Title VII has been the primary legislative tool for congressional action in the battle against discrimination in employment. It reads in part as follows:

It shall be an unlawful employment practice for an employer: **(1)** to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or **(2)** to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.¹⁵⁸

Related to Title VII and its mission to proscribe discrimination is Title VI, which has the same prohibitory

¹⁵⁴ President Lyndon B. Johnson, Address at Howard University: To fulfil These Rights (June 4, 1965), at <http://www.lbjlib.utexas.edu/johnson/archives.hom/speeches.hom/650604.asp>.

¹⁵⁵ Exec. Order No. 11,246, 30 C.F.R. 12319 (1965), available at <http://www.eeoc.gov/abouteeoc/35th/thelaw/eo-11246.html>.

¹⁵⁶ Title VII of the Civil Rights Act, 42 U.S.C. § 2000e (1964).

¹⁵⁷ Title VII of the Civil Rights Act, 42 U.S.C. § 2000e-2(j).

¹⁵⁸ Title VII of the Civil Rights Act, 42 U.S.C. § 2000e-2(a)(1-2).

scope but is enacted under Section 5 of the Fourteenth Amendment to the United States Constitution. Through Title VI, Congress can deny federal funding to those who discriminate based on race, color, or national origin in federally-assisted programmes. It reads as follows:

No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any programme or activity receiving Federal financial assistance.¹⁵⁹

In Title VI Congress provided a statutory remedy against discrimination separate and apart from the Equal Protection Clause of the Fourteenth Amendment. However, it is important to note that this clause also prohibits discrimination (in employment) based on race, national origin, and gender.

In the United States, it is more accurate to say that what we term as affirmative action is really more about the government reacting to a pattern of existing discrimination to prevent future discrimination. In fact, Black's Law Dictionary defines affirmative action as 'a set of actions designed to eliminate existing and continuing discrimination, to remedy lingering effects of past discrimination, and to create systems and procedures to prevent future discrimination.'¹⁶⁰ The definition may even be leaning toward the ideal. Because voluntary affirmative action plans and statutes are aimed at addressing issues of past and existing discrimination, they often provide a benefit related to race.

11.2.2. Does legislation establish any obligations on public or private sector organisations to take affirmative (positive) action?

There are some examples where the federal government has promoted proactive measures to battle discrimination. The first is the Philadelphia Plan promoted by President Nixon in 1969, which was designed to ensure fair hiring in construction jobs because the workers in the craft unions were openly hostile toward African Americans, refusing to let them into their closed circle. Still, Skrentny regarded Nixon's action as a 'safe conservative move' when compared to the civil rights campaigns of the day like bussing and housing desegregation.¹⁶¹ Another example in federal government is found the *Adarand v. Peña* case where a federal programme rewarded contractors for hiring a subcontractor who had been certified as a small disadvantaged business by the Small Business Administration, a state highway agency, or some other certifying authority acceptable to the contracting officer. Another subcontractor that was not awarded the guardrail portion of a federal highway project brought an action challenging the constitutionality of a federal programme designed to provide highway contracts to disadvantaged business enterprises.¹⁶² The Supreme Court held that all racial classifications, imposed by whatever federal, state, or local governmental actor, must be analysed by the reviewing court under strict

scrutiny. The High Court remanded the case and required the lower court to determine whether the challenged programme satisfied strict scrutiny.¹⁶³ Hence, this federal programme, which was proactive, was found to be unconstitutional under the exacting test of strict scrutiny.

Executive Orders 11246 prohibits discrimination and requires federal contractors to take affirmative action to promote equal opportunity for minorities and women. For instance, section 202 of the order, as amended, states

'The contractor will not discriminate against any employee or applicant for employment because of race, creed, color, [sex], or national origin. The contractor will take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, creed, color, [sex] or national origin.'¹⁶⁴

The Department of Labor monitors this requirement for all federal contractors and it has developed regulations to which these contractors must adhere. These requirements made it into the Civil Rights legislation and include the public and private sectors. Title VII did not originally extend to educational institutions but it was amended in 1972 to cover such institutions. It was also during this time that state and local governments were no longer exempt from Title VII. While the focused development of the orders and the legislation was a deliberate response to the wide-spread and blatant discrimination directed at African Americans in this country at the time, today's required response from the federal government is really one of compliance with these regulations. That compliance includes disseminating and enforcing a non-discrimination policy, establishing a written affirmative action plan and placement goals for minorities and women, and implementing voluntary action-oriented programmes for accomplishing these goals. Moreover, federal contractors should assign an official in the organisation the responsibility for implementation of equal employment opportunity and the affirmative action programme.

If there is a charge of discrimination, then the statutes provide a framework to address it. For example, Title VI is used by federal agencies to deny federal funding to those who discriminate in state and local agencies. The idea here is that the federal government will not fund state and local agencies that discriminate. Similarly, Title VII is the vehicle used to bring a suit against an agency to challenge alleged discrimination. It has two aspects: disparate treatment and disparate impact. Disparate treatment, known as direct discrimination in European law, is used when an individual charges that he or she is being treated differently in adverse ways because of his or her membership in a protected class (i.e. because of the individual's race or gender).¹⁶⁵ Disparate impact, known as indirect discrimination in European law, is when individuals charge that a facially neutral rule or policy has an adverse effect on

¹⁵⁹ Title VI of the Civil Rights Act, 42 U.S.C. § 2000d.

¹⁶⁰ Black's Law Dictionary 60 (7th ed. 1999).

¹⁶¹ John David Skrentny, *The Ironies of Affirmative Action: Politics, Culture, and Justice in America* 194 (1996).

¹⁶² *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200(1995).

¹⁶³ *Id.*

¹⁶⁴ *Supra*, note 11.

¹⁶⁵ *Griggs v. Duke Power Company*, 401 U.S. 424 (1971).

minorities.¹⁶⁶ All require the individual to bring a charge of discrimination, which arguably is more reactive than proactive. So while the push for affirmative action comes from the state and local voluntary plans, monitoring of these efforts is the responsibility of the federal government. Indeed, the federal statutes that emanated from the federal government created a climate conducive to producing affirmative action policy.

11.2.3. What forms of affirmative action (positive action) are permitted, but not required, by legislation?

In order for a rule or policy promoting the action of providing some benefit based on a racial classification to survive, it must be analysed by federal courts using a two-pronged test called strict scrutiny. This test has been articulated in several cases, like *Fullilove v. Klutznick*.¹⁶⁷ First, strict scrutiny requires that any racial classification designed to provide a benefit must be supported by a compelling interest (a really good reason). In employment cases, a compelling interest has amounted to plans that seek to address past discrimination by the government agency offering the benefit. This does not include broad societal racism so the agency has to demonstrate through specific examples where it discriminated and how the affirmative action plan addresses that discrimination specifically. In higher education cases, diversity has been found to be a compelling interest and race can be used as a *factor* in achieving this diversity. This is not true for K-12 (primary and secondary) education.¹⁶⁸ Second, the method selected to achieve this racial classification must be narrowly tailored to achieve this goal. The federal cases that make it to court deal more with the lawfulness of local or state affirmative action plans as tested under Title VII, Title VI, and the Equal Protection Clause of the Fourteenth Amendment.

Federal courts have permitted affirmative action plans that pass strict scrutiny, the test articulated above. A good example that demonstrates how courts apply this test is the higher education case of the *Grutter v. Bollinger*. In this case, University of Michigan law school applicants were denied admission and consequently challenged race-conscious admissions policy of the law school, alleging that the policy which encouraged student body diversity violated their equal protection rights. The case eventually made it to the U.S. Supreme Court where it held that the law school had a compelling interest in attaining a diverse student body, thus satisfying the first prong of strict scrutiny; and the admissions programme was narrowly tailored to serve its compelling interest in obtaining the educational benefits that flow from a diverse student body. Hence, the Court found that the state law school's voluntary affirmative action policy passed strict scrutiny and thus did not violate the Equal Protection Clause.¹⁶⁹

11.2.4. Are any forms of positive action prohibited by legislation?

On the same day as the decision in *Grutter*, the Supreme Court decided in *Gratz v. Bollinger*. In the case, white applicants who were rejected for admission to University of Michigan's College of Literature, Science and the Arts filed a suit against the university alleging that its use of racial preferences in undergraduate admissions violated the Equal Protection Clause, Title VI, and Title 42 USC § 1981 of the Civil Rights Act of 1966. They sought compensatory and punitive damages for past violations, declaratory and injunctive relief, among other things. The Supreme Court eventually took the case and held that the university's current freshman admissions policy violated Equal Protection Clause because its use of race was not narrowly tailored to achieve respondents' asserted compelling state interest in diversity and that Title VI and § 1981 were also violated by that policy. Contrary to the *Grutter* case, this plan, which made race the deciding factor for nearly every borderline application, did not pass strict scrutiny, as it was not narrowly tailored to meet the compelling interest of diversity.¹⁷⁰

In an employment case, *Wygant v. Jackson*, white school teachers sued a Michigan school board and its members challenging the validity of a provision in a collective bargaining agreement whereby African American teachers were to receive greater protection from layoffs than their White counterparts. The white teachers brought the suit under Title VII and the Equal Protection Clause.¹⁷¹ Though the school board was responding to prior discrimination against minorities by the Jackson School District and societal discrimination, the court found that there was no relationship between the board's proposed affirmative action plan and that discrimination. Furthermore, the Court noted, "societal discrimination is too amorphous a basis for imposing a racially classified remedy." The Supreme Court held that school board's policy of extending preferential protection against layoffs to some employees because of their race violated the Fourteenth Amendment.

There is also state action in the form of anti-affirmative action ballot initiatives challenging the voluntary use of race-conscious policies to promote diversity in higher education. The steps required include gathering signatures that oppose affirmative action. After having met the required signatures, voting citizens decide whether to make affirmative action illegal in the respective state. Such initiatives have already passed in California, Washington, and Michigan.¹⁷² Additionally, Florida's former governor Jeb Bush ended affirmative action in his state through executive order. While the group that promotes these anti-affirmative action measures have tried and failed to get enough signatures in Arizona, Missouri, and Oklahoma, they are well funded and will continue to work to dismantle this policy. However, race can still be used as a factor in 46 states for now.¹⁷³ In primary and secondary education,

¹⁶⁶ Sage Encyclopedia of Education Law 252 (2008).

¹⁶⁷ *Fullilove v. Klutznick*, 448 U.S. 448 (1980).

¹⁶⁸ For a discussion on the impermissibility of using race as a factor in K-12 education, see *PICS v. Seattle School. District. No.1*, 127 S.Ct. 2738 (2007).

¹⁶⁹ *Grutter v. Bollinger*, 539 U.S. 306 (2003).

¹⁷⁰ *Gratz v. Bollinger*, 539 U.S. 244(2003).

¹⁷¹ *Wygant v. Jackson Board of Education*, 476 U.S. 267 (1986).

¹⁷² Michele S. Moses, Patricia Marin, and John T. Yun, *Ballot Initiatives That Oppose Affirmative Action Hurt All Students*, *The Chronicle of Higher Education*, October 10, 2008, at A39.

¹⁷³ *Id.*

affirmative action has also disappeared. The Supreme Court recently determined that two school districts' use of racial classifications for student assignments were not narrowly tailored to achieve diversity, thus violating the equal protection clause.¹⁷⁴ Hence, one could understandably assume that affirmative action as a programme is under constant attack.

In summary, despite what opponents of affirmative action argue, the policy as manifested in Title VII of the Civil Rights Act of 1964 prohibits discrimination in employment, reverse or otherwise. Additionally, it is invoked, oftentimes with the Equal Protection Clause and/or Title VI, to challenge alleged discrimination of local, state, and even federal affirmative action programmes and plans. To be sure, voluntary affirmative action plans are strictly prohibited from favoring one group over another and will likely be found unconstitutional if they do unless the plan can pass strict scrutiny. Moreover, if these plans have met their stated objectives federal courts would rather that they be deemed no longer necessary.

11.3. Findings from consensus workshop and interviews

One consensus workshop was conducted on September 19, 2008. Despite contacting more than 50 non-profit organisations, university, governmental and private businesses, there were 14 participants who attended the workshop. A detailed description of the recruitment strategy for the workshop is described below. All participants who attended the workshop were asked to complete individual interviews and an additional 13 individuals were recruited to complete interviews. After the workshop a consensus conference call was conducted with individuals to determine if there was an agreement with the statements derived from the consensus workshops. Overall, 30 individuals provided data for the USA PAMECUS project. The data presented represents the findings from the workshop, interviews and the conference call.

11.3.1 Workshop recruitment methodology

Recruitment for the workshop: Planning of the workshop began by first compiling a list of organisations. The list consisted of 56 public, private and governmental organisations such as educational institutions (colleges and universities); Medical establishments (hospitals and medical centres); private businesses (United Parcel Services, FedEx); hotels and governmental agencies. These organisations were selected to represent a diverse pool of human resource managers and personnel who had responsibility for implementing positive action measures. The goal was to represent a variety of educational levels, and work place situations, as well as racial/ethnic, gender, age, religious backgrounds.

Initial contact was made eight weeks before the workshop via phone to the central Human Resource office of each organisation. Workshop invitations and other information about the PAMECUS project were distributed via email and by United States postal deliveries to each organisation on the list. Initial

contacts were made to approximately 35 organisations. Realising that the response was slower than anticipated an additionally 21 organisations were contacted. The initial contacts were made to obtain email/ mailing addresses via phone. Six weeks before the workshop email and mailed invitations were sent to the organisations. Email invitations were sent out on four separate occasions within the three weeks prior to the workshop. We began contacting organisations, eight weeks before the workshop, as a Save the Date flyers format before human subjects/ethics approval was obtained. Once we had obtained human subjects approval we re-doubled our effort by almost daily phone calls and email to the agencies on our list. Additionally, we use our human resources contacts to have them contact other human resources professionals.

Eight registrations, mainly from Johns Hopkins University and Johns Hopkins Medical Institutions divisions were received prior to the workshop. There was no response from the majority of organisations that were contacted, either about attending or not attending.

Attendance of the workshop: Organisations represented among the workshop attendees included Johns Hopkins University, Johns Hopkins Medical Institutions, Emily Madison Foundation, Page Technologies. Workshop attendees were easily able to access the venue and free parking was available.

The workshop attendance was disappointing, despite the significant amount of effort that went into trying to get 30-40 attendees. We also attempted to push for attendance while simultaneously obtaining the human subjects approval. We believed that having human subjects approval ensured the principal investigator would be able to use all data obtained via workshops and interviews. Among the participants who attended there was full and active engagement in the workshop. We believe the views expressed reflect the general national perceptions and beliefs.

Follow-up interviews: All of the workshop attendees volunteered to be interviewed after the workshop. An additional 13 were completed.

11.3.2 Data collection

One consensus workshop was conducted in the USA, on the 19th of September 2008. The workshop was attended by 14 participants drawn from health, education (further and higher), business and private business organisations. The workshop began with a keynote presentation by the principal investigator for the PAMECUS project, who provided an overview of the development of the UK equality legislation and the implications for positive action. The presentation also included the background and the details of the development of the PAMECUS project and an overview of the processes to be followed during the workshop. The workshop facilitators described the purpose and process of the workshop, elaborated on the role of the facilitator and ensured that the ethical components of the research were adhered to. The facilitators essentially enabled the process, kept it on track and intensified dialogue. The workshop followed five steps - setting the scene, generating new ideas (brainstorming), clustering the ideas, naming the

¹⁷⁴ *Parents Involved in Community School District No. 1, et al. and Meredith v. Jefferson Cty Bd. Of Educ., et al*, 127 S. Ct. 2738 (2007).

clusters and symbolising the resolve. Four focus questions were used to inform the workshop discussions. During the discussions, the facilitator asked a number of probe questions to facilitate in-depth discussion around these topics.

Themes elicited from workshops were further validated through conducting targeted follow-on interviews with individuals identified from consensus workshops and other key personnel who were knowledgeable about and/or who had positions that focused on some aspect of affirmative action (positive action). The interviews provided a more detailed insight into some of the positive action initiatives taking place within organisations. A total of 13 interviews were obtained from non-workshop attendees. The interviewees all provided further information about affirmative action (positive action) measures implemented within their respective organisations. This report includes the analysis and findings from these interviews. Interviewees represented organisations from the public sector, education, health (long term care and acute care) and not for profit agencies. The interviews were conducted using the interview guide / proforma to facilitate obtaining systematic information.

11.3.3. Findings

In this section the main findings from the thematic analysis based upon the data collected from the consensus 14 workshop participants and the 13 follow up interviews are described. As with all qualitative research, the interconnected and cross-cutting nature of the themes will lead inevitably to a certain degree of overlap and cross-referencing in presenting these findings.

Understanding of affirmative (positive) action

In general all of the interviewees believe that affirmative action was designed to provide equal access, equal opportunities to groups not having the same access in the past. They described it as a process used by educational institutions and governmental, private and non-profit organisations to provide equal access and equal opportunities.

The majority of the participants expressed their understanding of affirmative (positive) action as a set of strategies used by mostly employers and educational institutions, particularly institutions of higher education, to provide equal opportunities and fairness related to obtaining employment or admission to universities and colleges. The majority of statements about affirmative action were positive. All defined affirmative action broadly and that it was righting discrimination as it pertained to racial/ethnic background, gender, sexual orientation, age, religious background and disability. Most stated they believed that affirmative action strategies came about to right discrimination and barriers to education and employment involving certain groups experienced particularly by African American and women.

In a discussion of media representation of affirmative action one participant from the health sector believed that the media represents the world as fair and that all have equal opportunities now. Another participant, an educator, believed the media created the perception

that some people are hired because of their ethnic/racial background or gender instead of qualification or performance.

Summary from the discussions were that all statements of understanding were positive; key statements from the discussion were *'providing equal opportunity; specific minority populations such as age, ethnic/racial, disability; correcting past inequalities'* and key descriptive terms were 'equality, qualification and disability'.

Interviewees revealed the following major themes in terms of types of affirmative (positive) action measures used in their organisations included: training, leadership development, recruitment/enrolment strategies for targeted student groups, communication/confidence building strategies, recognition awards, mentoring and outreach strategies. The interviewees identified the following equality strands: ethnic/racial background, gender, single parents, socioeconomic status, disability, religion and sexual orientation.

Impetus for affirmative (positive) action

Many described changing contexts, such as the 'changing complexion' of the nation, in other words that the USA was becoming more diverse and the 'old ways' were not working as well as in the past. They stated that 'grassroots' efforts from the surrounding communities could be driving, so that organisations represent the surrounding communities that they serve. Furthermore organisations that appear more diverse or hire diverse people would also attract more diverse people from the community.

Others discussed the historical context as a driver of affirmative (positive) action. An educator stated that previously African Americans had been excluded from schools and higher education, and during the 1960's and 1970's due to social and religious group activities, which raised awareness, eventually the civil rights laws were passed. There were several who believed that these types of laws were drivers of affirmative (positive) action. However, others stated that there were legitimate ways to appear to be compliant with civil rights, disability and other laws which were intended to promote equal rights for all, and that the evidence was that the numbers related to diversity, disability, etc., do not change. Several participants stated that there were always the human factors, when it comes to interpreting laws, policies and guidelines, which were effective barriers against affirmative action.

Several people from government and business stated that often there is the realisation that diversity is good for the organisation and that the leadership often sets the culture and acceptance of affirmative action. Participants from education and health care also believed that the leadership of the organisation was an important driver of affirmative action.

When asked *'Why is legislation not a significant driver of affirmative action?'* Comments included: 'concern about reverse discrimination'; 'the understanding that there are ways to present the data so as to appear to be in compliance'; and 'every university admissions board does it differently'.

Summary of key statements from the workshop discussion included: 'culture is a driver; employers are driver' and a key word was 'leadership'.

Interviewees stated that the catalyst for affirmative action was related to the perceived need for equality, to ensure a diverse workplace, the mission and/or vision of the institution, recruitment and retention, societal needs and evidence on an organisation's website that depicts it as a diverse and equal opportunity organisation. Interviewees also identified barriers to implementing affirmative action: traditions - not open to change; negative behaviours; educational levels; miscommunications; lack of leadership support; ineffective planning for implementation strategies and the potential for reverse discrimination.

Effectiveness of affirmative (positive) action

Many believed and were certain that affirmative (positive) action was effective in achieving improved opportunities for those groups of people who had previously been discriminated against or been treated unfairly. However, many of the responses began with a 'yes...but...,' indicating that there needed to be other things done to make the implementation of affirmative action even more effective or to prevent unintended consequences. Examples of these statements were 'Yes it is effective, but attitudes need to change in order to make affirmative action work'; 'Yes affirmative action is effective, but the culture needs to change'; 'Yes affirmative action policies are good but there may be consequences because of the way the policy is implemented'; and 'Yes affirmative action is effective but it is only effective if the intent of the organisation is to fully implement and support'.

At least one workshop participant did not believe affirmative (positive) action was effective because there are ways to manipulate data so as to appear to be meeting goals, when there are really no changes. Further it was stated that Affirmative Action/Positive Action is only effective if it is the intent of the organisation or agency to make it successful and to fully embrace it.

Participants were asked if the benefits of affirmative action outweigh the negative. Comments included: 'Yes, it (affirmative action) increases awareness'; 'Yes, if the organisation fully supports it (affirmative action)'; and 'Yes, if efforts are made to find the targeted groups and document efforts related to recruitment and retention.'

11.4. Examples of affirmative (positive action) measures

Name of the Initiative: *Mosaic Initiative*
Sector/institution: Private/University
Reasons for the initiative: As part of the University's strategy to increase the diversity among ranked faculty from ethnic/racial underrepresented groups in the academy.
Process: The Mosaic is initially funded at a minimum of \$1 million per year. A department may apply for funds to the dean or director of its division, who will prioritize requests and forward to the provost. Departments may make proposals for up to \$250,000 to be spent over three

Summary of key points included that affirmative action in general was effective and that the benefits do outweigh other consequences. The intent of the organisation influences the effectiveness of affirmative action. Factors that influence effectiveness are attitudes, culture and interpretation of how policies should be implemented.

Impact of positive action

There were a variety of responses about the impact of affirmative action. Participants stated the impact was in terms of certain groups such as women and all minority groups. Others suggested that the workplace and organisations have been impacted because of the diversity of different groups moving into leadership roles. Also, it was recognized that more people were fully engaged in the business of the organisation by having more diverse groups in the workplace or in institutions of higher education. In terms of higher education most believed an impact was a higher graduation rate among certain groups i.e. Hispanics and African Americans.

Overwhelmingly, participants believed that ethnic/racial minorities benefited the most. Also, it was felt that certain groups benefited more than most, specifically, women, both European-Americans and African Americans, African American males and immigrants to the USA. Others felt that organisations benefitted and all groups have benefitted because of the increased diversity in the workplace and in institutions of higher education.

Groups that benefited the least from affirmative action were the disabled and sexual orientation groups e.g., transgender people, gays and lesbians. A summary of key statements related to the impact of affirmative action include: 'it is more than a numbers game, all circumstances must be considered'; 'acceptance by others is as important as being educated and qualified for the position or admission'; and 'leadership communicates the goals and values and this influences the impact of affirmative action'. Interviewees described the groups who were most often targets of affirmative action initiatives in their organisations and agencies: ethnic/racial minority groups, disabled persons and low socio-economic status individuals.

years, on such items as salary, research support and laboratory equipment. Funds will be allocated on a rolling basis; allocation will continue as long as dollars are available in a recruiting year.
Outcome: The intended goal is to increase the number of faculty from underrepresented ethnic racial minority groups. The programme was implemented during May 2008, so there is no outcome data to measure effectiveness of the initiative to date.

Name of the Initiative: *Diversity Leadership Council (DLC)*
Sector/institution: Private/University

Reasons for the initiative: As part of the University's strategy to address affirmative action issues for faculty, students and staff.

Process: The DLC is composed of representatives from each major academic unit and the academic medical centres, and the human resources department for the university. The DLC falls under the purview of the Provost for Institutional Equity. The DLC meets monthly to consider issues, develop strategies and monitor issues across campus and to collect data about pertinent campus issues.

Outcome: The DLC hosts an annual conference that addresses various aspects of diversity, inclusion and other aspects of affirmative action, gives an annual award that salutes a campus faculty or department doing important community work and carries out the spirit of DLC. It has negotiated for family leave issues for gay/lesbian families, has helped with working out tuition reimbursement policies that impacts most significantly staff, meets with the head of each division at a regularly scheduled meeting to monitor implementation of the division's diversity plan and has most recently completed

a survey of the university's climate related to membership in an ethnic/racial group or as a woman in terms of faculty and staff, promotions, positions.

Name of the Initiative: *Employee Focus Group*

Sector/institution: Public/Medical Center

Reasons for the initiative: To salute and embrace diversity in the workplace.

Process: A voluntary group of about 15 employees who meet regularly during the year to put activities together for the year. The activities are designed to reach out to the diverse groups and to increase awareness of the diversity in customs and practices of diverse groups as well as a social milieu for people to get to know each other.

Outcome: Activities are well received by employees. Examples of activities include Employee Appreciation Week, Are You Smarter than a Senior Manager?, Aces of Cakes and Iron Chef.

11.5. Key statements identified from consensus workshop grouped by theme

Emerging theme	Key statements	Rank (score)
Understanding of affirmative action/positive action	Affirmative action promotes fairness and equality regardless of differences i.e. age, gender, sexual orientation, race, religion (creed), disability...	1 (5)
	Affirmative action corrects inequalities of the past and present to mirror the current population.	2 (2)
	Proactive system mandated by federal government to prevent exclusion, to insure that people can contribute society.	3(1)
	Affirmative action provides opportunities and access to ensure no artificial barriers.	
	Affirmative action insures equality and redressing ingrained historic and current disadvantages	
Impetus for affirmative action/positive action	Affirmative action provides equal opportunities to all.	
	Corporate vision and mission with the right leadership and management commitment.	1 (3)
	Social consciousness - a feeling that the status quo is not delivering, grassroots agitation.	2 (2)
	The right and ethical thing to do.	3(1)
	Leadership of organisation or agency - top down or bottom up.	3(1)
Effectiveness of positive action	Cultural and environmental context as the primary driver, especially when the organisation is a representation of the population it serves.	3(1)
	Business case - benefits of diversity being realised as a competitive edge and better team work.	
	Yes but attitudes and culture need to change for it to work.	1 (10)
	Affirmative action is effective but it needs more i.e. changes in attitudes to be fully embracing of affirmative action.	2 (3)
	Yes but it needs to be modified to accommodate the needs of changing societal trends in order to address its original intention.	2 (3)
Impact of affirmative action	No affirmative action as a policy has worked, but its implementation has produced some consequences e.g., reverse discrimination, stereotyping and backlash.	3 (2)
	Affirmative action is effective if an organisation is fully committed and there is increased awareness throughout the organisation.	4(1)
	Benefits outweigh the negatives if the numbers increase diversity in the workplace.	4(1)
	Affirmative action increased diversity in the workplace which was beneficial to all.	1 (4)
	Affirmative action will increase diversity, therefore increases exposure to ideas, viewpoints and perspectives.	1(3)
Groups targeted for affirmative positive action initiatives	Affirmative action has increased resource allocation to targeted groups, which have increased their presence and success i.e., increased graduation rates in Hispanic population.	2(2)
	Organisational diversity.	
	Career achievements.	3(1)
	Open opportunities.	
	Groups most targeted - gender (white women, black women, black men), African Americans and international immigrants.	
	Groups least targeted - Lesbian, gay and bisexual, transgender people and disabled people.	

11.6. Key summary

Summary from all sources of data and informants in the USA are as follows:

- Affirmative (positive) action was viewed as a positive strategy for bringing about changes in private and governmental organisations, medical centres, and institutions of higher education.
- Affirmative (positive) action was seen as an effective strategy to address past issues of inequality and unequal access for certain groups.
- While certain laws and policies were helpful and were drivers to support the implementation of affirmative (positive) action, other conditions were seen as more important specifically the increased awareness of the values of a diverse workforce or student body; the business case for embracing affirmative (positive) action and the community or the grassroots efforts to bring about change.
- Leadership that sets the context for affirmative (positive) action, such as the mission, vision and a commitment to the implementation of affirmative (positive) action activities were seen as important.
- Organisations believe their affirmative (positive) action programmes and initiatives have been effective, and are satisfied with the progress they have made.

- Much of the claims of the success of affirmative (positive) action are based on anecdotal feedback and the evaluation of progress of programmes, rather than systematic outcome data collection and evaluation.

11.7. Implications for policy and practice and recommendations

Affirmative (positive) action has made significant changes in the workplace and in institutions of higher education in the USA. While many people understand the meaning and purpose of affirmative (positive) action as well as the benefit, many people seem to be reluctant to engage in dialogue about it. While there are strategies in place that are *best practices* for implementing affirmative (positive) action measures and have resulted in behaviour changes, the changing of attitudes, the embracing of tolerance and respect for differences, are other aspects that are harder to change, but do need to be addressed. Focus on the benefit, the business case for supporting, the acceptance and respect for all and the ethical/moral aspects are most likely the next important steps of affirmative (positive) action measures and are the aspects that are least likely to be addressed successfully by policy. The focus on best practices that have impact for practicing in a context that fully embraces affirmative (positive) action are the next steps.



Centre for Inclusion and Diversity
25 Trinity Road, Bradford
West Yorkshire BD5 0BB

Tel: +44 (0)1274 236347

Fax: +44 (0)1274 236443

www.bradford.ac.uk/pamecus

Email: diversityudy@bradford.ac.uk