

Positive action in sport

Breaking down barriers and
promoting sport to all

Driven by partnership

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OVERVIEW

What is positive action?

The Equality Act 2010 seeks to ensure that people are treated equally and not discriminated against because of a protected characteristic. However, the Equality Act 2010 also recognises that sometimes groups of people will need help or encouragement, due to disadvantage, under-representation or different needs.

Positive action is a soft form of favourable treatment, which is entirely voluntary, and is aimed at helping people to overcome that group disadvantage, different needs, under-representation or to assist in recruitment. Conditions apply to creating and applying positive action and ensuring that the treatment remains soft; if the conditions are not met the action will be unlawful and likely constitute positive discrimination.

What is positive discrimination?

Positive discrimination is a hard form of favourable treatment to the exclusion of other groups. It may involve ensuring that persons get more favourable treatment solely because of their protected characteristic, for example, in recruitment. Ensuring that all persons of a particular ethnicity were listed for interview, to the exclusion of other qualified persons, would likely amount to unlawful discrimination under the Equality Act 2010. Exceptions apply for disabled people and transsexual people, in certain circumstances. Otherwise positive discrimination is unlawful.

How can this document be used? What benefit will it have for SGBs?

Positive action is under-used and as a tool that can help address disadvantage and under-representation, it is a tool that can help sport to break down barriers and to potentially increase participation in sport.

This guide is intended to be another tool offered to SGBs to help SGBs increase participation within their sports and to grow participation. This is not a mandatory set of rules, but is something to assist SGBs to implement positive action when it is appropriate to do so.

INTRODUCTION

If clubs or bodies in membership of the SGB seek guidance on implementing positive action on a localised level, this guide should also be of use.

How does positive action compliment the Equality Standard for Sport?

This is not in substitution for the Equality Standard; it is intended to be a guide to compliment the work that an SGB does towards achieving a level of the Equality Standard.

If an SGB is yet to start working toward a level of the Equality Standard or is not at the stage of considering positive action as part of this work, there is nothing to stop the SGB from working on an initiative that is positive action.

Hopefully when you've finished reading through this guide, you'll recognise that you will already be taking steps that support the concept of positive action, or you may be inspired to start an initiative to help further grow and diversify your sport.

This is a guide, not legal advice

The information prepared in this document is accurate and correctly states the law as at November 2016. This is a guide as to principles and does not constitute legal advice to the reader. Advice should be sought on any specific situation in which the SGB has any concern as to how these principles can be applied or where the SGB is concerned as to risk.¹

INTRODUCTION

In the past few years Scotland has hosted a number of world class sporting events and continues to prepare to welcome more such events.

In a golden decade of sport for Scotland, these events will help promote Scotland's status as a country that punches well above its weight in sport, whilst encouraging the public to be sports-minded, if not sports-mad.

It's routinely said that large scale events capture the interest and imagination of the public. The legacy of sports participation is often spoken of as one of the major benefits of hosting such prominent events, together with substantial regeneration and improvement in facilities. Sports events play a major role in society and welcome many people, from all walks of society, to see the merits of becoming involved in sport.

However, showcasing sport is not enough to increase participation in sport, particularly given that sports can be less diverse than society itself, and barriers exist to securing increased participation for many areas of society across many sports.

Barriers

These barriers tend not to be caused by sport or are barriers that are capable of being addressed by sport alone. The barriers exist for a multitude of complex reasons and difficulties that exist within society, and result in imbalances in sport, in participation numbers and in the backgrounds of those persons who participate. However, the barriers and the lack of participation can be identified and sport can play its part in helping to remove those barriers, paving the way to include people in sport and increasing not only the diversity of participants but the overall participation levels.

sportscotland has undertaken recent equality research² and the Scottish Government has undertaken equality analysis as part of the Active Scotland programme³. Both materials are useful to SGBs in this area and should be considered. Barriers can include early experiences of physical education in formative years, particularly in schooling; self-esteem and body confidence; family and peer influence, including cultural differences and religion.

Other issues inhibiting participation include an imbalance in how elite sport presents itself in certain sports, particularly in who are seen to be the role models; investment and availability of facilities; leadership, coaching and volunteering; together with attitudes and perceived attitudes. Time, family life, racism, a lack of understanding, restrictive rules on clothing or equipment and inflexibility in approach can contribute to inhibiting broader and better participation in sport from across all of society. Increasing participation numbers and the levels of diversity in sport in Scotland is not philanthropic nor is it ideological. Benefits will be derived, not merely to wider society in terms of integration, inclusion and health, but

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widening access and increased participation in sports, will stimulate and advance sport across Scotland.

Statistics

Statistics should not be viewed in isolation but research can always help to gain both an overview and an insight to where under representation lies, why this may be the case, what this looks like for different groups of people and to help bring focus to the imbalances and challenges that can be faced. Identifying where under representation and barriers exist also equates to identifying where opportunity exists.

According to recent research⁴:

- More males than females routinely participate in sport across the life span
- More men are members of sport clubs than women
- Females begin to drop back from sport aged 13 to 15 years old
- Disabled people are less active and are less likely to participate in sport
- In Scotland, Pakistani adults are least likely to participate in sport
- People of Muslim faith are least likely to take part in sport
- Roman Catholics also have a slightly lower sports participation rate than average
- 16 – 24 year olds have the highest numbers of participation in sport across all the age ranges
- There is a substantial drop off in sports participation of those over the age of 45

Particular challenges can exist when analysing sexual orientation and gender reassignment in the context of participation.

Societal issues

Barriers to participation and persons feeling excluded can cause many different concerns and problems, including a representation of wasted opportunities for sport, sports themselves becoming at risk and endangered by losing touch with society itself, health risks for those not participating and even difficulties with apportionment of investment for those regulating and supporting sport. Yet sport is an area unlike society as a whole; sport is recognised in society and in law as having its own specific requirements in many ways, all tending to link to physical composition and the fact that sports involve some form of physical contest.

Sporting competition can be legitimately regulated by reference to gender, or by age, and with health and safety or sporting fairness considerations prominent in consideration. Able-bodied athletes typically compete aside from disabled athletes.

Single-sex clubs are lawful. Leisurely pastimes often are regulated and organised with reference to gender. Many elite sports, so often the focus of the media and the public, operate in a very different way than society, with there being no concept of “equal pay” available to participants in law when competing in separate competitions. Yet ethical, moral, commercial and political perceptions and considerations all readily come into play. One of the main factors contributing to low levels of participation by sectors of society is a lack of suitable role models, either participating or organising sporting activities⁵. This factor can, however, be easily addressed, with thought.

Indeed, as we will discuss below, many steps can be taken to remove barriers and promote inclusion. Many steps and actions can be taken by sports acting sensibly and without concern for challenge, or legal intrusion, but other steps and actions need to be taken more carefully, particularly when the equalities legislation is considered.

The Equality Act 2010 – Positive action

Under the Equality Act 2010, sections 158 and 159, it is possible to take steps that help to encourage under-represented groups, groups with different needs and groups with particular disadvantages through positive action. There's a great deal that can be done under positive action plans, where measures, steps, investment, or decisions can be taken to favour one particular person or group of people, over others. Provided that care is taken, these measures can be both lawful and they can be truly effective. In the context of recruitment and promotion, positive action can also be an effective measure.

It should not be thought or assumed that under-representation in a sport or sport in general can be addressed by sport alone. Wider, cultural and historic differences have a great influence. However, ensuring that sport takes the right steps to encourage participation and to encourage the removal of whatever barriers may exist by widening access to sport, is an essential aim for sport. Sports can change and have a wider impact.



OVERVIEW OF DISCRIMINATION LAW

Legislation – the development

Over many decades, legislation has been passed to seek to create a fairer and more equitable society, regulating many different relationships and parts of life. The legislation covers the working relationship, and the provision of goods and services, as well as clubs and associations.

The legislation outlaws detrimental treatment on the grounds of sex, race, disability, religion and belief, sexual orientation, age, marriage or civil partnership, pregnancy and maternity as well as gender reassignment, in a number of different ways.

The Equality Act 2010 brought all prior pieces of legislation together, reframing the legislation and protecting the characteristics that people have, providing opportunity and offer up meaningful redress for those whose rights were infringed.

Equality for all

The concept of equalities within law is misunderstood and is perceived as protecting minority groups. It doesn't do only that.

The Equality Act 2010 protects everyone from unfair and unjust treatment on the grounds of one or more of their characteristics, when the characteristics of a person should ordinarily be irrelevant.

Every person can be protected by the Equality Act 2010. Whether protection is needed and ultimately provided depends on the circumstances that exist, the behaviour visited upon the person seeking protection and the reasons why people behaved as they did. In addition, for organisations who are subject to the public sector equality duties, equalities must be promoted and put at the heart of an organisation, thus promoting good relations, increasing opportunities and taking steps to eliminate discrimination.

The protected characteristics

The Equality Act 2010 operates on the basis of protected characteristics, being:

- Age
- Disability
- Gender reassignment
- Marriage and civil partnership
- Pregnancy and maternity
- Race
- Religion or belief
- Sex
- Sexual orientation

The prohibited conduct

Thereafter, the Act talks of prohibited conduct in respect of these protected characteristics.

The purpose of this note is not to forensically examine the way in which the legislation can operate in practice in each of these legislative parts, or to consider how prohibited conduct can arise, but rather it is to look at the role of the SGB when attempting to take steps that amount to positive action in practice. As we will come on to see, taking the correct steps and supporting positive action includes taking steps to prevent discrimination arising. A refresher as to what prohibited conduct is, as well as reminding ourselves how direct discrimination can arise, is useful to consider at this juncture. As we will see, positive discrimination is unlawful and a step too far from positive action.

Prohibited conduct includes:

Direct discrimination: namely where someone is treated less favourably because of their protected characteristic. A young Scottish male is refused a job because the employer thinks that the job should be done by an older French female, even although the young male's CV is better in many respects. This would be direct discrimination on the grounds of both sex (being male) and age (being young), with race (nationality) also a potential issue.

Example:

An Asian referee is stood down and not reappointed due to performance issues. A white referee continues, despite having a similarly poor performance record. A claim of discrimination on the grounds of race would succeed. A female doctor is berated for running on to a pitch to provide treatment to a player she perceived to be injured and thereafter ostracised from the first team.

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A male physio was also involved in the incident and was not treated as badly. This may amount to discrimination on the grounds of sex. There are very limited exceptions to direct discrimination, but usually those exceptions are in age and disability matters, with more limited and less common exceptions existing in relation to genuine occupational requirements that exist for certain roles.

Indirect discrimination: this is where something puts a group of people with a particular characteristic at a disadvantage compared to those who do not share that characteristic; the person is a member of that group and is put to that disadvantage; and that treatment of that person cannot be justified (as a "proportionate means of achieving a legitimate aim"⁶).

Example:

Mo is an athletics coach. He proposes to move training sessions to help fit in with a religious festival that he wishes to participate in. He is told by his employer that the sessions he has to take cannot be moved, because they are always held at that time and that changes shouldn't be made just for Mo. This may be indirect discrimination.

Jenny is a rower. Her coach tells her that she must remove the small cross that she wears on a chain around her neck because it is unsafe and the club has a "no jewellery" policy. Jenny challenges this and is told that it is for safety reasons. There has never been an accident reported involving such an item of jewellery. Jenny is not allowed to row because she refuses to take off the jewellery, the coach saying he is just enforcing the policy. This may be indirect discrimination.

Victimisation: this is where a person treats someone badly because they have done a "protected act" or that person believes they will do / have done a protected act (even if they have not).

A protected act is doing something to assert rights under the Equality Act, e.g. make a complaint or raise concerns about inequality.

Example:

Jane complains about her colleagues making jokes about women. Jane is then moved to a different part of the office, with no proper facilities, and Jane's manager stops speaking to her. This may be victimisation.

Ibrar is a physio who travels with a team and complains about the lack of concealed changing facilities at away matches; he says he cannot use open communal facilities

due to his religion. Ibrar is dropped from travelling to away matches. This may be victimisation.

Harassment: this is where a person experiences "unwanted conduct" and that unwanted conduct is related to a protected characteristic. Harassment occurs either if the harassing behaviour has the purpose, or effect, of either violating a person's dignity, or of creating an intimidating, hostile, degrading, humiliating or offensive environment.

Example:

Sandeep is a keen amateur footballer. He wears a turban. Sandeep is laughed at by his colleagues who mock his appearance. Sandeep asks them to stop but they do not. They mock his love for football on account of him wearing a turban, asking how he can head the ball if he wears a turban.

David is a post-operative transgender male referee in hockey. He is paid to provide these services. The organisation that pays him becomes aware that a club has two players who routinely mock David when he referees. David has reported an incident and a member of the public has separately reported an incident involving these players. The organisation would be guilty of failing to stop harassment from these third parties (the players) if they did not take steps to stop the harassment.

It should be noted that protection for harassment does not include marriage, civil partnership, pregnancy and maternity.

The parts

The Act then subdivides into a number of different parts, the most relevant of which for SGBs will typically be:

- Part 3 – services
- Part 4 – premises
- Part 5 – work
- Part 7 – associations
- Part 11 – advancement of equality

We will have regard to these different parts and circumstances when considering sections 158 and 159 of the Act (found in part 11) and the ability to take positive action.

THE ROLE OF THE SGB

The role of the SGB is multi-faceted, with SGBs required to embrace Equality Act 2010 principles, educate members and promote equality, whilst working towards eradicating inequality within their sport and sport in general.

SGBs have a key role in this area, as recent research conducted for **sports**scotland has highlighted the important role played by sports clubs in promoting equality and access to sport for all⁷. SGBs must lead and support sports clubs in this regard.

Tackling discrimination, promoting equality and increasing diversity must be central to the role of the SGB. SGBs must ensure they are able to:

1. Adopt a regulatory approach that is compliant with Equality Act 2010 principles;
2. Works toward the appropriate level of the Equality Standard for Sport;
3. Campaign upward for equality (if there are instances of inequality by an SGB's European or International Federations); and
4. Cascade equality downwards by requiring clubs and members to observe and promote Equality Act 2010 principles.

SGBs should aim to ensure that the Equality Act 2010 principles are observed:

1. In conducting its own business at all levels;
2. When taking decisions affecting members;
3. When setting membership requirements;
4. In staging competitions;
5. Setting rules for its members competitions;
6. Providing funding;
7. Selecting people for representative opportunities;
8. Choosing role models;
9. Appointing people to office;
10. Employing people.

SGBs must also have regard to the onus that falls on SGBs to promote equality compliance by members and if necessary take appropriate disciplinary action against members who fall foul of equality principles and laws.

Although SGBs are not, of themselves, public sector bodies for the purposes of the Equality Act 2010 and in particular the public sector equality duties that can apply, receiving and using public funding is thought to be capable of engaging the general public sector equality duty to the extent that the SGB is carrying out a public function on behalf of a public body. There has been no case law testing whether or to what extent a governing body is carrying out a "public function".

SGBs receive public money through various means including grants and the various support mechanisms put in place to support sport in Scotland. A condition of grant is to promote equality and observe the principles of equality.

SGBs play an important role in Scottish society and are duty bound to take steps to ensure that there are no barriers to participation and to encourage participation from all of Scottish society.

SGBs are themselves diverse businesses who employ people, engage with members, provide facilities and access to facilities, who interact with public bodies and members of the public. As leaders of clubs, members and regional bodies, SGBs should look to promote positive action, for the benefit of Scottish society and their sport.

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Part 11, sections 158 and 159, of the Equality Act 2010 permits positive action in all areas in which the Act otherwise applies.

Positive action comes in two main forms.

It can be to take steps to encourage activity for people who are part of a group whose participation in the activity is disproportionately low by the provision of support, training, meeting the needs of these people or taking other steps to encourage those people to participate. This may also apply to recruitment and promotion.

Or

It can be the removal of disadvantages or inhibitors that prevent or discourage participation. The principles apply beyond training, promotion and employment within the workplace, to participation in sport itself, in all ways, from playing, to volunteering, officiating or holding office within an SGB. It may even include providing services or access to or use of premises, as positive action applies across all parts of the Equality Act 2010.

Before understanding how positive action can apply in different circumstances that SGBs may face, and turning to more detailed examples, it is necessary to identify the three key parts to triggering and applying positive action.

The first of three parts – a reasonable need:

You have to “reasonably think” that there is a gap or a problem in participation for a group of people with a shared characteristic (e.g. people of a particular racial group) and:

- They suffer a disadvantage linked to that characteristic;
- There is a disproportionately low level of participation in this type of service or activity; or
- They need different things than other groups

“Reasonably think” doesn’t mean you need to have detailed statistical or other evidence, but it would help. You have to have a basis for your belief that stands up to some form of questioning or scrutiny, but your own experiences as sports administrators and regulators are relevant.

If you review membership and participant data and you see gaps or problems, you have a great base to start to take steps to opening access and improving participant numbers.

The second of three parts – suitable action:

The action you take is intended to:

- Meet that group’s different needs
- Enable or encourage the group to overcome or minimise that disadvantage and/or
- Enable or encourage the group to participate in that activity.

The positive action has to be pointed at helping to resolve the issue that is identified. It’s again a matter of logic and assessment by you. Is this suitable?

The third of three parts – a proportionate approach:

The third part is that the positive action you take has to be a “proportionate” way to increase participation, or to meet the different needs and/or to overcome the particular disadvantage.

This means that the action is:

- appropriate to that aim;
- suitable and that other action would be less effective in achieving this aim;
- other action would be likely to cause greater disadvantage to other groups.

This also requires the balancing of competing relevant factors.

These factors will vary depending on the basis for the positive action – whether it is to overcome a disadvantage, meet different needs or address under representation of a particular group.

Other relevant factors when looking at “proportionality” will include the objective of the action taken, or to be taken.

The cost of the proposed action is also very important. An investment to one particular group only, necessarily involves restricting or limiting investment for others. The seriousness of the relevant disadvantage, the degree to which the need is different and the extent of the low participation in the particular activity will need to be balanced against the impact of the action on other protected groups, and the relative disadvantage, need or participation of these groups.

This means that the action is directed at addressing the inequality or difficulty and it is a reasonable way of achieving the same. If a less obtrusive or less discriminatory method were to be available, the action might not be proportionate.

Each of these three parts needs to be present to support positive action. The type of action that is suitable as positive action will all depend on the circumstances of the sport and the context in which it is required. As a result we should look at positive action in the various circumstances that may exist, in practice.

It is also important to highlight that positive action is distinct from positive discrimination. The former is lawful. The latter is unlawful. We will come on to look at positive discrimination below, after looking at positive action in practice.

POSITIVE ACTION IN PRACTICE

Workforce recruitment - the 'tie breaker' principle

If an SGB was recruiting to their workforce, or appointing to their board, and two candidates for the role were equally well qualified for the role, with one being male and one being female, and the SGB recognised that it had a lack of female representation on their board, the female could be appointed to the board accordingly. The male candidate would not be able to complain.

The same principle applies to appointing a person from an ethnic minority group, for example, if that group is under-represented. Care needs to be taken, as positive action can potentially unintentionally unsettle staff. If two candidates both met the required criteria, but one candidate was better, it would remain good practice to appoint that person. Therefore, using a protected characteristic and under-representation as a tie-breaker should be used sparingly. If an SGB had no BME representation in its workforce, but had a BME population within its membership, and two candidates for a new role both scored the same in recruitment, but one was a black female and the other a white female, it may be lawful to appoint the black candidate, if the SGB felt it was important to try to better reflect the membership.

Care needs to be taken to not automatically treat all job applicants with a shared protected characteristic more favourably (or to guarantee them an interview or promotion) as that would be unlawful positive discrimination. The only exception is if the employer follows the "two ticks" disabled scheme and guarantees a disabled person an interview if they can demonstrate in their application that they meet the base criteria for the role.

A separate employment issue to remember is that when advertising for a vacant job or role, you cannot discriminate in the terms of the advert, or as to who it is directed towards, unless it is an absolutely necessary genuine occupational requirement to be of a particular sex, race, orientation or religion to undertake the job. Genuine occupational requirements are very rare.

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Workforce - employment more generally **Mentoring - promotion**

An organisation may provide mentoring opportunities to under represented groups to allow a better opportunity for those persons to demonstrate that they are well placed to apply for and take on specific roles or appointments.

Positive action to increase the number of staff and coaches from typically under-represented backgrounds may be a means to increasing overall diversity in sports participation.

For example, an SGB finds that of its staff composition, despite having a diverse workforce, only 1 of its 6 most senior employees is female. A training and development programme is made available for female staff only, to allow applicable staff to develop management skills and gain an understanding of how senior staff operate through a mentoring scheme. Future vacancies for senior roles see an increased number of female applicants and appointments increase.

Organisational structure, board composition & volunteers

Diverse and inclusive organisational structures can help narrow under-representation of a particular group in a particular sport.

At present there is no legislation or other code requiring SGBs to achieve equal representation between male and females on boards, but there is a wealth of evidence which highlights that diversity in every respect on a board, will both lead to better performance of the board, and less risk of poor governance and/or corrupt practices being permitted or tolerated.

For board composition, the "tie-breaker" principle can be applied, and mentoring opportunities can be promoted. When dealing with recruitment and selection of people to voluntary positions, care needs to be taken to apply the Equality Act 2010 principles or problems could arise in how the sport is perceived, how the sport engages with its members and with Scottish society as a whole. It's important to ensure that the Equality Act 2010 principle of equal opportunities flows through all that an SGB does.

Mentoring – volunteering, official positions

Being positive about promotion opportunities, by providing training and mentoring opportunities to under-represented groups, applies equally to volunteering and official positions. These could be provided to underrepresented groups in particular to allow a better opportunity for those persons to demonstrate that they are well placed to take on specific roles or appointments.

Role shadowing

A work-shadowing scheme or unpaid internship for a group connected by a protected characteristic (ethnic minority, disabled, etc) is possible and should be considered if it would help those persons.

The same applies equally to director / board member positions. A shadowing scheme for ethnic minority, disabled, etc can be applied.

Other steps

One point which cannot be undervalued is the provision of training within the workforce. This is to allow members of staff to identify what may constitute discrimination and understand why certain actions may act as a barrier to those from under-represented minorities. By providing training to these individuals, they will gain a greater understanding.

Such training would allow members to identify what statements and behaviours are unacceptable and empower them to challenge damaging behaviour.

Participation in the sport

Some groups may need more help or encouragement than others. Some groups are disadvantaged or under-represented, or have different needs from the population as a whole due to past or present discrimination or exclusion or particular experiences.

The principles of the Equality Act 2010 allow service providers to take action that may involve treating one group more favourably where the action is a proportionate way to help members of that group overcome the particular disadvantage that they face. Equally positive action can be taken to allow them to participate more fully, or in order to meet the needs they have if they are different from the population as a whole.

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Competitive pricing

A study has found that adults in lower socio-economic backgrounds are less likely to either participate or volunteer in sport⁸. At both primary and secondary school, children and young people in schools with a high percentage of free school meals may be less likely than their peers to be participating as regularly in sport. If underrepresentation is connected to cost, improving access may involve looking at whether there is a "price" barrier to be removed or relaxed, to increase access to the sport.

Examples may include a reduced fee for such individuals for initial participation, provided that this is short-term and unlikely to otherwise impact on club facilities or use. A "tempter" program would be permissible.

It may not be lawful to e.g. waive an annual fee, unless the evidence was that the cost of participation is a problem suffered by those under-represented persons. It may be difficult to sustain in the long-term; a bursary on the other hand, or equivalent, may be better.

Concessions for retaining certain categories of members are permissible. For example, in certain sports it is recognised that male and female sportspeople will not always transition from junior/youth membership to adult membership. A discounted fee or creation of a different category of membership may prove worthwhile. This would not necessarily be positive action but be separately permissible under the Equality Act.

Open days

The purpose of an open day is to generate interest. Such open days give an opportunity for genuine hands-on involvement within a particular sector or industry and to show that pre-conceived stereotypes are not accurate. The focus of open days is on providing activities and opportunities for those from under-represented groups to learn more about the opportunities available to them. When this is considered in the sporting context, taster sessions or open days may be a viable way of increasing memberships (across all groups) for sports clubs. In order to maximise interest, the net would need to be cast wide as to where advertising takes place. Consideration should be given to the prospect of identifying what groups are under-represented, and advertising and liaising with representative groups. Having a drop-in or try-out arrangement, with some regularity, for under-represented people, would be lawful, provided that you monitor the

arrangement and its effectiveness. If the arrangement did not encourage an increase in participation (e.g. people signing up as members) it would need to be ended.

Diversity champion/ambassador roles

Many different sectors apply diversity to their champion/ambassador roles, helping to engage if not ensuring that the audience they seek to connect with are better engaged.

In the sporting context, having people who champion the sport and act as ambassadors, from different backgrounds, can be an effective way to connect with under-represented groups.

Therefore, if there is a specific aim of increasing the number of members from a particular background, who are presently under-represented in the sport, consideration might be given to whether it would be sensible to speak to local community groups; having a person from the background or ethnic community being targeted being appointed and being an ambassador, would be permissible.

The industrial sector is a good example of a sector in which a staff member can be identified and appointed as a "champion" for increasing diversity. As part of their ordinary role, the person is tasked with working with local community roles and outreach programmes, ensuring that the public are aware of opportunities to participate.

Bursaries, scholarships and possibly prizes.

Providing a bursary, scholarship or prize may be useful. Depending on the context, this may not amount to positive action in terms of the Equality Act, but it may be a step that is consistent with the principles of positive action to attempt to encourage persons from a particular group to engage and participate.

Coaching courses

Directing a proportionate amount of funding to arranging coaching courses can be useful positive action. This may apply in the course of the workforce (e.g. employees) or it may apply to other areas in which employment principles would apply, such as with persons who are coaches or match/game officials in sport. If it was felt desirable to have more coaches from a BME group, or a particular gender, providing targeted sessions restricted to that group would be permissible.

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Using coaching to improve the sporting performance of a particular group within a sport tends to be permissible.

Equipment supply

If equipment is the issue and stopping people from a particular group participating, then supplying equipment can be permissible.

Facilities and services

Separate training sessions or separate medical treatment/support for a category of people may be required. This has been seen to be an issue for trans-persons in certain situations.

If these barriers are known or suspected to exist in a particular sport, it would be positive action to take resource and channel it into providing specific training or support for this particular group. Remember, however, absent the evidence of need, there is no positive action obligation to act.

Segregation of leagues / events

The choice of recognising or permitting leagues or events to be organised and run based on ethnicity is a different question to that of gender or age or disability. The question of safety arises and is recognised in law as a reason for segregation (where the circumstances permit). Unlike gender or age or disability, no safety issue arises when looking at the question of ethnicity. Looked at in the context of positive action it may not be suitable to arrange segregated leagues or events based on ethnicity on a permanent basis; it may possibly be suitable to arrange single events or competitions that assist in attracting people to participate. However, organisation of the sport itself should not be defined by ethnicity (race).

Changing club rules for participation?

This may not be positive action but may be permissible in any event under the Act.

For example: A golfer has parkinson's disease. Although they can walk short distances, longer journeys are problematic and a full round of golf is only possible with the use of a golf buggy. The club has a rule that buggies may not be used in competitions; it believes those using them will receive an unfair advantage in competition.

Typically, disabled (mobility) players should have the opportunity to use a buggy, provided that they meet certain criteria; a mobility difficulty would preclude them from having access to the full benefits of membership, which include entry to competitions, and a change of rule to allow the use of buggies by the relevant disabled players is necessary.

Changing club rules for entry

For example: A club has 1000 members, but only 90 of them are female. The Management Committee therefore concludes that a campaign is needed to encourage women to join and decide to offer a course of introductory lessons to women, waiving the joining fee on entry and offering a discount off the first year's membership. This would be considered positive action to increase the disproportionately low level of female participation in that club. It would be sensible for the club to monitor the success of the project and ensure that cost is a factor determining whether women join the club or not and that their positive action is having an effect. Once the level of female membership has increased to the target level, they should remove the discounts.

Changing expectations as to uniform or equipment.

If there is evidence that uniform or equipment is off-putting for certain sectors of society, consideration should be given to adopting a change or to providing an exception.

This could arise in the case of religious considerations, typical ethnic backgrounds, or potentially disability issues.

Presentation of the sport Advertising/Communication

Where a sports club finds that very few of its members are from a particular background it may consider distributing leaflets to homes in the area advertising the club.

Those leaflets and any associated marketing campaign, could, for example, advertise that the club wishes to hold a free evening and targeting an under-represented group to try out the club's equipment, see the facilities and meet the staff, and follow this up by inviting those who attended, to join for a reduced fee for a short period of time. When planning such an event consideration might be given to where the evening or event is advertised.

For example, in such situations it would be sensible to advertise the evening/event in a medium relevant to the underrepresented group.

If the target group was Sikhs then consideration might be given to advertising in a Sikh newspaper.

One example may be wrestling sport, which is a very popular sport in country A and country B. The sports SGB could legitimately invest funding into promoting the sport to the communities of country A and country B in Scotland.

Membership newsletter and workforce newsletters

It is not necessarily positive action to promote diversity and inclusion themes in membership newsletters and workforce newsletters. However, it is a permissible positive step to support equality.

Targeting a community of people with a shared race or religion by sending or using promotional materials, in their language, is permissible. Widening promotion and encouraging access to sport in this way is always permissible. Advertising your sport by promoting participants from different genders and races is neither positive discrimination nor positive action.

POSITIVE DISCRIMINATION

Positive action is to be encouraged and is easily in reach of organisations in all walks of life – as and when the circumstances arise and require it to be implemented. If the correct steps are taken, positive action will not only represent a good investment for sports to help increase participation, but also in a way that is fair and equitable and without risk. The one area of risk to be mindful of is that if action is taken that is not positive action but positive discrimination, claims might arise.

Positive discrimination is almost always unlawful, because it involves restricting entrance and/or otherwise appointment to one group of people only. If a group of people with a shared characteristic were under-represented or disadvantaged and a decision was taken to restrict applications for a vacancy to only people from that group, positive discrimination would arise. A person who was not allowed to apply would then be entitled to bring proceedings under the Act.

The so-called “Rooney Rule” in America’s National Football League is an example of what would be unlawful positive discrimination under the Equality Act 2010 if adopted in the UK. The “Rooney Rule” mandates that black and ethnic minority senior coaching and operational role applicants have to be interviewed for roles, save in very narrow exceptions. It is enforced by the NFL.

Another example of positive discrimination could be found in hard-defined quotas, either for employee profile, board or committee composition, or if applied to other categories of the workforce supporting sports. Mandatory quotas that require e.g. at least 3 people of a particular race or gender will cause difficulties and go beyond the concept of positive action.

There is a statutory exception to positive discrimination for disabled people which provides that an employer can decide to limit recruitment to a particular role, or roles, based on disability; able-bodied persons have no grounds to bring a complaint if they are not permitted to apply.



DEVELOPING A STRATEGY FOR INCLUSION

SGBs working towards the Equality Standard for Sport are considering equality issues routinely. The progressive nature of the standard drives SGBs to embed equality within their everyday working as well as wider strategic planning processes.

Positive action is an area that can be incorporated into equality action plans as well as long term strategies. It can be a key step to improving the composition of the sport, help shape current priorities, areas for development and the long term goals of the sport.

Positive action can be perceived to be a focus on a minority grouping to the detriment of the rights and interests of all others. This is not the case. An equalities action plan which includes positive action is a commitment by an SGB to take forward strategic initiatives that can assist to increase diversity, can strengthen the sport and can leave the sport better placed to progress, develop and strengthen its own reach across all aspects of Scottish society.

Developing a positive action scheme

In considering positive action measures, SGBs should look at drawing up an action plan that:

- Sets out evidence of the disadvantage, particular need and or disproportionately low levels of participation, as appropriate, and an analysis of the causes

When developing a positive action plan it is necessary to understand just why there is under representation of a particular group. By taking time to critically assess what the disadvantage is, steps can be taken to remove it.

Any assessment should be carried out as objectively as possible; the reasons for under-representation might not be those that were expected.

Sharing thoughts and findings with other sports may be helpful when looking at assessing problems and concerns.

- Sets out specific outcomes which the SGB is aiming to achieve

Each SGB will have its own particular challenges and therefore will have its own unique outcomes. When identifying desired outcomes, the outcomes should be meaningful, but achievable.

- Identifies possible action to achieve those outcomes It is important that the actions are focussed so that their impact can be measured. It may be tempting to implement a host of non-specific actions but this can make the measurement of success or failure difficult.
- Shows an assessment of the proportionality of proposed action

By taking steps to promote involvement from under-represented groups, there may be an impact on those groups already involved. It is therefore necessary to consider whether the identified actions are proportionate to the aims which are to be achieved.

- Sets out the steps to achieve these aims Each step should be identifiable and logical.
- Sets out the measurable indicators of progress towards those aims, set against a timetable

Indicators will depend on the nature of the organisation and the goals which it has set for itself. Different goals will have difference indicators.

- Explains how they will consult with relevant groups

Consideration should be given to what methods will be used to advertise the aims of the organisation and the media used.

ANCILLARY CONSIDERATIONS

- Specifies a time period for the programme

Change takes time. However, time frames for change should be realistic.

- Set out a period of review of progress of the measures towards the aim to ensure it remains proportionate.

Review is important in assessing what steps have been taken and whether the changes are working.

If steps are not working the question can be raised as to “why” and a change in approach can be adopted.

Board focus and good governance of positive action

Decisions should be taken by following this cohesive process, as set out above and in the attached check list. Monitoring and reporting on “positive action” should be incorporated into the wider strategic monitoring process that an SGB will have in place to report on targets and outcomes. A suggested remit appears below.

SGB boards meet routinely. Positive action should be included as part of the “equality” standing item on the agenda.

As positive action steps are typically project based, focused initiatives that are finite in time, resource and commitment, an SGB should monitor the investment made and measure the outcome, to assess the effectiveness of the positive actions steps.

SGB organisational issues

Creating an action plan and focusing on initiatives shouldn't start and end with a focus on those particular initiatives. The Equality Standard for Sport framework ensures that SGBs are working on continuous improvement using the evidence available to them to implement appropriate actions relevant to the sport and membership. This progressive framework challenges SGBs to question themselves on their understanding of their sport and membership and to address the inequalities that exist. There are many ancillary steps that can be taken by SGBs to embed positive action into the work of the SGB. For example, SGBs can:

- Review hotspots and areas of concern or risk in the organisation. A staff survey may support this and help to assess what barriers may exist and what can easily be changed.
- Recruitment processes for employment positions and all other posts should be considered; can we reach all parts of the community when we have vacancies?
- Can we encourage a culture in which problems for participation can highlighted and reported?
- Ensure that your equalities profile on the SGB website and communications highlights positive action initiatives being taken.
- Communication review – are we communicating in an inclusive way, through the use of our language? Is our language neutral? In furtherance to considering its communication strategy, a club may wish to review its own internal policies and procedures.
- Ask and answer - is it necessary to train our staff and/or committees on the obligations incumbent on us as SGBs?

Create a plan to cascade action points to member organisations, comprising information and support.

POSITIVE ACTION IN SPORT

Data capture and use

Data capture and use is significant in identifying the areas in which SGBs are performing well and in which greater support is required: Membership data; capture, retention and review is necessary – to understand where your sport stands with diversity.

Capturing participation data and assessing progress in increasing participation from under-represented parts of the community may be challenging but it will be necessary to achieve an accurate picture of the effectiveness of any steps being taken by an SGB. Data collated should be anonymised and without reference to individuals.

Discipline/complaints

If you are going to promote equalities principles and make your sport diverse and open to all, allegations of any breaches of equalities principles need to be properly investigated and disciplinary action taken.

You need to be well placed to act against persons who offend equality principles, to ensure that your sport does not tolerate inequality.

Age issues

It may not be necessary to take all measures as “positive action” when dealing with age issues. There are concessions in place in the Equality Act 2010 allowing clubs to provide concessions e.g. to allow golf clubs to offer concessions to members above/below a certain age or based on the length of membership.

Similarly, age restricted competitions are permissible, for example under 21s competitions and veterans competitions.

CONCLUSION

SGB organisational issues

SGBs who embrace positive action and take steps to address needs, remove disadvantages, encourage participation, and address recruitment and promotion difficulties can demonstrate that they are progressive organisations, who are acting to contribute to addressing and promoting equality within sport and society as a whole.

Successful positive action will encourage diversity and wider participation in sport, hopefully resulting in stronger sports and sports organisations across Scotland. Many challenges exist for sports but embracing and using positive action also represents an opportunity for sport. As an entirely voluntary concept, adopting one or more positive action steps from time to time is to be encouraged, not only by SGBs, but also by clubs and organisations within membership of the SGB.

When adopted, positive action steps should be project-based and focused, finite in time, resource and outcome. As a result, positive action can be crafted around the needs of the organisation.

GET IN TOUCH



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ACTION POINT CHECK LIST

Positive action – action point check list

SGB:	
Author:	

The gap or problem (part 1)

What is the issue?	
What is the measure of the participation level?	
Basis for this (evidence/data etc):	

Intended action (part 2)

Action to meet the group's needs:	
How this will overcome or minimise the difficulties faced:	

Why the action is proportionate (part 3)

Cost, time and ancillary investment:	
Expected success:	
Suitability or not of alternatives:	
Potential impact on other groups:	

Conclusion to proposal:	Approved [<input type="checkbox"/>]	Rejected [<input type="checkbox"/>]
Comments:		

APPENDIX I

Positive action – responsible person remit

Identify a person as the “equalities officer” or “inclusion officer”. Ensure that at least one senior person in the SGB has specific responsibility for ensuring that equalities issues are, at all times, on the radar.

Whilst the equality standard requires a nominated person to implement, a strong message can be issued by appointing someone within the board to have overall responsibility for this topic.

Additional resources

Equality and Sport Research

<http://www.sportscotland.org.uk/media/1886385/Equality-and-Sport-Research-Final-Report.pdf>

Active Scotland Outcomes: Indicator Equality Analysis

<http://www.gov.scot/Publications/2015/11/9439/3>

Equality Standard in Sport

<http://equalityinsport.org/equality-standard-for-sport/>

Equalities Issues in Sport – An introductory guide for Governing Bodies, February 2015, Harper Macleod LLP



END NOTES

1. Namely age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex and sexual orientation.
2. Equality and Sport Research <http://www.sportscotland.org.uk/media/1886385/Equality-and-Sport-Research-Final-Report.pdf>
3. Active Scotland Outcomes: Indicator Equality Analysis <http://www.gov.scot/Publications/2015/11/9439/3>
4. Equality and Sport Research 2016, Page 2, Key Findings – Participation in Sport
5. For example, see page 10 (paras 2.18 & 2.19) of the Equality and Sport Research 2016. “Exposure to role models is perhaps one of the key barriers to females participating in sports. On average less than 5 per cent of sports coverage in national and local print media is dedicated to women’s sport. This continued after London 2012 where reporting patterns found a continued bias towards men’s sport in the media”. Pages 21 and 22 (paras 2.61 and 2.66) “Similarly, 79% of LGBT people feel homophobia in sport is an issue. The lack of positive role models may perpetuate this problem. During London 2012, there were only 23 ‘out’ gay participating athletes, one of which was from the UK.”
6. This means that the action is directed at addressing the identified issue, is a reasonable way of achieving the same and there is no less obtrusive or discriminatory method, meaning that the impact on other people is as low as possible, in comparison to other actions that address the identified issue.
7. Only one in four sports clubs believes that their facilities are suitable for disabled people to participate (page 16 (para 2.40) of Equality and Sport Research January 2016); women are less likely to be members of clubs and more likely to take part in individual and non-competitive activities; (page 10 (para 2.21) of Equality and Sport Research January 2016).
8. There are many concerns for people experiencing socio-economic disadvantage. Research highlighted that high performance sports people require support to enable them to reach that level – meaning success can be very dependent on parental support, finances, school opportunities, and wider opportunities.” Page 47 (para 3.30) Equality and Sport Research January 2016 “Older participants cited the cost of activities as off-putting, although there were examples of older people receiving free passes for their local gym. For some, the cost of activities had led them to give up attending classes or clubs.” (page 63 (para 4.17) Equality and Sport Research January 2016.

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