

The Women's Representation Bill: Making it Happen

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July 2001

£10.00

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Executive Summary

- This briefing responds to the announcement in the Queen's Speech 2001 that government will prepare legislation to allow political parties to apply positive action mechanisms in selection of candidates for public office. These mechanisms have been shown to be effective in increasing women's representation, whilst when they are not used progress has been slow or non-existent. The purpose of the briefing is to offer some guidance in the drafting of this new Women's Representation Bill.
- The current legal difficulties result from the interpretation of the Sex Discrimination Act 1975 which has been found to cover candidate selection. Candidate selection has been considered, since 1996, to be covered by the part of the Act relating to employment (and by the equivalent part of the Race Relations Act).
- EU law and the European Convention on Human Rights almost certainly do not create a barrier to amending domestic law to end this problem.
- Government will need to act quickly if it is to influence selection procedures for the next general election.
- An important issue to consider is whether positive action on grounds of race, as well as gender, should be allowed. There are arguments on both sides. In any case, it may be necessary to amend the Race Relations Act in order to create a consistent legal framework for candidate selection.
- Another key issue is the extent to which the candidate selection process should be regulated by law, versus the extent to which this should be left to the internal democracy of political parties. In particular, consideration should be given to how far the law should seek to prevent 'negative' discrimination (eg. against women) in this process.
- There are three broad options for changing the law:
 1. Leave candidate selection within the 'employment field' of the Sex Discrimination Act, but include an amendment allowing positive action.
 2. Exempt the selection process from the discrimination acts altogether, giving parties freedom to decide their own procedures including, if they wish, the adoption of positive action.
 3. Create a new little body of law covering the candidate selection process, which disallows discrimination but allows positive action.
- Of these, option 3 is the most attractive, as it maintains protection against negative discrimination, whilst acknowledging that candidate selection is a different process to employment, and that positive action should be allowed. This option is slightly more complex to draft than the others, but should not present difficulties and would appear more robust in the longer term.
- Government will want to consult with lawyers, political parties, and interest groups in the drafting of the Bill. Political parties themselves will need to prepare for its introduction by amending their selection procedures.
- There is much that could be learnt from other European countries on this issue, as the perceived legal obstacles here seem not to have been seen as difficulties elsewhere.

Introduction

The purpose of this briefing is to inform the debate - both inside and outside government - about the preparation of the 'Women's Representation Bill' which was promised in the Queen's Speech on 20 June 2001. The purpose of this Bill is to allow political parties to use 'positive action' ('quotas') in the selection of candidates for elected office, and thus to facilitate an improvement in women's representation in politics.

The briefing is the product of a research project based at the Constitution Unit, whose aim was to produce recommendations for such a legal change and publish a draft Bill for tabling by a private member. The Constitution Unit's work in this area began in early 2000, with a short project which sought to investigate the legal obstacles to parties using positive action, and whether these could be overcome. This resulted in a report, *Women's representation in UK politics: What can be done within the law?*, which was published in June 2000. The report, based on desk research and interviews with senior lawyers, concluded that a change in the law was both possible and necessary in order to allow political parties to use positive action with confidence. This report helped break the log-jam which had prevented parties and government from considering a change in the law. It appeared to be influential in the Labour Party conference decision in autumn 2000 to review the law in this area.

At this time there was no indication of how or when government would act, and whether any review would result in concrete action. A number of legal questions remained about how legal change might be implemented. The Constitution Unit thus sought further funding for a project which would consider the legal details, and produce a draft Bill. This project was to end in autumn 2001.

However, since the project was funded, events have moved rapidly. A commitment to legal change was included in the Labour Party manifesto for the 2001 manifesto and then in the first Queen's Speech. A Bill is due to be prepared in this parliamentary session (ending autumn 2002). These decisions were in part influenced by the poor performance of all the political parties in selecting women candidates for the election, and the adverse publicity which this attracted. On June 7 the number of women MPs dropped for the first time in 22 years. This was in stark contrast to the doubling in the number of women at the 1997 election, when the Labour Party used all women shortlists. It appears that the mood amongst both the public and the parties is turning towards positive action as a necessary means to increase women's representation in parliament beyond its current 17.9%.

Given the new commitments from the government to act, the Constitution Unit's project will not continue in its original form. Instead of producing a major report in the autumn, this briefing is being published now. Its purpose is to inform those directly involved in the preparation of the Bill, and those who have an interest in its content. As the project is not complete, the conclusions in the briefing are not firm, and it does not set out a single blueprint for reform. Instead it discusses three options which may be pursued, and the pros and cons of each based on research to date. These are the issues which will need to be considered by those involved in developing the Bill, and it is hoped that this briefing will be of use to them in their deliberations.

The briefing is in four main parts. First, the legal and political background is set out, for those not already familiar with the arguments to date. This includes a brief summary of the issues in the court cases in 1996 and 1999 which created the obstacles to positive action, and the wider legal context in terms of EU and international law (a more complete description of

these matters is included in the 2000 report referred to above). The second part looks at some of the political issues which will need to be considered in deciding both the timing and the content of a Bill. The third part considers the three broad options which could be adopted in the drafting of the Bill, and discusses each in the light of the key issues which have been identified. The final main part of the briefing then looks at the processes which might be followed, both in getting agreement about the content of the Bill, and by the political parties in response, assuming it is passed.

After the conclusions and recommendations, the briefing also includes two appendices. The first of these describes six forms of positive action which parties may seek to employ, in order to illustrate the necessary scope of the Bill. The second appendix describes, for illustrative purposes, how the legal systems in four other European countries treat candidate selection and positive action. These examples demonstrate how out of step the UK is with other countries in Europe, and may be of use in the drafting of the Bill.

This project and the one which preceded it were funded by the Nuffield Foundation. We are extremely grateful for their support. In addition, the seminar which brought together overseas speakers and resulted in the material in the appendix was generously funded by the ESRC's Future Governance Programme. I would personally like to extend thanks to Sharon Witherspoon of the Nuffield Foundation and Professor Edward Page of the Future Governance Programme for their support and advice. The project benefited from the input of a team of legal advisers, to whom we are also extremely grateful. This team comprised Professor Noreen Burrows (University of Glasgow), Professor Bob Hepple QC, Alan Lakin (EOC), Lord Lester QC, Helen Mountfield, Colm O'Connell and Gerald Shamash. Their input was invaluable, but they should not be held responsible for the views, and any errors, in this briefing. The speakers at the seminar, Sylvie Guillaume, Karin Lundstrom, Kristin Mile and Frank Schulz, also provided invaluable input. Finally, I would like to thank all the others who provided help and support with the project, who are too numerous to mention. Particular thanks though go to Professor Robert Hazell, Professor Joni Lovenduski and Mary-Ann Stephenson (Fawcett Society).

1. Background

Before describing the possible ways forward, it may be helpful to summarise the background to the current situation. This is done here in two parts. First, the legal background, including the results of relevant cases and the international legal context, is summarised. Second, the political context, both in terms of current women's representation and party attitudes to positive action and a change in the law. This second part ends with a description of recent party commitments.

1.1 The Legal Landscape

The debate on positive action in candidate selection came to the fore when the Labour Party adopted a policy of 'all women shortlists' in half of its winnable seats in 1993. This policy applied for parliamentary selections prior to the 1997 election, and was largely responsible for the large increase in women MPs at that election (see next section).

The system of all women shortlists was controversial both within the Labour Party and in the press. It was finally ended before the 1997 election when two of the Labour Party's male members took it to court claiming that the policy constituted unlawful discrimination. The basis for their argument was the Sex Discrimination Act 1975. In particular they argued that selection of a party candidate was covered by the part of the Act governing employment.

Consequently their case was heard in an Employment Tribunal.¹ The tribunal ruling, in January 1996, found in their favour and consequently the policy was dropped.²

The preamble to the Sex Discrimination Act states its purpose as to:

render unlawful certain kinds of sex discrimination and discrimination on the grounds of marriage, and establish a Commission with the function of working towards the elimination of such discrimination and promoting equality of opportunity between men and women generally.

The Act prohibits sex discrimination in three main fields. These are the 'employment field' (Part II), 'education', and 'goods, facilities and premises' (both covered by Part III). Unlike in some European countries (see Appendix 2), there is no positive action clause in the Act.

Section 29(1) of the Act covers the provision of services 'to the public or a section of the public', and prohibits discrimination in this field. However, political parties are expressly exempted from this clause by Section 33 of the Act, which reads:

- (1) *This section applies to a political party if:*
 - (a) *it has as its main object, or one of its main objects, the promotion of parliamentary candidatures for the Parliament of the United Kingdom, or*
 - (b) *it is an affiliate of, or has as an affiliate, or has similar formal links with, a political party within paragraph (a).*
- (2) *Nothing in section 29(1) shall be construed as affecting any special provision for persons of one sex only in the constitution, organisation or administration of the political party.*
- (3) *Nothing in section 29(1) shall render unlawful an act done in order to give effect to such a special provision.*

This clause was originally included in the Act to allow for women's organisations within the political parties.

Part II of the Act, the part dealing with employment, also covers access to employment and training. Section 13(1), located in this part of the Act, states the following:

It is illegal for an authority or body which can confer an authorisation or qualification which is needed for, or facilitates, engagement in a particular profession or trade to discriminate against [someone on grounds of sex] in the terms on which it is prepared to confer . . . that authorisation or qualification or by refusing or deliberately omitting to grant . . . application for it.

The arguments at the tribunal rested on whether candidate selection by political parties was covered by this section. The Labour Party's lawyer held that parliamentary candidates could not be covered by Section 13 of the Act, because they are not in employment, saying that even MPs are 'office holders' rather than employees. In any case, he argued, the choice of who is elected as an MP is not made by the party, but by the voters. He stated that 'the regulation of the Parliamentary election process is the prerogative of Parliament itself, election courts, the High Court and the Privy Council and is not for an industrial tribunal', arguing that selection of candidates formed part of the 'constitution, organisation or

¹ At that time Employment Tribunals were known as Industrial Tribunals.

² *Jepson and Dyas-Elliot v The Labour Party*, [1996] IRLR 116 ET.

administration' of a party and was thus exempt from the Act under the provisions of Section 33. The tribunal however found the Labour Party's argument unconvincing, and ruled in January 1996 that candidate selection was covered by Section 13 because it was 'an authorisation or qualification which is needed for, or facilitates, engagement in' the 'profession' of being an MP. This meant that all women shortlists constituted unlawful discrimination as they excluded men from selection simply on grounds of their sex.

It was suggested that the Labour Party should appeal the tribunal decision and seek a ruling from a higher court. This did not happen at the time, but the principle has since been tested in the Employment Appeal Tribunal. In this case, which concerned alleged race discrimination using the equivalent provision in the Race Relations Act (Section 12), it was confirmed that candidate selection constitutes 'an authorisation or qualification which is needed for, or facilitates, engagement in a particular profession or trade'.³

Hence the law must be changed if political parties are to be able confidently to use positive action measures to improve women's representation. The obstacle currently created by Section 13 of the Sex Discrimination Act must be removed. This requires a change in domestic legislation which may be made by the Westminster parliament. However, in making this change it is important to be aware of the wider legal context, in terms of the UK's obligations under EU and international law, and the impact of the Human Rights Act 1998.

In the past it has been suggested that changing UK domestic law to allow positive action could raise difficulties either under EU discrimination law, or under the European Convention on Human Rights. Obviously the government will seek to avoid such difficulties. These issues were discussed at length in the Constitution Unit's previous report, and will not be exhaustively covered here.⁴ Our earlier report concluded that neither of these bodies of law necessarily created an obstacle, but nonetheless the government will need to proceed with care.

There are several sources of EU law with respect to gender equality in employment. These allow positive action to varying degrees. As a basis, Article 141(3) of the Amsterdam Treaty states that:

The Council . . . shall adopt measures to ensure the application of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation, including the principle of equal pay for equal work or work of equal value.

Whilst Article 141(4) expressly permits positive action to achieve equality:

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

The main source of detailed equality law in the EU has for many years been the Equal Treatment Directive 1976. Article 1(1) of this Directive defines its purpose as:

³ *Sawyer v Ahsan*, [1999] IRLR 609 EAT.

⁴ See M. Russell, *Women's representation in UK politics: What can be done within the law?*, Constitution Unit, 2000.

to put into effect in the Member States the principle of equal treatment for men and women as regards access to employment, including promotion, and to vocational training and as regards working conditions and . . . social security.

The Equal Treatment Directive includes a positive action clause, but this has been interpreted quite restrictively.⁵ The key principle applied by the European Court of Justice is that a positive action system should not be so rigid that men are totally barred from access to particular positions.

An update to the Directive is currently under discussion. This leaves its original scope unchanged, but replaces the previous positive action clause (Article 2(4)) with a requirement for member states to report regularly on positive measures adopted in relation to Article 141(4) of the Treaty. When it is adopted this may allow a more liberal interpretation of positive action.

However, it is extremely unlikely that the European Court of Justice would (as UK courts have done with respect to the Sex Discrimination Act) outlaw positive action for women in the party selection process by ruling that it is covered by employment provisions. The European Commission has twice stated a clear belief that selection of candidates by political parties does not fall within the scope of the Equal Treatment Directive, in answer to questions in the European Parliament.⁶ If the court were to rule that EU law extended to candidate selection by parties, this would create chaos for those many parties all around the EU which use quota systems. As described in Appendix 2, strict positive action measures are now even enshrined in domestic law in some states such as France. In practice it would be politically impossible for the European Court of Justice to overturn these systems, and it can easily be argued that selection of candidates for political office is outside the competence of the EU.

Whilst the European Court of Justice would be unlikely to present a problem, it is clear that any action taken by the UK government must comply with the European Convention on Human Rights, as incorporated by the Human Rights Act 1998. The European Convention is, however, more tolerant of positive action.

There are two parts of the Convention which, when read together, could be used to protect individuals from discrimination in the process of standing for election. Article 3 to the First Protocol (free elections) has been interpreted as extending to the 'right to vote' and the 'right to stand for election to the legislature'.⁷ This would be relevant when combined with Article 14 of the Convention, which requires access to all Convention rights to be equal:

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

⁵ See for example the *Kalanke* and *Marschall* cases, described in M. Russell, *Women's representation in UK politics: What can be done within the law?*, Constitution Unit, 2000.

⁶ Questions by Nal van Dijk MEP in 1996 and 1998, quoted in M. Russell, *Women's representation in UK politics: What can be done within the law?*, Constitution Unit, 2000.

⁷ *Mathieu-Mohin and Clerfayr v Belgium*, 10 EHRR 1, 1987. Quoted in Clements, L. J., Mole, N. and Simmons, A. (1999), *European Human Rights: Taking a Case under the Convention*. London: Sweet and Maxwell, p. 233.

The way in which Article 14 has been interpreted has been helpfully unpacked as follows⁸:

the elements which should be taken into account if a given treatment or situation is reviewed for its conformity with the principle of equality . . . are the following: A violation of the principle of equality and non-discrimination occurs if there is:

- a) differential treatment of*
- b) equal cases*
- c) without there being an objective and reasonable justification, or if*
- d) proportionality between the aim sought and the means employed is lacking*

This allows broad scope for positive action, as the same text goes on to explain:

As far as the first element is concerned, it should be observed from the outset that Article 14 . . . does not prohibit every difference in treatment. On the contrary, the obligation contained therein may even entail unequal treatment. Indeed, Article 14 is not only concerned with formal equality – equal treatment of equal cases – but also with substantive equality: unequal treatment of unequal cases in proportion to their inequality. In other words, a difference in treatment which is aimed at eliminating an existing inequality creates substantive equality and is consequently in conformity with Article 14.

Positive action will not be in conflict with the Convention if it is both proportionate and objectively justified. This has been spelt out in the new Protocol 12 to the Convention, which creates a free standing right to equality. The preamble to the new Protocol:

Reaffirm[s] that the principle of non-discrimination does not prevent States Parties from taking measures in order to promote full and effective equality, provided that there is an objective and reasonable justification for these measures.

The UK has not as yet signed up to this Protocol, which means that it cannot be cited in domestic courts. There is also little case law on positive action in the European Court of Human Rights, so the terms 'justified' and 'proportionate' remain relatively ill-defined in this context. However, it is very unlikely that the Strasbourg court would seek to prevent positive action by political parties, which is widely used throughout Europe and aimed at the popular objective of increasing women's representation in public life.

Finally, the principle of positive action is accepted in international treaties. Most notably Article 4 of the 1986 United Nations Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) states that:

Adoption by States Parties of temporary special measures aimed at accelerating de facto equality between men and women shall not be considered discrimination as defined in the present Convention, but shall in no way entail as a consequence the maintenance of unequal or separate standards; these measures shall be discontinued when the objectives of equality of opportunity and treatment have been achieved.

These words have been used to insert clauses in the domestic equalities legislation of many EU member states.

⁸ P. van Dijk and G. J. H. van Hoof. (1998). *Theory and Practice of the European Convention on Human Rights*, The Hague: Kluwer Law International, p. 719.

1.2 The Political Landscape

The need for positive action in UK politics is perhaps best illustrated by the last two elections to the House of Commons. In 1997 the number of women MPs leapt from 60 to 120, largely as a result of the Labour Party's use of all women shortlists.⁹ In 2001, following the tribunal ruling against all women shortlists, no political party adopted an effective mechanism of positive action. In this election the number of women MPs dropped for the first time since 1979. The numbers of women in the 2001 parliament, and previous parliaments, are shown below.

Table 1: Women's Representation in both Houses of Parliament

Party	House of Commons (June 2001)			
	Men	Women	Total	% women
Labour	317	95	412	23.1
Conservative	152	14	166	8.4
Liberal Democrat	47	5	52	9.6
UUP	5	1	6	16.7
SNP	4	1	5	20.0
Plaid Cymru	4	0	4	0.0
SDLP	4	0	4	0.0
DUP	4	1	5	20.0
Sinn Fein	3	1	4	25.0
Speaker	1	0	0	0.0
Independent/other*	1	0	1	0.0
Total	541	118	659	17.9

Table 2: Women in the House of Commons 1945-97

	Con	Lab	LDem*	other	Total women	% total MPs
1945	1	21	1	1	23	3.8
1950	6	14	1	0	21	3.4
1951	6	11	0	0	17	2.7
1955	10	14	0	0	24	3.8
1959	12	13	0	0	25	4.0
1964	11	18	0	0	29	4.6
1966	7	19	0	0	26	4.1
1970	15	10	0	1	26	4.1
1974 (Feb)	9	13	0	1	23	3.6
1974 (Oct)	7	18	0	2	27	4.3
1979	8	11	0	0	19	3.0
1983	13	10	0	0	23	3.5
1987	17	21	2	1	41	6.3
1992	20	37	2	1	60	9.2
1997	13	101	3	3	120	18.2
2001	14	95	5	4	118	17.9

* Liberal Democrats, Liberals or other centre party.

⁹ For a discussion of this see Eagle, M. and Lovenduski, J. (1998). *High Time or High Tide for Labour Women?*, Fabian Society.

Parties have in general acted cautiously since 1996, in order to avoid legal challenge. The threat of legal action has been a factor in most parties' decisions about whether or not to adopt positive action.¹⁰ However, there have been some significant breakthroughs. When the new Scottish Parliament and National Assembly for Wales were established, the Labour Party adopted a policy of 'twinning' constituency seats so that two constituencies together selected one woman and one man. This policy was highly successful in terms of outcomes, and together with good results by the Scottish National Party and Plaid Cymru in particular, accounts for the high proportion of women in these new assemblies. However, the twinning procedure was subject to threats of legal challenge by Labour Party members, which in the end did not materialise. Similarly, the Liberal Democrats adopted a policy of 'zipping' (alternating male and female names) for the electoral lists for the European elections in 1999. Legal action was again threatened but did not occur.

The proportion of women and men in different elected assemblies in the UK is illustrated in Table 3. This presents a very general picture and masks both differences between the parties (Labour generally faring best, although the Liberal Democrats achieved 50/50 representation amongst their MEPs) and between the different nations and regions of the UK. In local government, for example, women's representation ranges between 27.8% in England and 15.6% in Northern Ireland.¹¹

Table 3: Women's representation in different UK elected assemblies

	no. men	no. women	total	% women
National Assembly for Wales 1999	37	23	60	38.3
Scottish Parliament 1999	82	47	129	36.4
European Parliament 1999	65	22	87	25.3
House of Commons 2001	541	118	659	17.9
Northern Ireland Assembly 1998	94	14	108	13.0

In relative terms, women's representation is low in the House of Commons, although it is lower still in the Northern Ireland Assembly. In the latter, where a different party system operates, women's poor representation may be traced to the traditionally macho, adversarial and divided nature of politics.¹² In the House of Commons, the first past the post electoral system has continued to present a major obstacle. No positive action policy other than all women shortlists has yet been found to work. The Labour Party applied a policy of 50% women on every shortlist for the recent general election, as did the Liberal Democrats in Scotland and Wales. However, both parties still overwhelmingly selected men.

Consequently the political climate has started to change, and it is increasingly widely accepted that political parties should be free to adopt positive action measures in order to increase women's representation above current levels. The publication of the Constitution Unit's report *Women's representation in UK politics: What can be done within the law?* in June 2000 appeared to give the Labour Party and the government more confidence that legal

¹⁰ See M. Russell, *Women's representation in UK politics: What can be done within the law?*, Constitution Unit, 2000.

¹¹ The figure for Scotland is 22.6% and for Wales is 20.4%. Source: Local Government Management Board, Scottish Local Government Information Unit, Association of Local Authorities in Northern Ireland.

¹² For a discussion of these issues see Yvonne Galligan, Eilís Ward and Rick Wilford (eds.) (1999). *Contesting Politics: Women in Ireland, North and South*, Oxford: Westview Press.

change was possible in order to enable this to happen. At its conference in autumn 2000 the Labour Party indicated for the first time that it would consider a change in the law. The policy document on Democracy and Citizenship agreed by the conference stated that:

In the next Parliament we will take action, including legislation if necessary, to ensure that all political parties can introduce measures guaranteeing selection of more women and ethnic minority candidates for winnable seats.

When she appeared on the On the Record programme on 6 May 2001 Margaret Jay, the then Minister for Women, indicated that this would be progressed as a new piece of electoral or party law, which was the favoured option in the Constitution Unit report:

This would be a change, we hope, in the electoral law, which would . . . allow parties to take that choice to take positive action to have more women candidates.

The commitment then went on to be included in the party's manifesto for the 2001 general election, which said¹³:

The House of Commons is more representative than ever before, yet only one in five MPs is a woman. Labour increased women's representation five-fold [sic] in the 1997 Parliament through all-women shortlists. We are committed, through legislation, to allow each party to make positive moves to increase the representation of women.

Partly in recognition of the time constraints, discussed in the next section, the commitment was then included in the Queen's Speech for the first parliamentary session, on 20 June 2001. The words used were:

My government will prepare legislation to allow political parties to make positive moves to increase the representation of women in public life.

This does not amount to a firm commitment to introduce legislation in the current parliamentary session (which will run until autumn 2002), although if the 'preparation' of the Bill proceeds speedily, it could be introduced. The briefing note circulated on the Queen's Speech gave more detail on the government's intentions. This read:

Our proposals will resolve the legality issue of all-women (and gender balanced) shortlists since the shortlisting procedures used in the 1997 election were successfully challenged in an Employment Tribunal. Our proposals will not impose women only shortlists on parties who do not want them. Our aim is to ensure that any party keen to further its representation of women will not be prosecuted as a result.

A big question is how the other parties will respond to the introduction of such a Bill, and how they will choose to respond later, in terms of their own selection procedures. When an attempt was made to introduce a similar change as an amendment to the Scotland Bill in 1998, Scottish Liberal Democrat leader Jim Wallace spoke in favour, and the Scottish National Party joined his party in voting for the amendment. Plaid Cymru and the Liberal Democrats supported a similar attempt to amend the Government of Wales Bill.¹⁴ The Conservative Party has always been more unhappy with the principle of positive action, and

¹³ Labour Party, *Ambitions for Britain*, p. 35. In fact the number of women in parliament increased two-fold, not five-fold, in 1997. The number of Labour women MPs increased from 37 to 101.

¹⁴ See M. Russell, *Women's representation in UK politics: What can be done within the law?*, Constitution Unit, 2000, pp. 28-30.

its attitude to the Bill will prove to be important. At time of writing there are early indications that the party may support the government line. During the debate on the Queen's Speech on 25 June, Conservative leadership contender Michael Portillo commented¹⁵:

I ... welcome the proposal in the Gracious Speech to make it easier for women to enter Parliament. The proportion of women here is too low. At this election, the progress made in 1997 has not been sustained. In my party, the under-representation by women is truly chronic. The Conservative party must put it right, and the Government's legislation may help us all in that respect.

Likewise on 27 June Conservative spokesperson Caroline Spelman MP issued a press release stating:

Caroline Spelman, Conservative Spokesman on Women's Issues stressed Conservative Party support for taking parliamentary selection out of employment law which would allow a whole range of positive action which should help to get more women selected. . . . Each party would then be free to interpret this change in the law in the way that suits it best but all with the aim of achieving broader representation.

2. Issues for Consideration

Consideration of how a Women's Representation Bill might be drafted requires a number of issues to be tackled. There are various legal and political issues on which a position must be taken before the route to a legal change can be chosen. But there are also issues of timing, which must be taken into account in deciding when the Bill should be tabled. These are discussed below, followed by the wider issues.

2.1 Timing issues

The purpose of this Bill is to enable political parties to adopt candidate selection procedures which include positive action mechanisms. The Bill itself will not provide these mechanisms, and on its own will not deliver better women's representation. Progress depends on the parties agreeing appropriate selection procedures. This will require rule changes of some kind which will need to be approved through the processes used in each party.

The primary target of the Bill will be to facilitate entry of more women MPs to the House of Commons at the next general election, probably to be held in 2005/6. This seems a long time away, but in fact parties select their general election candidates long before the event, and must agree their selection procedures before this process begins. As an illustration, after the April 1992 general election the Labour Party agreed the all women shortlist process at its autumn conference in 1993, for a general election finally held in May 1997. This enabled candidates to be in place in plenty of time for the election, and building up media and public profiles in the seats that the party hoped to win.

All parties work to similar timetables, although the Liberal Democrats may select their candidates even earlier than this. Party conferences in autumn 2002 - at the end of the current parliamentary session - are therefore likely to be discussing selection procedures. This suggests that influencing selections for the next general election requires the Bill to be passed in this parliamentary session, with parties preparing to approve selection procedures immediately thereafter.

¹⁵ House of Commons Hansard, col. 404.

Some concerns have been raised by women in Scotland and Wales that the Bill should be passed in time for selections to the Scottish Parliament and National Assembly for Wales in 2003. Given that there will be similar lead times for selection of candidates for these elections, this appears unlikely.

2.2 Legal and political issues

The primary issues to be considered prior to introduction of a Bill are legal/political ones. Six of these issues are considered below:

- whether candidate selection should be considered as employment-related,
- whether the government should legislate for positive action on race as well as gender,
- how to protect potential candidates from negative discrimination in the selection process (eg. sexist behaviour which disadvantages women),
- which elections the legal change should apply to,
- the impact of the new devolution arrangements, and
- whether positive action measures should be allowed on a temporary or a permanent basis.

2.2.1 *Is candidate selection employment?*

At the heart of the Employment Tribunal case in 1995/6 was whether selection of candidates by political parties should be considered to be covered by Part II of the Sex Discrimination Act, governing the 'employment field'. The Labour Party argued that it should not, whilst the complainants argued that it should. Once the tribunal had decided for the complainants on this point, all women shortlists were automatically deemed unlawful because they formed the kind of 'reverse' or 'positive' discrimination which would not be allowed in the workplace under the Act.

Subsequent to the *Jepson* ruling there have been several other cases which have built upon this principle. The *Ahsan* case, which reached the Employment Appeal Tribunal in 1999 concerned selection of potential candidates to become local councillors, again by the Labour Party.¹⁶ Here Mr Ahsan, who alleged racism in the selection process, argued that selection of local council candidates (who unlike MPs do not draw a salary) should be considered to be employment-related under the Race Relations Act. The Labour Party, again, disagreed and appealed the case when the original tribunal backed Mr Ahsan. However, the Employment Appeal Tribunal cited the *Jepson* case and reinforced its conclusions. In a third case in 2000 a Mr Ishaq alleged race discrimination against the Labour Party, again in selection of local council candidates.¹⁷ The tribunal, using the precedent established in the earlier cases, automatically applied the employment provisions of the Race Relations Act and found the case of racism to be proven. This was the first time that a tribunal had looked inside the standard candidate selection process of a party (rather than the positive action process, as in the *Jepson* case) and found it to be discriminatory. This opens up the prospect of numerous disgruntled women and ethnic minority candidates taking parties to court under the two Acts alleging discrimination. As one commentator noted after the *Ahsan* case was decided:

This important precedent thus opens the way to prospective candidates for local and national office to challenge their failure to be selected by a political party on grounds that they were discriminated against by reason of race, sex or disability. This will place the selection process for elective office under scrutiny like that for any other job. It means, for the first time, that

¹⁶ *Sawyer v Ahsan*, [1999] IRLR 609 EAT.

¹⁷ *Ishaq v M. McDonagh and the Labour Party*, Hull Employment Tribunal decision 2 May 2000.

*political parties may have to explain and, in some cases justify, why particular candidates were rejected or selected.*¹⁸

The current situation places a great constraint upon the political parties. Whilst discrimination in the selection process is clearly undesirable, party processes are now expected to live up to the standard set for the workplace, which is potentially restrictive. Cases will be adjudicated by Employment Tribunals, which are familiar with employment but not with the political process.¹⁹ This situation does not recognise that candidate selection by parties is essentially a *democratic* process, which increasingly is expected to live up to democratic ideals within parties. All three main UK parties (though not Plaid Cymru or the Scottish National Party) now use some form of 'one member one vote' process for selection of parliamentary candidates. By its nature this process is more difficult to control than selection and interview for a regular job, since it involves dozens, hundreds or even thousands of members. Following the *Jepson* decision political parties have tried to adopt clearer selection procedures, including circulating selection criteria and job descriptions for the role of MP. However, these have shown no sign of ensuring more equal outcomes (and have been criticised by some within the parties for potentially screening out political diversity and maverick candidates). The low number of women and ethnic minority candidates suggests that discrimination remains within this process, and this may often reflect discrimination in the minds of individual selectors. If candidate selection remains employment, further Employment Tribunal cases could follow, resulting in further application of the model of employment selection to the candidate selection process. This could lead to future rulings which restrict party democracy and, in particular, the use of one member one vote.

As the Appendix shows, it is striking that in continental Europe candidate selection by parties is not considered to be 'employment-related'. In fact, to lawyers from other European countries the notion that it should be seems very odd. In Sweden parties are completely unregulated, and in Germany and France the selection procedure is governed by a separate body of law to the employment process. These examples back up the conclusion which is drawn from the above discussion, that candidate selection by parties is best removed from the scope of employment legislation. There are strong political arguments for implementing this change as part of the new Bill. These are backed up by strong legal arguments, discussed below in section 3.1.

If the new Bill takes candidate selection out of the employment field, this would take any disputes about sex discrimination in the process out of the Employment Tribunals. Such cases would therefore need to be dealt with in some other form of court. The appropriate forum to resolve such disputes will depend on the kind of legal change which is made (this is discussed further in sections 3.2 and 3.3, below). However, a change of venue for cases of sex discrimination in the candidate selection process would have knock-on effects for cases concerning other kinds of discrimination. It would be inconsistent, for example, for sex discrimination cases to be heard in Election Courts, whilst cases of alleged race discrimination by parties continued to be heard in Employment Tribunals. If the selection process is not employment related this ought to apply across the board. A legal change to ensure that candidate selection is not covered by Section 13 of the Sex Discrimination Act should therefore also be accompanied by consequent amendments to remove it from the

¹⁸ IRLR, vol. 28 no. 10, p.599.

¹⁹ Employment Tribunals comprise a legally qualified chairman sitting with two lay members, one representing employers and the other trade unions.

scope of Section 12 of the Race Relations Act, ensuring all cases of alleged discrimination in the process are dealt with in the same type of court.

2.2.2 Legislating for race as well as gender?

This leads to the question of the extent to which the new legislation should change the situation regarding race discrimination in the selection process. One of the most difficult questions surrounding the Bill is whether it should also legalise positive action in the candidate selection process to increase the number of ethnic minority representatives in elected office. The original document discussed at Labour Party conference which first considered changing the law seemed to suggest that this would happen. However, race has not been mentioned in more recent announcements and the government's intentions are not clear.

There are strong arguments on both sides of this debate. The issue of improving representation of ethnic minorities in elected office has been moving rapidly up the political agenda. The issue reached prominence particularly in the selection of candidates for the Greater London Assembly elections in 2000 and the general election in 2001. Following this election there are 12 ethnic minority MPs - up two from 1997. A parliament which reflected society would include approximately 55 such members.

The political parties have so far failed to find a means to effectively improve ethnic minority representation. There are therefore some calls for positive action to be applied by the parties to facilitate this. If the law is being changed to facilitate positive action for women, this would be an obvious point at which to do the same for race.

The barriers to positive action for ethnic minority candidates are twofold. First, there is obviously a legal barrier: following the *Ahsan* case, it has been confirmed that Section 12 of the Race Relations Act (equivalent to S13 of the Sex Discrimination Act) applies to candidate selection. This forbids discrimination, including positive discrimination. This legal obstacle is clearly a disincentive for parties to act.

However there are further difficulties. One of these is that it is practically more difficult to devise positive action measures for ethnic minority candidates than for women. Women and men are distributed fairly uniformly across the UK, in every constituency. Ethnic minority communities, in contrast, tend to be concentrated in some areas more than others. Men and women are roughly equal halves of the population. The ethnic minority population is smaller, and is itself diverse. This makes design of mechanisms by the parties difficult. It is notable that whilst the gender lobby in the 1980s had a clear set of demands - including, in the Labour Party, introduction of all women shortlists - the race lobby has not itself devised a blueprint for reform of selection procedures should a change in the law occur.

Legally, it has also been suggested that there are greater barriers to change with respect to race. These come primarily from EU legislation. The scope of the new Directive on Equal Treatment Between Persons Irrespective of Racial or Ethnic Origin (2000/43/EC) goes much further than the narrowly defined employment field of the Equal Treatment Directive and could arguably be found to apply to the candidate selection process. Article 3 of the Directive defines its scope as follows:

... this Directive shall apply to all persons, as regards both the public and private sectors, including public bodies, in relation to:

- (a) conditions for access to employment, to self-employment and to occupation, including selection criteria and recruitment conditions, whatever the branch of activity and at all levels of the professional hierarchy, including promotion;
- (b) access to all types and to all levels of vocational guidance, vocational training, advanced vocational training and retraining, including practical work experience;
- (c) employment and working conditions, including dismissals and pay;
- (d) membership of and involvement in an organisation of workers or employers, or any organisation whose members carry on a particular profession, including the benefits provided by such organisations;
- (e) social protection, including social security and healthcare;
- (f) social advantages;
- (g) education;
- (h) access to and supply of goods and services which are available to the public, including housing.

Likewise, the proposed new Directive Establishing a General Framework for Equal Treatment in Employment and Occupation covers discrimination on a wide range of grounds. Article 1 of the Directive describes its scope as putting into effect:

the principle of equal treatment as regards access to employment and occupation, including promotion, vocational training, employment conditions and membership of certain organisations, of all persons irrespective of racial or ethnic origin, religion or belief, disability, age or sexual orientation.

It was noted in the discussion of legal background that the European Court of Justice would be very unlikely to rule that the Equal Treatment Directive extended to the candidate selection process. This was for two reasons. First, it could straightforwardly be argued that selection of candidates for political office (certainly for the national parliament, if not for local government and European elections) falls outside the scope of EU law. Furthermore, the scope of the Directive is limited strictly to employment only. Second, it would be important to consider the political context. Parties all over Europe use gender quotas, and a ruling against these would be so disruptive as to be impossible in practice.

The argument that EU law does not extend to race discrimination in the selection process is, however, weaker on both fronts. Although this is the same process, and arguably exempt, the scope of the new Directives on race discrimination is clearly wider. Further, there is no political party in Europe operating a race quota (to our knowledge) and thus support for such action should a case reach the European Court would be less vociferous.

For all of these reasons, action on race discrimination looks more difficult than action on sex discrimination. The government will need to consider this matter carefully. The government will also need to consider that a Bill which sought to allow positive action for ethnic minorities would be likely to be more controversial and have a more difficult passage through parliament than one which dealt with gender alone. On the other hand, ignoring the racial dimension and pursuing a Bill which simply addressed gender concerns would be controversial with another group of activists and commentators. This is particularly the case given that a Bill which seeks to separate candidate selection from the employment process will - as discussed in the previous section - require the Race Relations Act to be amended in any case.

2.2.3 Protection from negative discrimination

Closely linked to the last two issues is the question of how much the law should protect women and ethnic minority members within the parties from 'negative' discrimination in the selection process, and how this should be done.

It has been recommended that the new Bill should explicitly remove candidate selection from the 'employment field' as defined by the Sex Discrimination Act, and consequently from the equivalent sections of the Race Relations Act. This would help safeguard party democracy, and would potentially also help protect positive action in the process from future legal challenge (as discussed in section 3.1, below). However, removing candidate selection from the scope of Employment Tribunals would remove a form of redress from individuals who had been 'negatively' discriminated against, and raises questions about what other form of protection should be put in its place. Recent cases in the tribunals have seen ethnic minority members challenging alleged racism (although no woman has yet taken a case alleging sex discrimination). These cases cause difficulties for the parties, but many would argue that they are helping to redress an imbalance and stamping out some of the worst practices in the parties.

To illustrate, the following are some of the most obvious forms of discrimination which can occur in the candidate selection process. In legislating for change it will be important to consider which of these should be outlawed, and how this might be done.

- A party might advertise for candidates of one gender (or race) only. This would be blatant discrimination and seem unacceptable if pursued by one of the main parties, but might be acceptable if, say, carried out by a women's party. Women's parties exist in many countries, and the Northern Ireland Women's Coalition - formed in 1996 - holds seats in the Northern Ireland Assembly.
- A local party might run the selection process in a way which is liable to be intimidatory to people of one or other gender (or to ethnic minority candidates). For example there have been cases, some of them very recent, of local parties holding selection meetings in men-only clubs or bars.
- Male and female candidates (or candidates of different ethnic backgrounds) might be treated differently in the process. For example there have been many cases of men and women being asked different questions at hustings meetings: eg. women being asked about how being an MP would conflict with their family responsibilities, whilst men are not asked the same question. Such behaviour would be unacceptable in an employment situation.
- Formal selection criteria might discriminate indirectly against one or other gender (or members of ethnic minorities). This discrimination would be quite blatant if, for example, the selection criteria required candidates to have been coal miners, as hardly any women would qualify. The bias would be more subtle if criteria required, for example, that aspirants had been candidates before, or had held high office in a trade union or in business.

In deciding the approach to these issues, we meet some tricky questions about the extent of freedom which a political party should have to decide its own selection procedures, and the extent that these procedures should be regulated by law. Some would argue that it should be up to party rules, decided by some democratic process within the party, how much regulation of the process there is. This is essentially the case in Norway, Sweden and Germany, as described in the Appendix. (In Germany, in particular, the law requires a

particular degree of democracy in the process.) If the candidate selection process were to prove unfair to aspirants of one or other gender (or to ethnic minority members) in these countries there would be little chance of redress. Instead it would be left to the voters to punish the party at the ballot box for not selecting fairly.²⁰ However, in Sweden and Germany a 'floor' of fairness is provided by an equality clause in the country's constitution, as parties must act within constitutional constraints. This should guard against blatant and unwarranted discrimination.

In the UK a similar level of protection might be achieved by leaving regulation of the candidate selection process to the Human Rights Act alone. As discussed in section 1.1, two clauses in the European Convention on Human Rights could be interpreted as barring discrimination in the selection of candidates on gender, ethnic and other grounds (though a challenge to a political party would depend on parties being judged to be 'public authorities' - which is by no means certain). Arguably this should be sufficient, with more detailed regulations left to internal party statutes.

There are some difficulties with this approach, which are discussed below in section 3.2. Primarily the problem is that this would make legal redress more difficult for aspirant candidates, as cases would (at best) be heard in the High Court, rather than local tribunals. This might be seen as justified in terms of gender, as better gender representation could be ensured through positive action. However, in terms of race this option is less attractive, unless some effective form of positive action can be found for ethnic minority candidates, and is legislated for as part of this Bill.

2.2.4 What elections?

Another consideration in the drafting of the Bill is what type of elections it is intended to apply to. The broad purpose of the Bill is to allow parties to practice positive action in selecting candidates for elected office. The primary target in the short term is improving women's representation in the House of Commons. However, there are also concerns about women's representation in local government, in the devolved assemblies and in the European Parliament. It therefore seems desirable to draft the Bill broadly, in order to encompass all these forms of elections. It may be that parties do not wish to apply positive action to selection of local government candidates, but since the Bill is intended to be permissive rather than prescriptive there will be no requirement upon them to do so. On the other hand, if positive action seems appropriate for these elections in a few years time, the parties will have the freedom to use it. The only reason for excluding a particular type of elected office should be if government thinks it would be positively harmful for positive action to be applied. It is hard to imagine why this might be the case.

In terms of drafting it may be felt necessary to define 'elected office' in the Bill by providing an exhaustive list of those elections where positive action may be used. The difficulty with this is that it will be subject to amendment in the future as new forms of assembly are created. For example, in the future it seems likely that parties will want to use positive action in selection of candidates for English regional assemblies, and for elected seats in a reformed upper house.²¹ If an exhaustive list is included in the Bill it will be necessary for legislation setting up any new assemblies to include additions to this list.

²⁰ It could be argued that whilst this might be fair in countries with proportional electoral systems and a diverse party system (particularly such as Norway and Denmark) it would not be fair in the UK where many voters are faced with only one or two candidates at parliamentary elections who have a chance of winning.

²¹ A potential complication here is that the Royal Commission's proposals for reform of the upper house included a quota of 30% women members rising to 50%. Responsibility for maintaining this

2.2.5 Devolution issues

Devolution to Scotland, Wales and Northern Ireland has had some impact on the potential reach of the Bill to elections throughout the UK.

The most important change is with respect to Northern Ireland, because the Sex Discrimination Act applies in England, Scotland and Wales only. Hence any legislation which seeks to amend the Act will apply only in these parts of the UK. In Northern Ireland sex equality rules are contained within a separate Order, which was made by the Westminster parliament but for which the Northern Ireland Assembly now has control. Electoral and party law is not devolved in any part of the UK, so in principle it is possible to legislate for the regulation of parties in a way which extends to Northern Ireland (the Political Parties, Elections and Referendums Act 2000 does this, and the Electoral Commission has jurisdiction in Northern Ireland). However, it will not be possible to make consequent amendments to the relevant equalities Orders for Northern Ireland covering sex and race equality. These Orders would remain in conflict with the new law, leaving a certain amount of legal ambiguity. The Northern Ireland Assembly will need to be alerted to this and encouraged to act to bring their law into line with that in the rest of the UK. This seems to be a priority given that the Northern Ireland Assembly has only 13% women, and Northern Ireland has the lowest proportion of women councillors in the UK.

In Scotland the same difficulty does not apply, because the Westminster parliament retains control over the Sex Discrimination Act. However, there is a complication given that the Scottish Parliament has jurisdiction over administration of local elections in Scotland (more so than does the National Assembly for Wales). Nonetheless it should be possible for Westminster to legislate to remove the existing obstacle provided by the Sex Discrimination Act. If local government elections are explicitly mentioned it may be necessary to gain consent from the Scottish Executive and Scottish Parliament to include Scottish local elections.²²

2.2.6. Temporary or permanent measures?

A final issue with both political and legal implications is whether legislation allows positive action by political parties on a permanent and open-ended basis, or whether the use of positive action is tied to time limits or some other form of restriction.

The legal justification for placing constraints on positive action would be caution about complying with international human rights commitments, including the European Convention on Human Rights. CEDAW (cited in section 1.1) notably allows 'temporary special measures' as a means to boost women's representation, so some kind of a time limit included in the new Bill would be in line with this approach. CEDAW is, however, not immediately applicable in UK courts, although it might be used in interpretation of other more binding commitments such as the Human Rights Act.

As discussed in section 1.1, the requirement of the European Convention on Human Rights, and thus the Human Rights Act, is that any positive action must be 'proportionate' and 'justified'. These terms are ill-defined, but it has been suggested that new measures would be made safest if they included some limits. These might be time limits (for example allowing

balance would primarily be the responsibility of the new statutory Appointments Commission. It may be necessary for any Bill implementing this reform to include an explicit exemption from the Sex Discrimination Act to enable the Appointments Commission to do this without challenge.

²² Such action is not unprecedented. A number of Bills have been passed at Westminster on matters which are devolved in Scotland, under an arrangement which is known as the 'Sewel convention'.

positive action for three electoral cycles) or, probably more usefully, limits linked to the level of women's representation achieved. So, for example, the law might allow parties to use positive action to boost representation of the underrepresented sex, where members of that sex made up fewer than 40% of its representatives on the body concerned. This ensures that measures are temporary, and justified, but allows for some parties not starting to take action immediately. This would allow for the Conservative Party, which in any case starts from a lower base of women's representation, to adopt all women shortlists in ten years time if other measures had failed and women were still fewer than one in four Tory MPs.

There is no absolute requirement to include limits on positive action within the new Bill, though their inclusion would create a clearer legal framework for parties to operate within. On the other hand, the government might prefer to leave the wording of the Bill quite loose, leaving parties to take action which, in the opinion of their legal advisers, falls within the limits allowed by the Human Rights Act and other commitments.

3. Legal Options

We now turn to the specific means in which the government might seek to change the law and the advantages and disadvantages of each.

The Constitution Unit report published in 2000 suggested that there were five courses of action open to the government. Three of these are potentially now on the agenda, and are discussed here. The other two have clearly been ruled out. One of these was to do nothing, and leave parties operating within the current, rather hostile, environment. The other was to go further than the government have said they will go, and introduce some kind of compulsory quota system. This is the approach that has been taken in France, where parties are now legally required to put up equal numbers of male and female candidates. The French system is described in the Appendix.

Elimination of these options leaves three other possible ways forward, each of which has its attractions. These are as follows:

1. Leave candidate selection within the 'employment field' and covered by Section 13 of the Sex Discrimination Act, but include an amendment in the Act explicitly allowing positive action within this process.
2. Explicitly exempt the selection process from the 'employment field' and from the other parts of the Act, so that parties have freedom to decide their own procedures, including if they wish the adoption of positive action. The only protection against 'negative' discrimination would be under the Human Rights Act.
3. Create a new little body of law relating specifically to the candidate selection process. This would disallow discrimination in the process, but allow positive action. Given that this would remove candidate selection from the employment field, discrimination cases would no longer go to employment tribunals, but would need to be sent to a different kind of court

The following three sections discuss each of these options in turn.

3.1 Option 1: Candidate selection remains employment

Under this option candidate selection continues to be treated as employment related, but a clause is added to the Sex Discrimination Act allowing positive action for women within this process.

This is probably the simplest legal amendment from the drafting point of view, and its advantage is its immediate simplicity. It involves no change to the court system with respect to candidate selection: claims of negative discrimination would continue to be heard in Employment Tribunals, as they are now. This solution also has the advantage of being self-contained: there would be no need to amend the Race Relations Act to ensure consistency. The government could legislate for positive action on race through a separate and simultaneous amendment if it wanted to, or it could leave this until later.

However, this solution also has a number of disadvantages, which make it probably the least attractive of the three. Politically the disadvantages were alluded to above, in section 2.2.1. If candidate selection continues to be treated as employment-related, discrimination cases will continue to go to employment tribunals, which will continue to try and fit the process into an ill-fitting employment box. Over time, consecutive judgements are likely to erode the freedom of parties to decide their own procedures, and may weaken party democracy and involvement of members in the process. More centralised procedures may also tend to produce a set of MPs who are more alike, with less room for colourful or unusual candidates.

More seriously still, there are potential legal dangers in following this option, which could threaten the use of positive action when it is introduced by the parties. In short, it is desirable to remove candidate selection from the scope of employment legislation in order to minimise comparisons with EU employment discrimination law. If EU law is used to interpret parties' scope to adopt positive action, this will prove restrictive and would probably not permit the use of all women shortlists.

The difficulty with EU law would not lie in its interpretation by the European Court of Justice, but in the potential problems caused by its interpretation in lower-level UK courts such as Employment Tribunals. As discussed in section 1.1, should a case reach the ECJ there would probably not be a problem. But if candidate selection cases continue to go to Employment Tribunals these tribunals will almost certainly seek to interpret what forms of positive action are allowable by using the body of law they know, and which provides the richest source of case law on positive action. This body of law is EU law, and the limits which it imposes are restrictive. The key principle applied by the European Court of Justice is that a positive action system should not be so rigid that men are totally barred from access to particular positions. However, the difficulty with political party selection is that the rules need to be rigid, and the all women shortlist system depends on just this kind of rigidity.

Of course, if Employment Tribunals interpreted the new law in what was seen to be an inappropriate way, there is scope for a series of appeals up through the court system until a case is heard in the European Court of Justice. However, cases like this can take years to reach the European Court of Justice. More likely would be a reference from a domestic court on a specific question (such as 'does the definition of employment as contained in the Equal Treatment Directive extend to the selection of candidates by political parties for elected office?'). However, even these references take at least a year to reach the European Court of Justice. In either instance, the danger of this kind of delay to selection procedures would be likely to deter political parties from action.

3.2 Option 2: Candidate selection exempted from discrimination law

Under this option, candidate selection would be exempted from the Sex Discrimination Act altogether. In practice this would mean exempting it from the employment field, obviously, but also from the 'services' section of the Act. The simplest way of doing this might be to clarify that the exclusion in Section 33 of the Act for the 'constitution, organisation or

administration' of political parties does indeed extend to candidate selection. This was the case made by the Labour Party's lawyer in the Jepson case, which was rejected by the tribunal.

The main advantage of this option is also its simplicity. It would be a very short amendment, although a parallel amendment should really be made to the Race Relations Act to ensure consistent treatment of candidate selection in the legal system. It would also have all the advantages associated with removing this process from the employment legislation - freeing up political parties to have more discretion in the choice of their selection procedures, whilst minimising the risk of restrictive EU legislation being used to interpret parties' freedom to adopt positive action measures.

The potential difficulty with this option is the impact that it has on individuals' ability to challenge parties when their selection procedures are discriminatory in a negative sense. The extent to which this is desirable was discussed in section 2.2.3. On the one hand it may be seen as attractive to maximise parties' freedom to choose their selection procedures, with the ultimate decision about whether these are acceptable left to the voting public. On the other, it may be argued that parties should be restricted as far as possible by law from using discriminatory practices. This case would probably be put particularly vociferously by the ethnic minority lobby, who have seen benefits in recent years from being able to take parties to Employment Tribunals. It could be highly politically controversial if a move of this kind was seen as taking away ethnic minority members' rights to challenge racism in the selection process, particularly if parties are not about to adopt positive action measures to counter this discrimination, and ethnic minority representation remains low.

Candidates with complaints against the parties might not, of course, be completely denied redress. The Human Rights Act could be seen as covering the candidate selection process, so in principle a complainant could take a case under the Act. However, it is not yet established whether a party is a 'public authority' under the Act, and legal opinion is split on this point. Additionally, if a complainant's only option was to take a case under the Human Rights Act, such a case would have to be pursued through the High Court rather than through a local court or tribunal. Arguably it is not desirable to have every legal dispute over selection of local council candidates taken through this route, which is inconvenient both to the court and to the complainant. It has even been suggested that removing a route to redress against discrimination in this way could result in a case being taken against the government under Article 13 of the European Convention on Human Rights, which states that individuals should have 'an effective remedy' to protect their convention rights. Such a case would be difficult, however, given that Article 13 has not been incorporated through the Human Rights Act and the only route to redress on this point would be through the Strasbourg European Court of Human Rights.

So there are potential difficulties with this option, although it has some attractions. Basically this would take us closer to the situation in other EU countries, where fairness in candidate selection is guaranteed by constitutional law, rather than law governing equality in employment. If this change were made, any complaints about the forms of positive action adopted by parties would also need to be made under the Human Rights Act. This is more permissive of positive action than is EU law, and would allow reverse discrimination so long as this was 'justified' and 'proportionate'.

3.3 Option 3: A new body of law governing candidate selection

Under this option, candidate selection would be removed from the employment field, but discrimination in the process would continue to be outlawed. There would be a clause

stating that positive action, nonetheless, was allowed. As cases would have been taken out of the Employment Tribunals, the Bill would need to state what type of court would now hear cases and what the penalties would be.

This is the more complex of the three options. Not only would it, like option 1, require a positive action clause to be drafted (this might use words from the new Protocol 12 to the European Convention on Human Rights, or some other source). It would also require a clause or clauses drafted preventing discrimination - which would require some decisions to be taken about how this was to be defined, given that this would be designed to be a looser regime than applies in employment (a new clause might explicitly cite the importance of parties' democratic rights to choose their own candidates). It would require consideration of where cases should be heard, if not in either Employment Tribunals (as in option 1) or the High Court (as in option 2) and what system of penalties might apply for parties which breached the rules. Finally, as in option 2, there should really be an amendment to the Race Relations Act to ensure that all cases of discrimination in the selection process were treated in the same way. This would beg the question of whether government was going to legislate to allow positive action on race as well as gender grounds, and a political decision would need to be made.

The only disadvantages of this option, however, appear to be its relative complexity. In terms of outcome it is the most attractive of the three. It has the advantage of both separating the selection process from employment legislation and at the same time outlawing discrimination, with the potential for legal redress through a more convenient system than the High Court. It would acknowledge that candidate selection by parties is a distinct process, and would introduce a degree of regulation specially designed for the purpose. Unlike option 2, it would not remove existing protections from candidates who have been 'negatively' discriminated against.

As parties are currently relatively unregulated (for an example of a highly regulated party system see Germany, in the Appendix) this would not fit neatly with existing law. It would probably not form part of the Sex Discrimination Act, although it could in principle be implemented through a major amendment to Section 33. One difficulty here is that there is no equivalent exemption for political parties in the Race Relations Act - though one could of course be added. This new type of party regulation would probably come closest to that already provided by the Political Parties Elections and Referendums Act 2000 (though this at present comprises primarily financial regulation). Thus it might be implemented as an amendment to that Act.

Existing electoral law structures might provide the appropriate court structures for resolving disputes. Under the Representation of the People Act 1983, Election Courts exist to resolve electoral law cases. These courts exist at both local and national level, and would thus be appropriate for dealing with different kinds of cases. At local level the courts are presided over by barristers, whilst Parliamentary Election Courts comprise two High Court judges. Local courts have the power to refer important cases up to the High Court.

If a new body of party regulation were set in place, the most difficult issue would probably be deciding how far to prevent parties discriminating in law, and how far to leave discretion to party rules. As in other countries described in the Appendix, a basic floor of protection might be provided through constitutional law, in the shape of the Human Rights Act. At a minimum the Bill could be designed to give candidates more direct access to these rights.

4. The Process

Before concluding it may be valuable to briefly consider the political process needed to get agreement on the Bill, and what will happen afterwards.

4.1 Agreeing a Bill

This briefing has sought to set out some of the issues for consideration in drafting the Women's Representation Bill, and some of the options that may be followed. The option chosen is dependent on the government's general approach to the issues. Two of these are large political issues: whether positive action should be permitted for ethnic minority candidates as well as women, and the extent that the candidate selection process should continue to be regulated by law and bar discrimination. Other issues are more technical/legal: whether candidate selection should continue to be treated as employment, what elections positive action should apply to, and whether positive action should be allowed on a temporary or an open-ended basis.

All of these issues will require further discussion before the final form of the Bill is agreed. This need not cause long delay, but it will require government to open discussion with interested parties at some point during the Bill's development.

There are three groups with whom the government should ideally engage in dialogue during the Bill's preparation: in order to ensure the widest possible consensus for it when it is proposed, and to avoid difficult political and legal arguments after it is passed. The first of these groups is, obviously, the lawyers. This project has benefited from the expertise of a group of lawyers, between themselves specialising in discrimination, employment, human rights, party, electoral and European law. The issue which this Bill will deal with is a very unusual one, which touches upon all of these areas. Government will want to take advice from all of these perspectives, and may indeed want to enlist the support of the project legal advisers, who have spent a great deal of time thinking about this issue and developed their ideas over time.

The second group with whom government would be advised to consult are the political parties. This is particularly the case if option 2 or 3, as recommended in this briefing, is followed. Either of these options would result in a new regulatory framework for parties, albeit in the small and well-defined area of discrimination in candidate selection. As discussed in section 2.2.3, the issue of how much this process is regulated by law, and how much it is left to internal party democracy, raises important questions. It would not seem right for government to be seen to be imposing a new regulatory framework on the other political parties in this regard. This does not mean that government must seek the support of all parties for its attitude to positive action, as this may not be forthcoming. The Bill will not seek to impose positive action on parties, and those that do not support it will not need to use it. But the Bill will potentially see other claims of discrimination - which may affect all parties - moved to a different type of court and dealt with differently to how they are now. It would seem desirable to proceed on this point by consensus.

Finally, the government will want to seek support from the various lobbies which are working towards a more representative parliament. The gender lobby have been influential in winning the commitment to progressing this Bill. However, given the extent to which the two issues are interlinked - as discussed above - it would seem advisable to talk to the ethnic minority lobby as well. This is particularly the case if the effect of the Bill - as potentially with option 2 - would be to remove a protection from racial discrimination or reduce the routes to redress.

4.2 After the Bill is Passed

Of course the passage of the Bill is not the end of the story. The Bill itself will not provide for a single additional woman to be elected. This is the responsibility of the parties, who must address women's representation through their candidate selection procedures. If rapid progress is to be achieved, parties must move towards adoption of positive action mechanisms.

Appendix 1 lists some of the positive action mechanisms which have previously been used, or proposed, for use within the UK. Even in advance of the Bill being passed, the political parties will need to start considering what action they might take once the legal framework is more sympathetic. Given that selections for the next general election are likely to start as early as 2002, this will require quick action. Whilst the argument for legal change may have been won amongst the government and the public, it is not yet clear whether the argument for positive action has been won within the parties. Those lobbying for improved women's representation will need to focus on these procedures, which may be adopted by autumn conferences in 2002, as well as on ensuring that the Bill is passed sufficiently quickly to enable them to be put in place.

Conclusion and Recommendations

This briefing has sought to set out some of the key issues relating to the Women's Representation Bill, and propose some ways forward. In particular, it has outlined three distinct ways in which the government's commitment to changing the law could be implemented. Each of these has quite different implications. We have sought to consider the process to agreeing a Bill as well as the content of the Bill itself, and have also (in the Appendix) provided illustrations of how other European countries deal with the legal issue currently facing the UK.

The recommendations which we have come to are as follows:

- That government will need to legislate within this parliamentary session (ending autumn 2002) if they want to influence political parties' selection procedures for the next general election.
- That a legal change will need to remove the existing barrier caused by Section 13 of the Sex Discrimination Act, whilst staying within the scope of EU law and the European Convention on Human Rights. It is almost inconceivable that the European Court of Justice would consider the former as being relevant to the issue of candidate selection, so this should not be considered a barrier. Likewise, the ECHR is tolerant of positive action for justified purposes and should not create difficulties.
- That it would be highly desirable to remove candidate selection by political parties from the scope of employment legislation. This will avoid the potential problem of greater and greater restrictions being placed on parties by Employment Tribunals. It also avoids the difficulty of tribunals erroneously applying restrictive interpretations of positive action taken from EU employment law, when EU law almost certainly does not apply.
- That if this is done, government will need to consider to what extent it wants the candidate selection process to be regulated by law (in particular to prevent 'negative' discrimination) and how much this should be left to the internal rules of the parties. It would be advisable to discuss this matter with the other parties, and seek to proceed by consensus if possible.

- That a key issue in the drafting of the law will be whether it allows positive action on the basis of race as well as on the basis of gender. There are arguments on both sides. On the one hand, ethnic minorities are seriously underrepresented. On the other, no effective positive action mechanism has yet been proposed. In changing the legal framework for candidate selection, it seems advisable to amend the Race Relations Act to ensure that gender and race cases are dealt with consistently. This will require government to consider how far it wants to go on this issue.
- That there could be advantages in stating a limit on positive action, although this is not strictly necessary. Although time limits have been proposed, a limit linked to the current levels of women's representation would appear more useful. This might, for example, permit a party to adopt positive action for so long as representation of women amongst its members of the given assembly was below 40%.
- Of the three options which appear to be open to government, the most attractive is creation of a new little body of law governing the party candidate selection process. This would outlaw discrimination, but allow positive action, whilst acknowledging that candidate selection is a democratic (not an employment) process. Cases would be taken out of the Employment Tribunals, and probably most appropriately sent to Election Courts. In practice a new clause might be added to the Sex Discrimination Act (and Race Relations Act) or to the Political Parties, Elections and Referendums Act.
- Another option would be to take the candidate selection process out of the scope of the discrimination acts altogether. However, this has the disadvantage of reducing the protection available to potential women or ethnic minority candidates who may have been discriminated against. A third option, of leaving candidate selection within the scope of Section 13 of the Sex Discrimination Act, seems unattractive for reasons given above.
- That in considering how to approach this matter the government should look at examples of legal frameworks in other European countries, where the perceived obstacles in this country (EU law, ECHR) are simply not considered a problem. Some examples are given in Appendix 2.
- That political parties will need to ready themselves for the new legal framework, and should start thinking now about what forms of positive action they might want to adopt.

Appendix 1: Forms of positive action

For illustrative purposes it may be useful to set out some of the types of action which political parties may seek to use to promote women's representation. Most of the actions listed below have already been applied in the UK; others have been proposed. It may not be possible to legislate to absolutely protect parties taking these actions, as the extent to which they are lawful may depend on the detail of how they are applied in party statutes. However, the aim of the Bill should be to allow parties to find a lawful way to apply each of these mechanisms.

It has been suggested that it may be desirable to list the forms of action which are envisaged somewhere when the Bill is passed, in order that these form part of 'soft law' in the event of a court case. Suggestions have ranged from the idea of including these options for illustration in the 'notes on clauses' with the Bill, to ensuring that the type of mechanisms envisaged are listed in government speeches when the Bill is debated, so that they attract judicial notice under the *Pepper v. Hart* ruling which allows the courts to look at Hansard.

1. All women shortlists

This mechanism is listed first because it is probably the most important and the most difficult to accommodate. The mechanism applies to single member constituency elections (eg. for House of Commons, majority of seats in Scottish Parliament and National Assembly for Wales), where local parties each select only one candidate. Under this system a proportion of local parties are required to shortlist only women candidates for selection, in order that a woman is selected in that seat. From 1993-96 the Labour Party applied this mechanism in half of its 'winnable' seats (ie. Labour held seats and target marginal seats). The way it was applied was that representatives of such seats in each region were required to meet together and decide amongst them which seats would use the shortlists. (Arguably this provided the kind of flexibility required by European law for 'exceptional cases' to be taken into account). This was the mechanism which was found to be in breach of S13 of the Sex Discrimination Act, since at the individual constituency level men were barred from applying in these seats.

2. Twinning

This mechanism was used by the Labour Party for the elections to the Scottish Parliament and National Assembly for Wales in 1999 and Greater London Assembly in 2000. It is essentially an adaptation of all women shortlists intended to avoid the legal obstacles (a legal challenge was threatened but never made it to court). It too applies in single member constituencies. Here two local parties select their candidates jointly, with a requirement that one man and one woman be selected. Thus every selection is open to both women and men, and equal representation is assured. This mechanism is, however, not suitable where there are large numbers of incumbent candidates, as vacant seats are too geographically dispersed to be twinned.

3. Clustering

Also for single member constituency systems, this mechanism has been proposed within the Liberal Democrats but never actually used. It is essentially similar to twinning, but involving more than two constituencies. For example four neighbouring constituencies might together select two women and two men, or all the vacant seats in a region might select their candidates together, with equality between men and women selected (thus making the system rather similar to all women shortlists as applied by the Labour Party, but with the candidates chosen jointly rather than by individual constituencies). In practice this system is

even more politically difficult to apply than twinning, as it requires groups of vacant seats which are geographically close together.

4. Zipping

A system used for proportional list elections - widely used in Europe and applied by the Liberal Democrats to their selections for the European Parliament elections in 1999. Here the members selecting the candidates on a list (who may be anything from a small group of senior figures to thousands of individual members through a ballot, depending on party rules) are required to alternate male and female names on the list. This might apply either in pure list systems, such as that for the European Parliament, or for the lists in 'mixed member' or 'additional member' systems such as that for the Scottish Parliament, where some members are selected in constituencies and others on lists.

5. Using lists to balance under-representation in constituencies

There is no snappy name for this system, which applies only in additional member systems (eg. for the Scottish Parliament and National Assembly for Wales). Here a party agrees to review the results of local selections for constituency seats and, where necessary, use lists to balance out any under-representation. Plaid Cymru used this mechanism in 1998 for selections to the Assembly, when it agreed that all lists should be headed by women because men had been selected in most of the constituency seats. This rule was agreed formally. Less formally the Labour Party applied a similar system in selecting candidates for the Greater London Assembly, when the two top candidates on the party's list were from ethnic minorities.

6. Balanced shortlists

This mechanism might potentially apply in any electoral system. Here the party simply requires that there is a certain proportion of women on any shortlist for selection. For example the Labour Party required that half the members of each local shortlist for the 2001 general election were women and the Liberal Democrats have done the same for selections in Scotland and Wales. William Hague suggested in 1997 that the Conservative Party might apply a similar rule at the 25% level, but this was rejected by party members. The mechanism has never been threatened legally, but has proved ineffective where used. As a minimum some parties will probably continue to use it.

Appendix 2: Lessons from Europe

The information included in this appendix is based on a seminar hosted by the Constitution Unit on 26 June 2001.²³ It is included here to demonstrate how other countries in Europe have very different the legal frameworks within which party political selections take place. It is particularly interesting that none of the four countries described here - Sweden, Norway, Germany and France - consider candidate selection by parties to be covered by legislation on equality in employment. Likewise, none of these countries consider that EU law or the European Convention on Human Rights place any serious constraints on parties' ability to adopt positive action, although all of them countries are subject to a similar international legal framework to the UK.

Both Sweden and Norway enjoy high women's representation in parliament and have long traditions of positive action. Both of these countries use proportional list systems for their parliamentary elections. Germany in contrast uses an additional member system and has a high level of party regulation. France also provides a very striking example. Until recently it suffered from constitutional obstacles to positive action and low levels of women's representation. This was changed by a constitutional amendment in 1999 and radical new electoral law in 2000.

Sweden

Sweden is a member of the EU and a signatory to the European Convention on Human Rights. It currently has the highest proportion of women in parliament of any country in the world, at 43%.

The Swedish parliament has 349 seats and is elected every four years. Members are elected by a list system, in 29 multi-member constituencies (with between two and 34 seats) and there are an additional 39 seats to create greater proportionality. Voters can chose to vote for either a party list or an individual candidate from the list.

Equality law

The Sex Equality Act of 1992 (Jämställdhetslagen 1991: 433) regulates sex equality in the Swedish labour market. Section 1 states that the aim of the law is:

to promote women's and men's equal rights as regards work, employment and other working conditions and the opportunities for advancement in work (sex equality in working life).

The Sex Equality Act allows positive action in recruitment if this is part of an employer's strategy in order to achieve sex equality in the workplace. Section 15 of the Act states that an employer must not discriminate against a person on the ground of sex unless the discrimination:

- *is part of a strategy in order to achieve sex equality in working life and is not a question of wages or other employment conditions for work that are valued as equal or equivalent,*
- *is motivated by an idealistic interest or other particular interest that obviously must not be subordinated to sex equality.*

²³ Contributions were provided by Sylvie Guillaume (National Secretary for Party Development, Parti Socialiste, France), Karin Lundstrom (Assistant Professor of Law, University of Lund, and Secretary of the Ministry of Industry Discrimination Committee, Sweden), Kristin Mile (Equalities Ombud, Norway) and Frank Schulz (Working Group on Equal Rights Law, University of Frankfurt, Germany).

There are also three other laws on equality in the labour market, one law for each ground of discrimination, that is to say ethnicity, disability and homosexuality (Lag mot etnisk diskriminering (1999:130); Lag mot diskriminering av funktionshindrade (1999:132); Lag mot diskriminering på grund av sexuell läggning (1999:133)). All these laws came into force in 1999.

None of these labour market laws is applicable to the selection of candidates by political parties since the aim of the laws is to regulate the relation between employer and employees/job-seekers in order to achieve equality in recruitment and equal working conditions.

Being a candidate selected by a political party is not regarded as a contract of employment in Swedish laws. It is an appointment to a position of trust that is not regulated by labour market laws since there is no employer, no employee, no employment contract and no condition of obedience. Even quasi-political positions are regarded as positions of trust. Thus the labour market laws are not applicable to these positions either.

Constitutional and human rights law

The Swedish constitution includes a sex equality clause, but this allows for positive action. Chapter 2, article 16 says that laws must not discriminate on the grounds of sex unless a regulation is part of striving for sex equality:

Laws and other regulations must not imply that any citizen is discriminated against on the ground of sex, if the regulation is not part of a strategy in order to achieve equality between men and women or applies to military service or corresponding duty of service.

According to the background of this clause (which courts can refer to in its interpretation), the exception refers to certain kinds of 'counter-discrimination' such as the use of quotas in admission for training and education.

There is a corresponding ban on discrimination on the grounds of race, ethnic origin and skin colour (Regeringsformen 2:15).

The European Convention on Human Rights is translated and enacted as law (Lag 1994:1219) in Sweden. This Act also includes a ban on discrimination on the ground of sex as well as on other grounds.

Electoral and party law

According to Swedish law, political parties are non-profit-making organisations. There is no law applicable to these kinds of organisations, which means that non-profit-making organisations are completely unregulated by law. The activities of the organisations are regulated only by their internal rules.

The Election Act (Vallagen 1997:157) regulates how the elections shall be held. However, it does not say anything about the political parties except that their names must be registered and their candidates announced to the election authority.

Use of positive action within the political parties

Whether the internal regulations of the political parties permit or encourage the use of positive action is left to their political choice. While the left-wing parties practice positive

action through lists of candidates alternating between women and men, the liberal, the right-wing and the green parties do not.

The Social Democratic Party and the Left-wing Party practice positive action in the selection of candidates for political and 'quasi-political' positions. However, in the case of elected office it is the voters that finally decide the proportion of women and men in the political assemblies, since they may vote for particular candidates.

The practice of positive action was introduced in the Social Democratic Party before the national election in 1994, when a female network called 'Support-stockings' threatened to start a women's party if the established parties did not step up their efforts to increase the numbers of women in the political assemblies. In this election the proportion of women in the Swedish parliament increased to the world record of 44%.

During the second half of the 90s the Left-wing Party declared in its internal regulations that it is a feminist party. At the same time it introduced a regulation saying that at least 50 per cent of those appointed by the party to hold political or quasi-political positions shall be women.

Since the last election in 1998, 43% of the members in the Swedish parliament are now women. Each party is represented by the following percentage of women:

Centerpartiet (Agrarian)	56%
Miljöpartiet (The Green Party)	50%
Socialdemokraterna (Social Democrats)	50%
Vänsterpartiet (Left-wing)	42%
Kristdemokraterna (Christian Democrats)	40%
Folkpartiet (Liberal)	35%
Moderaterna (Right-wing)	30%

Challenging discrimination in candidate selection

There has been no case in Sweden where the selection of a candidate has been legally challenged on the basis of discrimination.

Nor has there been any suggestion that the instances of positive action used by the left wing parties might be in breach of the law. There is no law that regulates the parties and it is not possible to apply labour market laws to positions of trust. There is no means of legal redress for a man who wishes to challenge the selection of a candidate by reference to the use of positive action. It is not he, the candidate, but the voters who decide which candidates are the best.

For the moment I (Karin) think it would be politically incorrect to suggest anything like this since it would be a proposal for diminishing democracy and political legitimacy. On the contrary, women are a large and important proportion of the voters, and the two parties that have appointed female leaders have registered a remarkable increase in electoral support.

Norway

Norway is not a member of the European Union, but is a signatory to the European Convention on Human Rights.

There are 165 members of the Norwegian Parliament (Stortinget) and general elections are held every four years. The electoral system is based on the principle of proportional

representation - the ballot is a vote for a list of representatives from a political party and the names on the party list are candidates representing that particular party. These candidates have been chosen and placed in order on the nomination conventions of each party. Voters may either support the party list or vote for one of the party candidates, although in practice the parties' ordering is never overturned. There are 19 counties in Norway which constitute the constituencies, each with between four and fourteen candidates. 157 constituency representatives in total are elected. Another eight are distributed among the counties after the election.

Representation of women in government and parliament from 1980 to 1997:

%	1980	1985	1990	1994	1997
Government	12	26	44	42	47.9
Parliament	24	34	36	39.4	36.4

Equality law

The Norwegian Gender Equality Act is the main source of equality law in Norway. It was adopted in 1978 and came into force in March 1979. In general, the Act applies to all fields of society. Discriminatory treatment of men and women because of gender will be in conflict with the Act without regard to area of law (an exception is made for internal conditions in religious communities in paragraph 2).

The Gender Equality Act permits and encourages the use of positive action to a large extent. Article 3 of the Act states that:

Differential treatment of women and men is not permitted.

The term 'differential treatment means treatment differentiating between men and women because they are of different sexes. The term also covers treatment which de facto results in an unreasonable disadvantage for one sex over the other.

Differential treatment which promotes gender equality in conformity with the objective of this Act, is not in contravention with the first paragraph.

This means that positive action used for the benefit of women and used to promote gender equality is allowed. The use of positive action, eg. in working life, is regulated in agreements between the social partners.

Paragraph 21 of the Gender Equality Act goes further and states that all publicly appointed and elected committees, boards, councils and other bodies should consist of at least 40% of each sex. However, this paragraph does not include positions achieved by election. It is clearly stated in paragraph 21 of the Gender Equality Act that:

Committees etc. which pursuant to statutory law consist only of members from directly elected bodies need not fulfil the requirements of this article.

Positions in parliament achieved by election are not considered to be employment, but rather a position of trust. Any regulation limiting the political parties' right to a free choice of candidates is looked upon as limitation of democracy.

Constitutional and human rights law

The Norwegian Constitution has no equality clause and there is no law on human rights regulating positive action except for the Gender Equality Act.

Electoral and party law

Political parties have their own regulations, including provisions for positive action. Other regulations concerning the political parties in particular are the Election Act and the Constitution of Norway. The Election Act regulates the procedures of the election and the Constitution regulates eligibility for election etc. However these laws do not include regulations concerning positive action.

Use of positive action within the political parties

Most Norwegian political parties use positive action for the benefit of women to a large extent. Most have used positive action for at least 10 years.

The Labour Party has in its regulation a provision stating that there shall be at least 40% of each sex represented on the lists at elections. The same rule applies to the Christian Democrats, the Liberal Party, the Centre Party and the Socialist Left Party. The most left wing party (Red Electoral Alliance) has a regulation demanding at least 50% women to be nominated to the lists.

The Conservative Party has no such written regulation concerning the representation of men and women, but use the same principle for nomination as the other parties. The Progressive Party has no regulation and no practice for the use of positive action for nomination.

The practical result of nomination and use of positive action is not always a 40% or 50% representation of women. The parties do not consistently place women at every second place on the list - women may be nominated in more insecure places on the list. Often the first person on the list tends to be a man.

The government is appointed by the Prime Minister and there has been a convention of at least 40% women in the government since 1986. This is not regulated, but every Prime Minister since 1986 has respected this code of practice.

The use of positive action for "quasi political" appointments is, as mentioned above, regulated in the Gender Equality Act (paragraph 21) or in the Local Community Act. These laws require a 40% representation in all public boards, committees etc. These are compulsory regulations.

Challenging discrimination in candidate selection

There have been no cases in Norway where candidate selection by political parties has been legally challenged on the basis of discrimination. The nomination of candidates to parliament is a matter exclusively for the political parties. Any fight for a place on the election lists has to be fought within the political parties.

The use of positive action is an internal matter for the parties. The parties which use positive action do this by nominating relevant persons, and any breach of the internal regulation is to be handled by the party itself.

To my (Kristin's) knowledge there has been no debate or discussion on the question whether the use of positive action is a breach of the Gender Equality Act, or a breach of any other national or international law. The nomination is considered an internal matter for the

political party, and the sovereignty of the political parties in these matters are considered a matter of necessity in a democracy. The people decide who should represent them, and the people make their choice of politicians through active participation within the political parties.

However, the view of the Progressive Party, the only party which does not use positive action in practice, is that positive action is discriminating in itself and that every candidate should be nominated for their political views and skills and not because of gender. This party has the lowest representation of women in parliament.

Germany

Germany is a member of the EU and a signatory to the European Convention on Human Rights. The lower house of the German parliament (the Bundestag) has 669 seats, and women currently make up 31% of members.

The Bundestag is elected using an additional member system, with half the seats elected on a single member constituency basis and the other half from party lists, to provide proportionality. These lists are organised on the basis of the 16 German states (*Länder*). Elections to state parliaments use a similar system.

Constitutional and human rights law

The main source of equality law in Germany is article 3 of the main constitutional document, the Basic Law (*Grundgesetz*). This states²⁴:

- (1) All people are equal before the law.*
- (2) Men and women have equal rights. The state shall seek to ensure equal treatment of men and women and to remove existing disadvantages.*
- (3) Nobody shall be prejudiced or favoured because of their sex, birth origin, race, language, national or social origin, faith, religion or political opinions. No one may be discriminated against on account of their disability.*

Unusually in constitutional terms, Article 21 of the Basic Law recognises, and regulates, political parties. Article 21(1) guarantees party freedom, but also requires the parties to organise themselves on democratic principles:

- (1) The parties shall help form the political will of the people. They may be freely established. Their internal organisation must conform to democratic principles. They shall publicly account for the sources and use of their funds and their assets.*
- (2) Parties which by reason of their aims or behaviour of their followers seek to impair or do away with the free democratic basic order or threaten the existence of the Federal Republic of Germany shall be unconstitutional. The Federal Constitutional Court shall rule on the question of unconstitutionality.*
- (3) Details are regulated by Federal Laws.*

The 'freedom' of political parties is interpreted to include not only their formation and membership, but also the content of their 'party programme' and internal organisation (see 'Electoral and party law', below). Thus so long as it organises democratically, a party's right to determine its candidate selection procedures is seen as constitutionally guaranteed.

²⁴ Note that the second sentence of Article 3(2) was added in 1994, as part of a reform of Constitutional Law. This gave the government an obligation to promote the factual enforcement of the equal rights principle.

Article 38 of the Basic Law concerns elections to the lower house of parliament:

(1) The members of the Bundestag shall be elected in general, direct, free, equal and secret elections. They shall be representatives of the whole people; they shall not be bound by any instructions, only by their conscience.

(2) Anyone who has reached the age of eighteen shall be entitled to vote; anyone who has reached the age of majority is eligible for election.

(3) Details are regulated by Federal Law.

Article 38(2) challenges the principle of party freedom set out in Article 21(1) with the principle of equality of election. The strained relationship between these two overarching principles might be interpreted as leaving little room for positive action in the selection of candidates. The arguments over whether quotas are in line with constitutional law are complicated, but it is interesting that they primarily concern these two articles and not the Equal Rights article. In practice, the constitutionality of quotas is interpreted in line with international human rights obligations and they are not seen as in breach of constitutional law if they are 'proportionate' and time limited.

Equality law

More specific laws to implement constitutional rights are left to federal laws and the statutes of individual states (*Länder*). The federal law that deals with the guiding principle of Article 3 is the Federal Law for Equal Rights (Bundesgleichstellungsrecht) 1994. This allows positive action for women public servants. This definition does not, however, extend to candidate selection in politics. Section 1 states:

The law applies to employees of federal administrations and public bodies, institutions and foundations as well as federal courts. The law also applies to public organisations which are run by a federal administration.

Section 2 of the Act states:

In order to achieve equal treatment of women and men in those administrations and federal courts mentioned in Section 1, women will be promoted according to this law, in accordance with the principles of aptitude, qualifications and professional ability. A further objective of this provision is, where women are underrepresented in particular areas, to increase the proportion of women according to binding quotas. The compatibility of family and work for women and men is also to be promoted.

Although this provides for positive action, it is couched in the words taken from Article 33(2) of the Basic Law, which relates to public service. This article states that:

All Germans are equally eligible for any public office according to their aptitude, qualifications and professional ability.

There is currently a lively debate going on about a government proposal that a similar equality law should be introduced with respect to the private sector.

There have been a number of cases concerning the application of the principle of positive action in public employment in the statutes of individual *Länder*. Three of these cases have reached the European Court of Justice and shaped the interpretation of EU law regarding positive action. These cases were *Eckhard Kalanke v. Freie Hansestadt Bremen* (1994), *Hellmut*

Marschall v. Land Nordrhein-Westfalen (1995) and *Badeck and others v. Landesanwalt beim Staatsgerichtshof des Landes Hessen* (1997).²⁵

Electoral and party law

The organisation of political parties in Germany is regulated by a Federal Party Law (Parteiengesetz) of 1967, whose legal basis is article 21 of the Basic Law. Section 1(2) of the Party Law includes the presentation of candidates for elections among the basic functions of a political party:

The parties contribute to the political motivation of the people at all levels of public life. They achieve this in particular by influencing public opinion, stimulating and enhancing political education, fostering active public participation in political life, educating competent citizens to take on public responsibilities, by selecting candidates to stand in federal, Länder and communal elections, by influencing political development in parliament and in government, by feeding their political goals into the general political process, and by providing for a lively connection between the people and the organs of the state.

Section 6 of the Party Law builds upon the requirements placed upon parties in the Basic Law when it states that:

The party must have a written statute and a written programme.

The party's statute, which is central to its organisation, is thus legally recognised.

Section 17 regulates selection of candidates, and again requires a minimum level of internal party democracy. However, the detail is left to party statutes and election law:

- 1. The selection of candidates for elections to assemblies must take place by secret ballot.*
- 2. The selection is regulated by election laws and party statutes.*

The Federal Election Law (Bundeswahlgesetz) regulates elections, and includes further requirements on parties' candidate selection procedures. Section 21 of this law states that constituency candidates must be nominated either by a meeting of local members, or a meeting of delegates who have themselves been elected by the membership. Likewise Section 27 sets out that list candidates must be selected by a meeting of such delegates at *Land* level. Party executives may question the selection of candidates, but the law states that ultimately the last word must lie with the membership.

Neither the Election Law nor the Party Law includes an equality or positive action clause.

Use of positive action within the political parties

Most political parties are currently convinced of the necessity of positive action, mainly due to public pressure. In public, during the nineties, political parties presented their positive action activities as a sign of modernity.

Since party and election law does not regulate the subject, this is left to party statutes. These must be consistent with the above laws and with Basic Law principles. The interpretation of this legal basis in constitutional law has been discussed controversially since the late 1980s when individual parties first agreed their positive action measures. Political parties have

²⁵ For a brief account of these cases and their relationship to this issue see M. Russell, *Women's representation in UK politics: What can be done within the law?*, Constitution Unit, 2000.

considerable freedom to define individually the extent of positive action in their statutes. Most parties' statutes have a separate Equal Rights chapter which sets out the target quota and states the formal rules. This generally starts by referring to Article 3 of the Basic Law.

Apart from the Liberals (Free Democratic Party, FDP), the remaining four main parties all use some form of positive action:

- 1) The Greens (Gruene/Buendnis 90), being the most progressive party with strong feminist roots, are the leaders in this field. In September 1986 they agreed a 'women-statute' which states that women and men are to alternate on election lists, both for public office and party offices.
- 2) Also in 1986 the Social Democratic Party (SPD) asked their board to search for effective ways to promote equal rights for women within the party. Two years later, the SPD followed the Greens and passed an internal quota order. This set an eventual target of at least 40% women at all levels in the party. However, changes were introduced gradually and it wasn't until 1994 that the 40% quota applied to internal office and 1998 that it applied to public office.
- 3) In October 1986, the Conservatives (CDU Christlich Demokratische Union) agreed on a decree to promote women's representation, but this was a target rather than a quota. In 1996 the party agreed a 30% quota both for women in public office and internal party office.²⁶
- 4) The rules of the German Socialist Party (PDS), the successor of the former East German Communist Party, demand 50% women in public boards, offices and internal party functions.

The proportion of women elected by each of the main parties to the Bundestag in 1998 is shown in the table. Note that the total proportion of women in parliament falls short of the parties' targets in part because some parties (eg. SPD, CDU) win many of their seats in the constituencies, whilst the quotas apply only to the lists. The smaller parties, in contrast, win all or most of their seats on the lists.

PDS	58.3%
Green	57.4%
SPD	35.2%
FDP	20.9%
CDU	19.5%

Challenging discrimination in candidate selection

To date, cases concerning the application of positive action within the parties, and other cases of grievance within the selection process, have been confined to internal party forums.

Legally speaking, German political parties have a hybrid character. They simultaneously have a public and a private law structure. As far as their public part is concerned they have an obligation as set down in Article 21 of the Basic Law. The private part has its origin in the conviction that parties are similar to a society/association: a group of people with common goals that voluntarily decide to follow a programme. They may thus organise freely and agree their own statutes, within the constraints of the Basic Law. Where infringements of party statutes occur, these are first addressed in party courts (courts or committees of 'arbitration'), before reaching ordinary courts. The existence of this system is set down in Section 14 of the Party Law (specifying for example that judges in party courts must not hold

²⁶ In Bavaria, the independent CSU (Christlich Soziale Union) as a sister-party to the CDU uses only targets, not quotas, in their statute.

a post in the party or be in any other way financially dependent on the party), although the precise composition of these courts is decided by the individual parties.

Just after the first equal rights clauses of party statutes were established in the late eighties, a considerable number of arbitration cases were dealt with at party courts of arbitration. Ten years later, the number of claims has decreased as the number of women in public office has increased. Nowadays, there are only rare cases of infringements of equal rights statutes concerning candidate selection in political parties.

This positive impression may however be a little misleading, since the parties' positive action systems are limited in time (the CDU's time limit is 2003 and SPD is 2012/3) and the legal grounds for positive action in general are fragile. Legal interpretations could change if society's attitudes change and/or as the time-limits expire.

France

France is a member of the EU and a signatory to the European Convention on Human Rights.

The lower house of the French parliament (the Assemblée Nationale) has 577 seats, and has traditionally suffered from a low level of women's representation. Currently women make up 10.8% of members. The chamber is elected on using a single member constituency system similar to that in the UK, but with a second run-off ballot between the top two candidates in seats where no candidate obtained a majority of the vote. France, like the UK, has different electoral systems in use for different levels of government. Local and regional government, and some seats in the upper house (Sénat) are elected using a list system.

Constitutional and human rights law

The main sources of equality law in France are the Declaration of the Rights of Man (sic) of 1789, the Preamble to the Constitution of 1946 and the Constitution of 1958.

At the time it was written, the Declaration of the Rights of Man proclaimed absolute equality between women and men in the sense that it did not distinguish between them. Article 6 of the Declaration states:

The law is the expression of the general will. All the citizens have the right to participate directly, or through their representatives, in its creation. The Law must be the same for all citizens, whether it protects or punishes them. All citizens, being equal in the eyes of the Law, are equally admitted to all dignities, functions and public offices, according to their ability and without any other distinction than their merit and their talents.

The Preamble to the Constitution of 1946 says, in its third paragraph, that:

The Law guarantees to the woman, in all fields, equal rights to the man.

This point acknowledges that human beings can be either women or men, and gives the law an active role in establishing equality between them. This point notably allowed the Council of State (Conseil d'Etat) in 1989 to disregard the strict application of the equality principle for entry to the civil service, explicitly accepting positive action in favour of women.

The Constitution of 1958 contains the Preamble of 1946, and so acknowledges the principle of equality between the sexes. It also states in article 3 that:

- *National sovereignty shall belong to the people, who shall exercise it through their representatives and by means of referendum.*
- *No section of the people nor any individual may arrogate to itself, or to himself, the exercise thereof.*
- *Suffrage may be direct or indirect as provided by the Constitution. It shall always be universal, equal and secret.*
- *All French citizens of either sex who have reached their majority and are in possession of their civil and political rights may vote as provided by statute.*

In 1982 the first attempt was made by government to legislate for positive action towards women in elections to public office. An electoral Bill was passed in order to help women to be elected at local level. This Bill stated that:

Lists of candidates must not be composed by more than 75% of persons of the same sex.

This had been agreed by both houses of parliament, but it was struck down by the Constitutional Council (Conseil Constitutionnel) on the basis of article 3 of the Constitution and article 6 of the Declaration of the Rights of Man. The Constitutional Council concluded that constitutional rules were 'opposed to any division of voters and candidates' and that 'making a distinction between candidates because of their sex (was) against constitutional principles'. In reaching this decision the Constitutional Council ruled that the Declaration of 1789 was superior to the Preamble of 1946. But its opposition to positive action towards women was limited to the political field.

In 1998 the Constitutional Council was asked for a statement by the President of the Republic and the Prime Minister because the French Constitution was required to conform to Amsterdam Treaty.²⁷ The Constitutional Council considered that this point conformed to the Constitution, and this opened the way to positive action for women in the professional field. But at the same time, it was understood that the Constitutional Council maintained its opposition to positive action towards women in the political field.

This position was reiterated in January 1999, when it was suggested (in a similar move to that of 1982) that lists of candidates for elections to Regional Councils should not be composed by more than 75% of persons of the same sex. The Constitutional Council again rejected this policy, delivering exactly the same verdict as it had in 1982.

This put a constitutional block in the way of any voluntary action towards a real equality between men and women in elected office. As a result it was concluded that the Constitution had to be modified.

This modification was made in 1999, when an additional clause was added to the end of article 3 (above) stating that:

- *Statutes shall promote equal access by women and men to elective offices and positions.*

At the same time a new clause was added to the end of article 4 of the Constitution, which deals with political parties. This article now states:

²⁷ The words from the new Article 141 of the Treaty are cited in section 1.1, above.

- *Political parties and groups shall contribute to the exercise of suffrage. They shall be formed and carry on their activities freely. They must respect the principles of national sovereignty and democracy.*
- *They contribute to the implementation of the principle set out in the last paragraph of article 3 as provided by statute.*

It was only after this change was made that electoral law could be introduced to promote (and in fact enforce) positive action for women in politics.

Electoral and party Law

The new electoral law was passed in May 2000. It includes two kinds of measures, applying to elections using lists and elections in single member constituencies respectively. Its application began with the local elections in 2001 and it will apply again in future elections.

1. Elections by proportional list

These include local and regional elections, some elections to the Senate, and European elections. Here the law requires a perfect equality between men and women candidates to be respected. If a party list does not comprise an equal number of men and women (within each sequence of six names), it is not accepted by the local electoral registration officer and the party cannot take part in the election.

Example	
N°1	man
N°2	woman
N°3	man
N°4	man
N°5	woman
N°6	woman
----- OK : the list can go on	
N°7	man
N°8	man
N°9	woman
N°10	man
N°11	woman
N°12	woman
----- OK : the list can go on	
N°13	man
N°14	woman
N°15	man
N°16	woman
N°17	man
N°18	woman
----- OK : the list can go on	
N°19	woman
N°20	woman
N°21	woman
N°22	man
N°23	man
N°24	man
----- The list is registered	

For the European elections, and the part of the Senate elections which use proportional lists, the requirement is even stricter. Here 'zipping' must apply, meaning that male and female names must alternate on the list.

2. Elections in single member constituencies

Here the equality of candidatures is encouraged by indirect means. In France, the state supports political parties by giving them a amount of money corresponding to the number of votes they win in elections for the upper and lower house of parliament. The new law requires that parties will receive less money if they present a number of women candidates 2% below the number of male candidates (or, in theory, if they present a number of male candidates 2% below the number of women). The financial penalty the party suffers is greater the larger the disparity between the number of male and female candidates. The amounts of money involved are large, as the total state funding from this source amounts to approximately £55 million. This is divided between the parties on the basis of their popularity.

Example

The entire number of candidates is 100.

- If a party presents 49 women and 51 men (2% fewer women), it will receive all its state funding.
- If a party presents 48 women and 52 men (4% fewer women), its amount of state funding will drop by 2%.
- If a party presents 40 women and 60 men (20% fewer women), its amount of state funding will drop by 10%.

This law is compulsory for selection of candidates by all political parties and groups.

Use of positive action in the candidate selection process

In terms of positive action, the political parties acted on their own until the Constitution and electoral laws concerning the access by women to elected office were modified.

In the past there had been some attempts by the political parties to increase the number of women in elected office. The Socialist Party was the first one to act on a voluntary basis. In 1994 it presented a strictly equal 'zip' list for the European elections. Nine of the 18 Socialist members elected were women. For the general election in 1997, the party voluntarily selected 30% of constituencies where only women could be candidates. An attempt was made to ensure that a fair portion of the seats were winnable. However in fact only 16.7% of candidates elected were women.

The application of the new electoral law

The local elections in March 2001 were the first time that the new electoral law was used. Many women were elected. More than 38,000 women were elected to municipal councils, comprising 47.5% of councillors in towns with over 3,500 inhabitants and 48% in towns with over 30,000 inhabitants. After the previous elections in 1995 there had been only 22% women. In towns with under 3,500 inhabitants (where the new law does not apply) there was also an improvement.

One difficulty is that there is no law concerning women's participation in the executive, where they are still very much less than 50%.

In terms of the future, the most difficult point will be the preparations for the next legislative elections in 2002. This is the first time that the law applying to single member constituencies will be applied, and it will present a challenge for all the political parties. The first challenge will be to plan ahead in order to avoid 'dramatic situations' for male candidates. The second challenge will be to find women who want to be candidates. The third will be to try and ensure that some political parties do not choose to lose money instead of presenting at least 48% of women. In all of this the political parties will know that public opinion is watching them. They must be seen to look very hard for women candidates.

As far as the French Socialist Party is concerned, two rules are proposed. First, only women will be selected in electoral areas where women were candidates in 1997. Second, in all seats where MPs are retiring, only women will be eligible to be candidates.