



# Boardroom Diversity - Making it Happen

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## DIVERSITY FROM A LEGAL PERSPECTIVE

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It is over 40 years since legislation was first introduced to tackle discrimination in the workplace but despite this only around 14% of FTSE 100 company directors are women and less than 5% of them are from ethnic minorities.

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The current national gender pay gap stands at somewhere between 15 and 22% and when comparing full time male employees with comparable female part time workers the gap rises to nearer 40%. It has been estimated that on average a woman will lose out on £300,000 of salary over the course of her career, effectively meaning a woman is working for free for two months of every year.



The latest Employment Tribunal statistics show that sex discrimination claims and race discrimination claims are steady at around 18,000 and 5,000 cases per year respectively but claims in relation to part time work and age discrimination are on the increase. The abolition of the national default retirement age may lead to a significant increase in the number of age discrimination claims.

The Government's recent announcement that from April 2012 the qualifying period for unfair dismissal claims will increase from 12 months to two years may mean that employees have to become more imaginative with their claims and could result in an increase in discrimination claims.



## Diversity and Discrimination – What Does the Law Say?

The Equality Act 2010 was introduced from 1 October 2010 and was intended to de-clutter the law and consolidate nine major pieces of legislation and over 100 statutory instruments.

Rather than the previous equality strands which each had their own piece of legislation, the Equality Act introduced the concept of protected characteristics. There are nine of these:

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

As far as possible the law now adopts a consistent approach to the protection offered to those who possess these protected characteristics.

Unlawful discrimination falls into four categories:

- ||| Direct discrimination – treating someone less favourably because they possess a protected characteristic.
- ||| Indirect discrimination – applying a provision, criterion or practice to everyone but which people with a particular protected characteristic will find it harder to comply with than those who do not possess that protected characteristic.
- ||| Harassment – engaging in unwanted conduct related to a protected characteristic which has the purpose or effect of violating a person's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment.
- ||| Victimisation – subjecting someone to a detriment because of a protected act.



As well as consolidating the law, the Equality Act also introduced some new concepts:

- III Protection now applies where someone does not have a protected characteristic but where it is perceived that he does.
- III Protection now extends not just to someone who possesses a protected characteristic but to someone who associates with someone who possesses that characteristic.
- III Employers can now be liable for not only harassment of one employee by another but harassment of one of their employees by a third party. If an employee is harassed on two occasions and the employer fails to take reasonable steps to prevent it happening again, on the third occasion the employer can be liable.
- III Pay secrecy clauses are now unenforceable to the extent that an employee makes or solicits a relevant pay disclosure.
- III From a recruitment perspective the law has allowed for certain types of positive action for some time but this has been limited to:
  - o Affording members of a disadvantaged group access to facilities for training which would help fit them for particular work.

- o Encouraging members of a disadvantaged group to take advantage of opportunities for doing particular work.

However, since 6 April 2011 employers have been permitted to go further and to take under-representation of particular groups into account when selecting between two equally qualified candidates for a role.

An employer does not have to take under-representation into account but it can do if it chooses to where there are two equally qualified candidates. However the protection is not available to allow for the selection of a less well qualified candidate from an under-represented group.

## What are the Legal Pitfalls?

- ||| Adopt fair and transparent processes – be as objective as possible.
- ||| Avoid stereotyping – this seems obvious but is a trap that employers often fall into.
- ||| When recruiting focus on someone's ability to carry out the role in question, so base your questions around your job description and person specification – use essential and preferred criteria and where possible score the candidates.
- ||| Avoid indirect discrimination by ensuring that if you do adopt a certain provision, criterion or practice that it is justifiable for the role in question.
- ||| Keep notes of your decision - making but remember that they may be discloseable at a later date
- ||| Pre-employment health enquiries are now only allowable if they are for a prescribed reason.
- ||| Be wary of references – many employers now only give factual ones so you may not be comparing like with like and remember you are relying on someone else's opinion and you do not know what the motivation for that opinion is.
- ||| Ensure that pay is set at an appropriate level – if you do not have a job evaluation scheme make sure you can justify your decision.
- ||| Make the best use of probationary periods – it is your opportunity to test someone's suitability and if he is not right for the role to not confirm him in place.

## What Liabilities Can You Incur If You Get It Wrong?



Ultimately any kind of discrimination can result in an Employment Tribunal claim. Such a claim should normally be brought within three months of the act complained of but a Tribunal does have discretion to extend this time limit.

Often as a prelude to a claim an employee will serve a statutory questionnaire. This is a way of obtaining information in order to explore whether or not a claim is worthwhile. An employer does not have a duty to respond to a questionnaire but if it does not adverse inferences can be drawn.



An Employment Tribunal has three possible remedies available to it:

- ||| It can make a declaration as to the rights of the parties.
- ||| It can make a recommendation to benefit not only the claimant but the wider workforce.
- ||| It can award compensation which is uncapped and can include an award for injury to feelings as well as compensation for financial loss.

## DIVERSITY FROM AN EXECUTIVE SEARCH PERSPECTIVE

Last year the Government asked Lord Davies to conduct an independent review into how diversity in boardrooms could be improved.

Before the publication of the Davies Report, the Government had been considering the possibility of implementing statutory quotas as a means of improving female representation on boards and it is believed that the Government was hoping that quotas would be one of the recommendations made by Lord Davies.

### The Davies Report

On 24 February 2011, Lord Davies published his report on "Women on Boards", in which he rejected the introduction of statutory quotas as a means of improving female representation on boards. Instead, the report made a number of other practical recommendations, including:

- ||| Chairmen of FTSE 350 companies should set targets for the percentage of women they aim to have on their boards in 2013 and 2015. The report encourages a minimum of 25% female representation by 2015 for FTSE 100 companies.
- ||| Companies should annually disclose the proportion of women at board level, in senior executive positions and throughout the entire organisation.
- ||| The UK Corporate Governance Code should be amended to require listed companies to establish a policy on boardroom diversity.
- ||| Companies should report on whether the regulatory changes are in place in their 2012 Corporate Governance Statement.
- ||| Companies should disclose information about their appointment process and how they address diversity.

- ||| Investors should consider the above recommendations when considering company reporting and appointments to the board.
- ||| Companies should periodically advertise non-executive board positions to promote diversity in applications.
- ||| Executive search firms should create a voluntary code of conduct to address gender diversity and best practice.
- ||| Women from both within the corporate sector and outside the corporate mainstream, such as entrepreneurs, academics, civil servants and senior women from professional service backgrounds, should be considered.
- ||| The steering board responsible for producing this report will meet every six months to examine progress.

Although the Davies Report did not recommend statutory quotas, the report indicated that the option to do so would be held in reserve by the Government in the event that the recommended business-led approach does not result in significant changes.

The Government met on 12 October 2011 to conduct a progress review following the recommendations.



## Preparing Women for the Boardroom

The Davies Report focussed on a business-led approach to improving boardroom diversity, with much of the emphasis placed on chairmen to implement processes to encourage the changes required.

Many studies carried out over the years have suggested that balanced boardrooms work more effectively and perform better, which is an important reason for promoting diversity. In order to encourage diversity, boards need to think differently and consider all areas of potential talent.

One recommendation would be for chairmen to mentor and assist women leaders within their companies. Evidence suggests that companies that have done this have significantly improved their boardroom diversity.

The Davies Report also suggested that it is important to promote recruitment of women from outside an organisation, as they may have additional and valuable experience that would not necessarily be found from a candidate from within the company. CEOs and HR Managers should also be promoting a culture within companies to encourage women and other minorities to succeed.

There should also be transparency within a company and its policies, so that it is clear that promotions are based solely on merit. Companies should have ways of measuring diversity on their boards and this measurement should be an integral part of each company's business plan.

To prepare women for the boardroom, boards should:

- ||| Indicate to talented women, across the whole company, that they have the potential to progress in their careers and also inform them of what they should do to develop the necessary skills to succeed.
- ||| Mentor talented women – the FTSE 100 Cross - Company Mentoring Programme is an external programme where chairmen mentor talented women.
- ||| Make sure that women who have risen to the top of a company are accessible to other women within their company.
- ||| Provide networks which help women develop.
- ||| Open doors and give support to women to pursue board positions.



## Executive Search Companies and the Davies Report

One of the recommendations of the Davies Report was for executive search companies to create a voluntary code of conduct to address gender diversity and best practice. The Association of Executive Search Consultants (AESC) has produced a code of conduct. However, it not as strong as many hoped it would be.

Firstly the code is voluntary, meaning it is unclear how many executive search companies will actually comply with the code. Secondly, although the code rightly acknowledges the value of diversity and the value of women in the boardroom, unfortunately it does not say much more than this and leaves the implementation of any changes to chairmen, making the code quite weak.

Executive search companies need to think why women are not equally represented on boards. This could be as a result of a number of different reasons, including:

- ||| Women simply do not want to be on boards as they want families, a better work/life balance and some do not want to work in such a macho environment.
- ||| Women often undervalue themselves and do not feel that they can reach such a level in their careers.
- ||| There are too few female role models for women to aspire to and far too often, when a woman fails on a board, it is blamed on the fact that she is a woman.
- ||| Women are generally not as good at networking as men.
- ||| Women often do not think about personal development.

Executive search companies need to think creatively when trying to find women candidates for an executive role. It must be remembered that executives can successfully move between different sectors and industries.

## QUESTIONS AND DISCUSSION

### What do you think about the introduction of quotas?

Norway introduced quotas six years ago, at a point where the proportion of women on boards stood at 6%. Today women make up 44% of board members in Norway. Spain and Germany are currently considering implementing quotas and there have been reports that the EU is also considering implementing quotas across Europe if diversity does not improve. If diversity does not improve then quotas may be the best way forward. At the end of the day the most important thing for companies is to have the best people on their boards.

Culture is also very important within a company and people will feel comfortable within a group of like minded individuals. For example, a group of 50 year old like minded males would possibly be adverse to a women coming onto a board, who would ask difficult questions and might make them feel uncomfortable. However, evidence suggests that diverse boards will often be successful.

There would need to be a change in the law before quotas were introduced as, currently, this would amount to unlawful positive discrimination.

A recent survey has revealed that only 10% of women leaders had experienced the glass ceiling and 100% of those surveyed were against quotas. The survey also revealed that most women would not have liked to have been promoted solely to satisfy a quota as opposed to on merit.

### Other points and ideas

- III Introducing quotas for a number of years to increase diversity and increase the number of role models for women at the top of companies and then remove these quotas at a later date.
- III Whether changes should be made throughout companies, from graduate to the board. This would ultimately lead better diversity at the top.
- III It is easy to forget how far we have come in this country. It was only in the 1960s that it was legal for employers to pay men and women differently

for doing the same role. Although we have come a long way the main point is that in future progress needs to be quicker.

- III An example was given of a company who would consider de-listing to avoid the red tape that quotas would create. Quotas may have the potential of stifling businesses which have become successful with the best people on the board, which is not necessarily diverse.
- III The point was also made that in the current economic climate boardroom diversity was not particularly high on companies' priorities. Many companies are struggling to survive and currently have much greater concerns.
- III A further concern was raised over the difficulty quotas may create when managing employees' expectations. If the natural successor to a position was male and he missed out on the position because the company had to fulfil a quota, then there would be a real risk that that the male employee would become disillusioned and consider leaving the company.
- III Many companies only recruit externally as a last resort, for both cost and cultural reasons. A requirement to do so would not sit well with many companies.
- III There was a suggestion that women often put in their own glass ceiling in place, as they do not ask for the help they require to make the jump up to the top positions in companies. It is seen as a big choice for women to take the final steps necessary to reach the top of a company, as they will have to decide that their career is a priority over a family life. There has recently been a change to the law to allow fathers to have longer paternity leave if the mother returns to work, which could allow women to have both a family and a career but, as yet there does not appear to be many couples who have taken this opportunity. It will be interesting to see if this changes in the future.

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## Cranfield's Progress Report

On 12 October 2011 Cranfield School of Management published a progress report on boardroom diversity, six months after Lord Davies' independent review. The report reveals that 14.2% of the 1,092 FTSE 100 board positions are now held by women - up from 12.5% in December last year. However, progress has been slower than hoped, with 21 women appointed to board positions out of a possible 93 since the Davies report. This represents 22.5% of all new appointments, some way short of the 33% recommended by Lord Davies.

The Financial Reporting Council has also announced two changes to the UK Corporate Governance Code to strengthen boardroom diversity. The changes will require listed companies to:

- Report annually on their boardroom diversity policy, including gender, and on any measurable objectives that the board has set for implementing the policy and the progress it has made in achieving the objectives.
- Consider diversity of the board, including gender, when evaluating board effectiveness.

The changes will apply to financial years beginning on or after 1 October 2012, however, the FRC strongly encourages all companies voluntarily to apply and report on these changes with immediate effect.

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