OPINION

Why One Person's Inclusion Rider is Another's Exclusion Rider

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When Frances McDormand, winner of this year's Oscar for Best Actress, ended her speech with two words, "inclusion rider", she left behind her a trail of Google searches and #inclusionrider hashtags. Now the Labour Party is calling for HMRC to employ them as a way of increasing diversity in the UK film industry. But is the inclusion rider even legal here in the UK?

The inclusion rider (also known as an equity rider) was developed in 2014 by Stacy Smith, founder of the Annenberg Inclusion Initiative, with assistance from Kaplana Kotagal, a civil-rights and employment-practice attorney based in Washington DC. Designed as a way to increase diversity and inclusivity in the film industry, the rider is a contractual provision that lead actors with clout can use to ensure the projects they work on hire more than just white men—and some famous white men such as Matt Damon and Ben Affleck have already committed to using them.

The Initiative recently made a five page template version available "open source for industry use".[1]

The express aim of the inclusion rider, as set out in its introductory "Statement of Purpose", is to increase the number of females and individuals from other under-represented groups auditioning for supporting roles and interviewing for certain listed off-screen positions, and to cast or hire them whenever possible, in order to facilitate employment and create a stronger pipeline for more diversity on-screen and off-screen.

It's a worthy enough aim. However, after reviewing the actual clauses contained within the inclusion rider, it seems to me it would be unlawful in the UK by virtue of the Equality Act 2010.

The Equality Act seeks to prevent discrimination and advance equality of opportunity for all. As per s.13 of the Act, a person (A) discriminates against another (B) if, because of a "protected characteristic", A treats B less favourably than A treats or would treat others. The nine protected characteristics are age, race, religion or belief, disability, gender reassignment, sex, sexual orientation, marriage and civil partnership, and pregnancy and maternity.

In the context of employment, employers are prohibited from discriminating against a person (among other ways) in the arrangements they make for deciding to whom to offer employment, and by not offering that person employment.[2] It is worth noting that "employment" has a wide definition and includes self-employed persons contracted to perform work personally, i.e. so long as they cannot sub-contract.

The prohibition is not limited to instances of discrimination where white men come out top. Positive discrimination is also unlawful. According to the Government Equality Office's "Equality Act 2010: What Do I Need to Know? A Quick Start Guide to Using Positive Action in Recruitment and Promotion":

> "Positive discrimination is recruiting or promoting a person solely because they have a relevant protected characteristic. Setting quotas to recruit or promote a particular number or proportion of people with protected characteristics is also positive discrimination."

(I'm not sure Shadow Culture Minister Kevin Brennan, the person calling for inclusion riders to be required by HMRC, can have read the memo.)

Instead, the Equality Act introduced new "positive action" provisions to improve diversity in the workforce.[3] Under these provisions, an employer is able to treat a person (A) more favourably in connection with recruitment or promotion than another person (B) where A has a protected characteristic that is underrepresented in the workforce *but only if* (i) A is as qualified as B to be recruited or promoted; (ii) the employer does not have a policy of treating persons who share the protected characteristic more favourably in connection with recruitment or promotion than persons who do not share it; and (iii) the action being taken is proportionate.

So where does this leave the inclusion rider?

[1] See *http://assets.uscannenberg.org.s3.amazonaws.com/docs/inclusion-rider-template.pdf* [Accessed 27 July 2018].
[2] Equality Act 2010 s.39(1).
[3] Equality Act 2010 ss.158 and 159.

The rider requires the production company to interview (I use the term widely to include auditions where relevant) at least one female and one person from any other under-represented group for each supporting role or listed off-screen position (cl.3 of the "open source" template rider). Unless a producer has a policy of interviewing *all* potential candidates, it looks as though this may fall foul of the laws against positive discrimination. This is because to impose a rule (quota) that one of the people interviewed must be female and one must be from another under-represented group (e.g. BAME), regardless of whether these candidates have equal merit or experience to the other candidates, means that people who might have been given an interview but for the fact they are not female or from an under-represented group have arguably been discriminated against.

Promising to increase the number of interview slots by two does not avoid the issue since by not allowing for people other than women/BAME candidates to fill the two additional slots, regardless of merit, a company would still be discriminating against anyone who doesn't fall into these categories.

I considered whether the problem could be avoided by amending the inclusion rider to ensure that at least one woman and one BAME candidate are given an interview *where their CV/prior experience is as good as that of a white male candidate also applying for the same role*. But even this appears to be problematic, given that the Equality Act prohibits *policies* of treating underrepresented people more favourably than others, which this would be since it is a compulsory practice introduced by the inclusion rider.

When it comes to casting actors for roles, there is an interesting point relating to the Equality Act's "occupational requirements" exception. Paragraph 1 of Sch.9 of the Act provides that a person (A) does not directly discriminate if A shows that, having regard to the nature or context of the work, (a) it is an occupational requirement, (b) the application of which is a proportionate means of achieving a legitimate aim, and (c) the person to whom A applies the requirement does not meet it (or A has reasonable grounds for not being satisfied that the person meets it). What this means in relation to acting jobs is that an employer may be able to avoid liability where the need for authenticity or realism requires someone of a particular race, sex or age for the role.

Now, where a film is set in the "real world" then arguably the actor who best fits the role will be one who would be expected to be in that role (i.e. in some sense demographically accurate)—which, *assuming* realism is one of the film's aims, could avoid any positive discrimination claims.

But the major issue here, and with the subsequent requirement to select qualified members of under-represented groups for supporting roles in a manner that matches the expected demographics of the film's setting wherever possible (cl.4(a)(ii)), is that story authenticity and, indeed, realism surely more often than not requires the consideration of the real-life demographic of people in a particular environment or role and *not* state or nationwide demographics. It is no good utilising national demographic figures when filling roles set in e.g. a fishmonger's or construction site because it simply is the case that these jobs (at least historically/currently) attract more men than women. Another obvious example is the biological family unit, which inevitably restricts who is suitable for the supporting roles of mother, father, sibling etc (unless there are adopted children, half siblings or step parents).

It is unclear what is meant by the obligation to "consistent with story authenticity and achieving a high-quality result, affirmatively seek opportunities" cast females and BAME actors (cl.4(a)(i)). If this is advocating choosing these categories of actor over white male actors regardless of merit then it is positive discrimination and illegal in the UK. If it is instead espousing a positive action to recruit women and BAME actors where they have equal merit to the other candidates, then the scope of the provision is in practice determined by the choice of script—which will often already be on the table at the point the celebrity pushing for the adoption of an inclusion rider is brought on board.

Perhaps the story is, in reality, what the Annenberg Institute is seeking to influence. Clause 8(a) of the template rider (which deals with compliance) hints at this, stating that:

> "a project has complied with this Addendum if the demographics of characters on-screen [and *not* the demographics of actors] match the expected demographics of the film's setting."

This shifts the focus of the rider on the substance of the script itself. Why not pin their colours to the mast, then, and attempt to directly influence film companies' choice of projects, rather than trying to manipulate a script once it has been greenlighted? It would surely be a more effective way of increasing diversity in film to require that a slate includes different groups of people's stories. But the reality is that certain sorts of films continue to bring in the big bucks and it would therefore be an uphill struggle to get film companies to agree to limit their script choice freedom in this way.

Even ignoring the legal issues, Labour's suggestion that HMRC should require the inclusion rider to be implemented industry-wide risks throwing the baby out with the bath water, swapping a tapestry of different film focuses for identi-kit models that all meet the rider's "demographic thresholds" tests.