

## Special measures policy PC008

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### Purpose and scope

A **special measure** is a positive action or actions intended to achieve equality for specific identified groups as defined in relevant anti-discrimination laws (refer to [‘Relevant legislation’](#)). All discrimination laws (i.e. Commonwealth and State/Territory) which prohibit racial discrimination—with the single exception of the NSW Act—have provisions which make clear that positive action to assist historically disadvantaged racial groups, that is for the purpose of promoting or realising substantive equality for members of that group, will not be considered unlawful discrimination.

The language used in the laws to describe such positive actions differs between the jurisdictions (i.e. sometimes they are called equal opportunity measures), but for the purposes of this policy they will be referred to generally as **special measures**.

Ahpra’s Special measures policy stems from the commitment within *Ahpra’s Aboriginal and Torres Strait Islander Employment Strategy 2020-2025* to increase Aboriginal and Torres Strait Islander participation within Ahpra, to ensure the organisation represents the diversity of communities in which we operate and serve. As part of Ahpra’s workforce planning and recruitment procedures, ‘special measures’ may be applied as part of targeted recruitment strategies which are aimed at improving employment opportunities for Aboriginal and Torres Strait Islander Peoples.

This policy outlines Ahpra’s approach toward the application of special measures provisions within various Anti-Discrimination legislation, as a strategy to promote enhanced employment opportunities, increased participation rates and culturally safe work environments for Aboriginal and Torres Strait Islander Peoples.

### Policy

*Ahpra’s Aboriginal and Torres Strait Islander Employment Strategy 2020 – 2025* establishes a 2% target participation rate for Aboriginal and Torres Strait Islander employees by 2025. As at March 2021, the employment participation rate of Aboriginal and Torres Strait Islander employees at Ahpra was less than 1%.

Ahpra has an express commitment to equal opportunity in employment and is committed to implementing strategies to increase the diversity of backgrounds and perspectives within the organisation. Ahpra supports actions aimed at increasing employment opportunities for Aboriginal and/or Torres Strait Islander persons.

All roles within the business which have responsibility for resourcing decisions as part of vacancy management and workplace planning processes, have a responsibility to implement strategies which are aimed towards increasing participation rates of Aboriginal and Torres Strait Islander Peoples.

Prior to advertising any role externally, a review of the Aboriginal and Torres Strait Islander Talent Pool must be undertaken by the hiring manager and recruitment team, to determine whether there are applicants who possess the required skills and experience to perform the role. If a suitable applicant is identified, they are to be shortlisted for interview.

All roles advertised by Ahpra via external channels (e.g. job boards such as LinkedIn or Seek, or employment agencies) must include at least one channel that is a recognised as a reputable source for prospective Aboriginal and Torres Strait Islander candidates.

While increased participation rates of Aboriginal and Torres Strait Islander employees may be achieved through standard recruitment and selection processes, where there is evidence that a targeted recruitment strategy is necessary in order to promote equal opportunities for Aboriginal and Torres Strait Islander Peoples, a 'special measure' may be utilised.

## Context

Discrimination laws recognise that 'equality' does not always mean identical treatment. In order to achieve genuine, 'substantive' equality, it may be necessary to treat people differently in order to address existing inequality or disadvantage ('equity').

Although special measures necessarily involve treating different racial groups differently, this differential treatment will not be unlawful if it meets certain criteria. This means that if an action taken to address the disadvantage experienced by a particular racial group meets the requirements of a special measure, it is not unlawful discrimination.

The Australian Human Rights Commission has published a set of core elements which provide a consistent set of requirements across federal, state and territory discrimination laws for application of special measures provisions.

Special measures may be applied where:

1. they are necessary because members of a racial group are disadvantaged because of their race
2. they will promote equal opportunity for members of that racial group
3. their sole purpose is to promote equal opportunity (and will be done in good faith)
4. they are reasonable and proportionate (including reasonably likely, appropriate and adapted to its purpose), and
5. they will stop once its purpose has been achieved.

[Australian Human Rights Commission (2015).

[Targeted recruitment of Aboriginal and Torres Strait Islander people: A guideline for employers](#)]

## Legislative frameworks

Ahpra is required to comply with the federal Racial Discrimination Act 1975 (Cth) and the relevant discrimination law which applies in the states and/or territories in which it operates. This legislation contains limited exceptions to the legal requirement that people must be given the same opportunities regardless of their race.

### Laws which prohibit racial discrimination

Law by jurisdiction	Exception for special/equal opportunity measures which includes recruitment?	Exception for genuine occupational requirements
Cth – <i>Racial Discrimination Act 1975</i>	Yes – s8(1)	No
ACT – <i>Discrimination Act 1991</i>	Yes – s27	Yes – s42(d)
NSW – <i>Anti-Discrimination Act 1977</i>	No	Yes – s14(d)
NT – <i>Anti-Discrimination Act 1996</i>	Yes – s57	Yes – sub-s35(1)(b)(ii)
Qld – <i>Anti-Discrimination 1991</i>	Yes – s105	Yes – s25
SA – <i>Equal Opportunity Act 1984</i>	Yes – s65	Yes – sub-s56(2)
Tas – <i>Anti-Discrimination Act 1998</i>	Yes – ss25 and 26	Yes – s41
Vic – <i>Equal Opportunity Act 1984</i>	Yes – s12	Yes – sub-s26(3) and s28
WA – <i>Equal Opportunity Act 1984</i>	Yes – s51	Yes – s50

There are two types of exceptions which can apply in the case of targeted recruitment of Aboriginal and Torres Strait Islander Peoples: special measures and genuine occupational requirements.

### **Special measure**

A special measure is an action taken to address disadvantage experienced by a particular racial group, so that members of that group may enjoy their rights equally with other groups. Special measures support groups of people who face, or have faced, entrenched discrimination so they can have similar access to opportunities as others in the community.

Examples of special measures that may be applied by Ahpra, where Ahpra determines that such a measure is necessary to promote equality of opportunity, include:

- **reserving certain positions** for Aboriginal and Torres Strait Islander applicants, especially roles that are public-facing, e.g. Customer Service Team, Registration, Notifications, etc.
- **targeted advertising strategies**, including exclusive advertising rights for certain roles through channels that are recognised by Indigenous audiences
- **guaranteed interviews** for individuals who identify as Aboriginal and/or Torres Strait Islander or who are referred through Indigenous agencies, and/or
- **early careers employment programs**, including traineeships and graduate development programs.

### **Genuine occupational requirements**

State and territory discrimination laws also contain separate provisions which apply if being of a particular race is a genuine occupational qualification or requirement for a particular job. This may include roles which involve developing or implementing policies, programs or services targeting Aboriginal and/or Torres Strait Islander service users or liaising with Aboriginal and/or Torres Strait Islander communities.

The term 'identified position' is not a defined term within Anti-Discrimination legislation, however it is generally understood to mean a job where the employer identifies that it is to be filled only by a person with a particular attribute, such as race.

As part of workforce planning activities, positions may be declared as an 'identified position' where there is a genuine occupational requirement that the position be filled only by a person with a particular attribute.

Whilst positions may be advertised as 'identified positions' under state and territory discrimination laws, as the federal Racial Discrimination Act 1975 (Cth) does not contain an exception in relation to genuine occupational qualifications or requirements, Ahpra will only advertise identified positions where those positions will also constitute 'special measures' within the meaning of federal, state and territory laws;

## Exemptions and application

There is no relevant special measures provision under the *Anti-Discrimination Act 1977* (NSW). It is therefore necessary for employers wanting to conduct targeted recruitment for Aboriginal and Torres Strait Islander People in New South Wales to apply for an exemption from that Act.

Where an exemption is required in order to undertake a targeted recruitment strategy in line with special measures provisions, the Recruitment team and Aboriginal and Torres Strait Islander Engagement Business Partner will facilitate the application process in partnership with the hiring manager.

While exemptions are not required in remaining jurisdictions, a documented recruitment strategy must be completed to demonstrate that the targeted recruitment meets the core elements to justify special measures provisions. The Special Measures Procedure outlines the process steps to document the targeted recruitment strategy, as well as documentation required to support the application of special measures provisions.

## Related documents

- [National Scheme's Aboriginal and Torres Strait Islander Health and Cultural Safety Strategy 2020-2025](#)
- [Ahpra Aboriginal and Torres Strait Islander Employment Strategy 2020-2025](#)
- [Innovate Reconciliation Action Plan for the Australian Health Practitioner Regulation Agency 2021-2023](#)
- [Recruitment and selection policy](#)
- Australian Human Rights Commission (2015) [Targeted recruitment of Aboriginal and Torres Strait Islander people: A guideline for employers](#)

## Relevant legislation

- *Fair Work Act 2009* (Cth)
- *Racial Discrimination Act 1975* (Cth)
- *Discrimination Act 1991* (ACT)
- *Anti-Discrimination Act 1977* (NSW)
- *Anti-Discrimination Act 1996* (NT)
- *Anti-Discrimination Act 1991* (QLD)
- *Equal Opportunity Act 1984* (SA)
- *Anti-Discrimination Act 1998* (TAS)
- *Equal Opportunity Act 2010* (VIC)
- *Equal Opportunity Act 1984* (WA)

## Document control

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