Guide to the Racial Hatred Act

Race Discrimination

Listen

Guide to the Racial Hatred Act

The Racial Hatred Act (http://www.comlaw.gov.au/Details/C2004A04951), introduced in October 1995, extends the coverage of the RDA so that people can complain to the Australian Human Rights Commission about racially offensive or abusive behaviour. It aims to strike a balance between two valued rights: the right to communicate freely and the right to live free from vilification.

The Act covers public acts which are:

- done, in whole or in part, because of the race, colour, or national or ethnic origin of a person or group AND
- reasonably likely in all the circumstances to offend, insult, humiliate or intimidate that person or group.

Exceptions

The Act makes these acts unlawful UNLESS one of the exceptions applies. The following are not unlawful if "done reasonably and in good faith":

- an artistic work or performance (for example, a play where racist attitudes are expressed by a character)

- an academic publication, discussion or debate (for example, discussing and debating public policy such as immigration, multiculturalism or affirmative action for migrants)

- a fair and accurate report on a matter of public interest (for example, a fair report in the media of an act of racial incitement or racially offensive conduct)

- a fair comment if the comment is an expression of a person's genuine belief.

Burden of proof

The complainant is responsible for proving that the act was done in public, that it was done because of his or her ethnicity and that it was reasonably likely to offend, insult, humiliate or intimidate a reasonable person of that ethnicity.

The respondent is responsible for establishing that the act is covered by one of the exceptions and that it was done reasonably and in good faith.

Definitions

Public acts

The act must have occurred either within sight and hearing of other people or in a place to which the general public is invited or has access. If the act happened in a private telephone conversation or in a private place, such as a person's home, it is not unlawful. Acts covered include speaking, singing and making gestures in public as well as drawings and written publications such as newspapers, leaflets and websites.

Example:

Remarks disparaging Aboriginal people and using racial epithets were shouted by the respondent from his front verandah to his Aboriginal neighbour. The magistrate noted that passersby could have heard them. The respondent was ordered to pay $1,500 in compensation as well as the complainant's legal costs (*McMahon v Bowman* (http://www.austlii.edu.au/au/cases/cth/FMCA/2000/3.html), Federal Magistrates Court, 13 October 2000, [2000] FMC 3).

Offend, insult, humiliate or intimidate

The act must be reasonably likely to 'offend, insult, humiliate or intimidate'.

Example:

At a workshop organised by the local Council of which both parties were members, the respondent suggested a 'solution' to an issue in the Aboriginal community was to "shoot them". The complainant, an Aboriginal councillor, and two Council staff were present and gave evidence that the comment was not made flippantly. HREOC Inquiry Commissioner Innes said: "Suggesting that a particular group of people … should be shot is simply offensive. It is made more so when such a suggestion is made by the holder of a public officer who has no doubt sworn an oath to appropriately serve all of the people in the ward which he represents [including the Aboriginal community referred to]." The respondent was ordered to pay $1,000 compensation to the complainant (*Jacobs v Fardig* (http://www.austlii.edu.au/au/cases/cth/HREOCA/1999/9.html), 27 April 1999).

More than mere slights are required. Trivial impacts are not unlawful, but fall within a 'margin of tolerance'.

Example:

Newspaper letters and articles which referred to English people as "Poms" or "Pommies" did not meet the threshold for racial hatred. HREOC President Sir Ronald Wilson said: "I can imagine, albeit with some difficulty, that the words complained of in this case could be unlawful in the context of an article which was plainly malicious or scurrilous, designed to foster hatred or antipathy in the reader." The words on their own, however, were not sufficiently offensive to the reasonable person (*Bryant v Queensland Newspapers* (http://www.austlii.edu.au/au/cases/cth/HREOCA/1997/23.html), 15 May 1997).

On the other hand, complaints about two newspaper articles blaming English tourists for littering a local beach and headed "Filthy Poms" and "Poms fill the summer of our discontent" were accepted as complaints and settled through conciliation by the Commission when the newspapers published apologies.

Exception in 'good faith'

This means the act must have been done without spite, ill-will or any other improper motive. Lack of good faith in the context of artistic expression will only be established by "something approaching a deliberate intent to mislead or, if it is reasonably foreseeable that a particular racial or national group will be humiliated or denigrated by publication, at least a culpably reckless and callous indifference in that regard" according to the Commission Inquiry Commissioner Johnston (*Bryl and Kovacevic v Nowra and Melbourne Theatre Company (http://www.austlii.edu.au/au/cases/cth/HREOCA/1999/11.html)*, 21 June 1999).

Example:

Complainants offended by a comedy set against the backdrop of the siege of Sarajevo and genocide in Bosnia-Herzegovina, argued the playwright should have been required to exercise diligence and care, through his research, to ensure he understood the truth of the situation. HREOC Inquiry Commissioner Johnston disagreed saying: "The problem, as I see it, is that to intrude into such matters as the state of knowledge or extent of research of the playwright comes close to an attempt to direct the way the playwright exercises his or her artistic insights … As I understand the import of section 18D [on exceptions], it is not intended as a charter for governmental bodies like the Commission to draw up standards or a rule book laying down what is acceptable in the way an artistic work is produced, or how it is reproduced in performance" (*Bryl and Kovacevic v Nowra and Melbourne Theatre Company* (http://www.austlii.edu.au/au/cases/cth/HREOCA/1999/11.html), 21 June 1999).

Example:

Fredrick Toben was ordered to remove material on the Holocaust from the Adelaide Institute's website. Although Toben claimed the material was a genuine examination of the historical record, HREOC Inquiry Commissioner McEvoy found that it was unpersuasive as such and that its main purpose was to humiliate and denigrate Jewish people (*Jones and Members of the Executive Council of Australian Jewry v Fredrick Toben on behalf*

of the Adelaide Institute (http://www.austlii.edu.au/au/cases/cth/federal_ct/2002/1150.html), 5 October 2000).

Exception 'done reasonably'

This is an objective test. Whether or not the publisher, speaker or artist thought the act was reasonable, it is the ordinary person whose assessment is relevant. The context of the act or publication, community standards of morality and ethics and the impact on the community, on the targeted person or group and on race relations generally are all relevant.

It has been noted that "the suppression of political expression would be justified on only extreme grounds" (*Walsh et al v Hanson and One Nation*, the Commission Inquiry Commissioner Nader, 2 March 2000, unreported).

Example:

In finding that the book *Pauline Hanson the Truth* and comments about it to journalists by One Nation leaders were not unlawful, HREOC Inquiry Commissioner Nader said: "... the statements of the respondents must be regarded as done reasonably and in good faith for a genuine purpose in the public interest, namely in the course of a political debate concerning the fairness of the distribution of social welfare payments in the Australian community" (*Walsh et al v Hanson and One Nation*, HREOC Inquiry Commissioner Nader, 2 March 2000, unreported).

Taking action against racial hatred

A complaint to the Commission

If you believe you have been the victim of an unlawful act as defined in this fact sheet you may be able to lodge a complaint with the Australian Human Rights Commission. For further information on lodging a complaint please refer to the Complaints Information section (/complaints_information/index.html). **No fee is charged for receiving, investigating or handing a complaint.**

Other options

You may also have other options such as:

- a complaint to your local State or Territory anti-discrimination and equal opportunity agencies. Click here to access further contact details. (/about/links/index.html#ad)

- a complaint to the Australian Press Council about newspaper and magazine publications (1800 025 712)

- a complaint to the Australian Advertising Standards Council regarding advertisements (02) 9233 8874)

- a complaint to the Australian Broadcasting Authority about material on TV, radio or the Internet (02) 9334 7700)

- a complaint to the Australian Electoral Commission about election advertising (13 2326).

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3rd October, 2024

Australian Human Rights Commission
everyone, everywhere, everyday

Draft guidelines for ensuring income management measures are compliant with the *Racial Discrimination Act*

Australian Human Rights Commission

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1. Introduction

1. Section 20(d) of the *Racial Discrimination Act 1975* (Cth) (RDA) provides the Australian Human Rights Commission with a function to 'prepare, and to publish in such manner as the Commission considers appropriate, guidelines for the avoidance of infringements of Part II or Part IIA' of the Racial Discrimination Act.[1]

2. The Commission has issued these draft guidelines to provide practical assistance to Parliament and the Government in designing and implementing income management measures that protect human rights and are consistent with the RDA. They are also intended to increase awareness among affected communities about the application of the RDA to income management regimes.

3. While not legally binding, they provide important guidance as to the operation of the RDA and will be relevant in assisting the resolution of complaints.[2]

4. The draft guidelines contain two sections which should be read concurrently:

    - Section one: poses three key questions to consider when developing and implementing an income management measure so it is compliant with the RDA and outlines the steps to achieve this.

    - Section two: provides background information on the legal basis for the different elements discussed in the first section. It also provides the background on existing income management regimes nationally and considers the extent to which they are consistent with the RDA.

5. In the Commission's view, taking the approach set out in these draft guidelines will not only ensure that such measures are compliant with fundamental human rights and discrimination laws, they will also help to ensure that they are effective.

6. The guidelines provide a framework to ensure that competing human rights concerns can be balanced in a manner that is appropriate and consistent with Australia's human rights obligations.

7. These guidelines have been released in draft format on the Commission's website to encourage feedback and comments. The Commission particularly wants to hear how the guidelines could be modified and improved to be a more useful and practical tool.

8. Comments should be provided to the Australian Human Rights Commission by close of business, **Friday 12 February 2010.**

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[1] Part II relates to the prohibition of racial discrimination and Part IIA to the prohibition of offensive behaviour based on racial hatred.

[2] Note that these guidelines do not alter the operation of the RDA and compliance with them does not constitute a defence to an allegation of discrimination under the RDA.

9. The Commission aims to finalise the guidelines in early 2010.

2. Key questions

10. This section poses three key questions to consider when developing and implementing an income management measure so it is compliant with the RDA and outlines the steps to achieve this. The key questions are:

    - Where the measure is established by legislation, does it ensure equality before the law?
    - Is the measure implemented in a way that avoids both 'direct' and 'indirect' discrimination?
    - Is the measure a 'special measure'?

2.1 Does the income management measure ensure equality before the law?

11. Where income management measures are established by law, the measure should ensure human rights are enjoyed equally by all racial groups (s10 of the RDA).[3]

12. Income management measures may impact upon the enjoyment of a number of human rights including, most prominently, the right to social security. This is a right relevant to both adults who may be entitled to social security and their children under Article 26 of the *Convention on the Rights of the Child.*

13. In determining whether an income management measure ensures equal human rights for all, you should ask:

    (a) Does the measure have a disparate impact upon the ability of people of a particular race to enjoy a right? If it does, the measure may be discriminatory.

    It is not necessary that the measure *target* a particular racial group, *apply* only to that racial group or *intend* to have a disparate impact upon members of that group. What matters is the practical effect of a measure. If, in practice, it has a greater impact upon people of a particular race, then it may be discriminatory.

    (b) Is any limitation on the right a legitimate one, intended to achieve a non-discriminatory purpose? If it is not, the measure will be discriminatory.

    To be legitimate, any limitation on a right should meet the following criteria:

[3] For the purposes of these guidelines, the term 'race' is used as shorthand for 'race, colour or national or ethnic origin'.

- The purpose of the limitation should be directly linked to the promotion of another human right, such as those protected by the *International Covenant on Economic, Social and Cultural Rights* ('ICESCR'), the *International Covenant on Civil and Political Rights* ('ICCPR'), the *Convention on the Elimination of Discrimination Against Women* ('CEDAW') and the *Convention on the Rights of the Child* ('CRC'). Administrative convenience or efficiency will not be a legitimate purpose to justify racial distinction.

- The limitation must be *proportionate* to the benefit being sought by the measure. This in turn requires that:

  - the benefit be clearly identified, and

  - the measure be the least restrictive/interfering option available to achieve that benefit.

  In practice, other ways of achieving the relevant benefit that do not have a disparate impact upon the rights of people of a particular race should be considered first. Only if the purpose of the measure cannot reasonably be achieved by those other methods can a limitation be described as 'proportionate', and therefore legitimate.

- Where an income management measure targets or impacts upon particular groups, working with those groups in the design and implementation of the measure will be important in establishing its legitimacy.

  For Aboriginal and Torres Strait Islander communities, the right to self-determination means that their effective participation in any decision is fundamental to the legitimacy of a measure. A standard of free, prior and informed consent should always be applied (see key elements of free, prior and informed consent in Appendix 1).

2.2 Does implementation of the measure involve discrimination?

14. Discretionary actions and decisions taken in the implementation of an income management measure must also avoid 'direct' and 'indirect' racial discrimination (sections 9(1) and 9(1A) of the RDA).

'Direct discrimination': s 9(1)

15. There are two central questions in assessing whether an income management measure may involve 'direct' discrimination. These include:

    (a) Are there any discretionary acts done in the implementation of the income management measure that involve a distinction, exclusion,

restriction or preference based on race? If so, the acts may be discriminatory.

An act will be 'based on race' where there is a sufficient connection between the act and the race of a person or group. It is not necessary to show a causal connection or that a person had an intention to discriminate - discrimination can be unintentional and unconscious.

(b) Does the act have a negative impact on the equal enjoyment of rights in public life by people of that race?

The practical effect of an act 'based on race' must be considered. If its practical effect is to limit the enjoyment of a human right, it is discriminatory.

'Indirect discrimination': s 9(1A)

16. 'Indirect discrimination' occurs when a term, condition or requirement is imposed *generally* that is unreasonable and has a disparate impact on people of a particular race.

17. In assessing whether actions taken in the implementation of an income management measure may indirectly discriminate against people of a particular race, it is necessary to ask:

    (a) Are there any terms, conditions or requirements being imposed that are unreasonable (both in terms of what they require or how they are applied)?

    (b) Are there people of a particular race who are unable to comply with the relevant term, condition or requirement?

    (c) Does the requirement to comply have a negative impact upon the equal enjoyment of rights in public life by people of that race?

18. If the answer to all of these questions is 'yes', the implementation of the income management measure is indirectly discriminatory.

2.3 Is the measure a 'special measure' that meets the requirements of the RDA?

19. If a measure is non-discriminatory, then it is not necessary to consider whether it is a 'special measure'.

20. For an income management measure to meet the requirements of a special measure it must comply with all of the following criteria:

    - the measure must confer a *benefit* on some or all members of a class of people

    - membership of this class must be based on race, colour, descent, or national or ethnic origin

- The *sole purpose* of the measure must be to secure adequate advancement of the beneficiaries so they may equally enjoy and exercise their human rights and fundamental freedoms;

- The protection given to the beneficiaries by the measure must be necessary for them to enjoy and exercise their human rights equally with others; and

- The measure must not have already achieved its objectives.

21. To meet the requirement outlined above that the sole purpose of the measure is to secure adequate advancement of the beneficiaries, the following should be considered:

    - When assessing the 'adequate advancement' of a group, it is necessary to consider their views. Because income management measures operate by limiting certain rights, both consultation with and consent of the group to whom it applies is essential.

    - In dealing with Indigenous communities, the standard of free, prior and informed consent should be applied. See Appendix 1 for an overview of the key elements of the standard of free, prior and informed consent.

    - The consultation process must be a real opportunity for engagement. It should aim for full and equitable participation across and between affected communities. (For a brief guide to good practice for community consultations see Appendix 2).

22. In relation to the requirement that the protection given to the beneficiaries by the measure must be necessary for them to enjoy and exercise their human rights equally with others, you should be aware that:

    - If the benefits of the measure can be achieved without making a racial distinction, the measure will not be necessary.

    - Demonstrating necessity requires evidence - current and credible evidence which shows that the measure will be effective. The data must be reliable, credible and where possible, supported by both qualitative and quantitative sources.

    - All parts of the measure must be appropriate and adapted to meet the intended purpose.

    - The measure must also be monitored and evaluated to ensure that it is working effectively. Without this it is not possible to establish whether the measure is necessary or not. (For a brief guide to good practice for monitoring and evaluation see Appendix 3).

23. To meet the requirement that the measure must not have already achieved its objectives - regular monitoring and evaluation is also required to assess if the objectives of the measure have been met. This includes:

- whether the measures are appropriate and suitably adapted to their stated purpose
- whether the measures are having the intended (immediate/short-term and/or long-term) effect
- whether there are any emerging, unintended consequences of the measures
- whether there are any negative flow on effects from the measures?
- whether there is a continuing need for the measures, that is, have they already achieved their stated purpose?

3. Commentary

24. This section provides background information on the legal basis for the different elements discussed in the first section. It also provides background on the recent income management measures and considers the extent to which current income management measures are consistent with the RDA.

3.1 Background

25. On 21 June 2007, the Australian Government announced the Northern Territory Emergency Response (NTER) to protect Aboriginal children in the Northern Territory from sexual abuse and family violence.

26. The *Social Security and Other Legislation Amendment (Welfare Payment Reform) Act 2007* (Cth) was part of the package to enable the NT intervention. Schedule 1 of the Act authorises a variety of income management measures.

27. The purpose of the income management measures is to promote socially responsible behaviour, particularly in relation to the care and education of children, by quarantining the suspended payments to ensure that they are only spent on food and other essential items. The quarantined income can not be used to purchase alcohol, tobacco products or pornographic material.[4]

28. The Act provides for five different types of income management measures for people receiving welfare, including:

- **Declared relevant Northern Territory area**

  A person can be subject to an income management measure if the person lives in a declared relevant Northern Territory area (s 123UB).

- **Child protection notices**

  Child protection officer of a State or Territory can require a person to be subject to the income management regime (s 123UC).

- **School enrolment in declared primary school area and declared secondary school area**

[4] The objects of the legislation under section 123TB are as follows:

(a) to promote socially responsible behaviour, particularly in relation to the care and education of children
(b) to set aside the whole or a part of certain welfare payments
(c) to ensure that the amount set aside is directed to meeting the priority needs of:
    I. the recipient of the welfare payment
    II. the recipient's partner
    III. the recipients children
    IV. any other dependants of the recipient.

A person can be subject to an income management measure if the person, or the person's partner, has a child who does not meet school enrolment requirements (s 123UD).

- **School attendance in declared primary school area and declared secondary school area**

  A person can be subject to an income management measure if the person, or the person's partner, has a child who has unsatisfactory school attendance (s 123UE).

- **Queensland Commission**

  A person can be subject to an income management measure if required by the Queensland Commission (s 123UF).

29. While the first measure is specific to the Northern Territory and the last measure only operates in specific areas of Queensland, the remaining measures have a national application and can be introduced in any State or Territory of Australia.

30. At the time the NTER measures were introduced, the *Social Security (Administration) Act* stated that: 'a decision under Part 3B of this Act that relates to a person who is subject to the income management regime under section 123UB cannot be reviewed by the Social Security Appeals Tribunal' (and subsequently the Administrative Appeals Tribunal).

31. However, an individual can ask the original decision maker or an authorised review officer to review the decision; can seek review under the *Administrative Decisions (Judicial Review) Act 1977*; or lodge a complaint with the Commonwealth Ombudsman. Also, payment suspensions due to a failure to respond to the income management letter, or attend an income management interview, are not made under Part 3B of the *Social Security (Administration) Act* and are subject to the usual review and appeals process.

32. In June 2009, the *Family Assistance and Other Legislation Amendment (2008 Budget and Other Measures) Act 2009* amendments were passed enabling the Social Security Appeals Tribunal and the Administrative Appeals Tribunal to review a decision made under Part 3B of the *Social Security (Administration) Act* about a person who is subject to the Northern Territory income management regime.

3.2 Current status of income management measures

33. To date, the following income management measures have been introduced:

- 73 prescribed communities in the Northern Territory have been determined to be declared areas in the NT for the purposes of income management;

- The Families Responsibilities Commission was established in Queensland (*Family Responsibility Commission Act 2008* (Qld) for the

Cape York Welfare Reform Trial and operates in the Aurukun, Coen, Hope Vale and Mossman Gorge communities and associated outstations.

- A trial in the Logan area (across Woodridge, Kingston, Logan Central and Eagleby), Queensland. This is the first welfare reform trial in Australia that targets a densely populated, urban mainstream community.

- In conjunction with the Western Australian Government, an income management measure for child protection was introduced in selected areas of WA (Cannington and Kimberley region). Under this measure a case manager from the WA Department for Child Protection can refer a person to Centrelink for income management.

34. In addition, the *Social Security and Veterans' Entitlements Legislation Amendment (Schooling Requirements) 2008 Act*, established an income management measure for school enrolment and attendance in two metropolitan locations in Western Australia and six Northern Territory communities (Hermannsburg, Katherine, Katherine town camps, Wallace Rockhole, Wadeye and Tiwi Islands).

35. There are also examples of voluntary income management measures. Such measures have been introduced under the Cape York Welfare Reform Trial and under the child protection income management measure in WA. [5]

36. There also continues to be provision under social security legislation to make regular payments to a registered service provider directly from Centrelink payments.[6]

37. This provision has been the basis for voluntary income management measures, such as the Tangentyere Council's food voucher system, which has been in operation for 25 years, pre-dating the income management measures under the NTER. Under the food voucher system, people receiving Centrelink payments can choose to have a nominated amount of money deducted from their Centrelink payments every fortnight. This money is then provided to them in the form of a food voucher, which is issued through the Tangentyere community banking service. The Council supports over 800 Aboriginal people under this voluntary measure.[7]

38. Of the four income management measures outlined above (not including the voluntary income management measures) the 'School enrolment and attendance measure (WA/ NT)' is the only one that is not exempted from the RDA and state/territory anti-discrimination legislation.

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[5] Section 123TGA of the *Social Security (Administration) Act 1999* also provides for the Minister to declare a specified State, Territory or area as a declared voluntary income management area for the purposes of this Part.
[6] Centrelink, *Voluntary Income Management* (2008). At http://www.centrelink.gov.au/internet/internet.nsf/filestores/co508_0808/$file/co508_0808en.pdf (viewed 1 October 2009).
[7] Tangentyere Council, 'Tangentyere's Voluntary Food Voucher System'. At http://www.tangentyere.org.au/services/finance/food_voucher/ (viewed 1 October 2009).

39. All four of the income management measures now allow for Commonwealth and state review processes and appeal rights, but, with the exception of the 'School enrolment and attendance measure (WA/ NT)', only for decisions made after 1 July 2009.

40. The '73 prescribed communities measure (NT)' applies mandatory quarantining within a declared area. In contrast, the 'Cape York Welfare Reform Trial measure (QLD)', the 'Child protection measure (WA)' and the 'School enrolment and attendance measure (WA/ NT)' are based on an opt-in or last-resort suspension model[8]

3.3 Racial discrimination and income management measures

41. To date, income management measures have been introduced primarily under the NTER legislation, which declares that the whole legislation is a special measure, as well as exempting the legislation and acts done under it from the RDA.[9]

42. The Commission and Indigenous communities have expressed concerns that the measures involve breaches of human rights.[10] In particular, concerns have focused on the potentially racially discriminatory impact of the measures, the characterisation of the measures as 'special measures' accompanied by the exclusion from the protection of racial discrimination laws, and the lack of participation and consultation with Indigenous peoples in the formulation and implementation of the measures. Measures that violate the human rights of the intended beneficiaries are more likely to work in ways that undermine the

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[8] An example of the last-resort suspension model can be seen in the Cape York Welfare Reform Trial which operates as follows: A person is referred by an agency to the Families Responsibilities Commission if:

a person's child is absent from school three times in a school term, without reasonable excuse
a person has a child of school age who is not enrolled in school without lawful excuse
a person is the subject of a child safety report
a person is convicted of an offence in the Magistrates Court, or
a person breaches his or her tenancy agreement - for example, by using the premises for an illegal purpose, causing a nuisance or failing to remedy rent arrears.

Once the Commission receives an agency notice, a process is followed where it is determined if the person is within the jurisdiction of the Commission. Upon determination of jurisdiction, the matter is then referred to the Local Commissioners for a decision about whether to order the person to attend a conference. A conference proceeds where the client may be encouraged to enter in an agreement, or an order is made to refer the person to community support services. The matter is then case managed by the Commission for the period of the order/agreement. Where a person does not comply, show cause proceedings are initiated and the client is ordered to appear before the Commission to explain reasons for non-compliance and if necessary an order for Conditional Income Management (CIM) may be made. (Families Responsibilities Commission, *Quarterly Report No. 3 January – March 2009,* Report *to the Family Responsibilities Board and the Premier of Queensland* (2009). At http://www.atsip.qld.gov.au/government/families-responsibilities-commission/documents/frc-quarterly-report-3.doc (viewed 1 October 2009).)

[9] *Northern Territory National Emergency Response Act 2007* (Cth), s 132(2); *Social Security and Other Legislation Amendment (Welfare Payment Reform) Act 2007* (Cth), ss 4(3), (5); *Families, Community Services and Indigenous Affairs and Other Legislation Amendment (Northern Territory National Emergency Response and Other Measures) Act 2007* (Cth), s 4 (2).

[10] Aboriginal and Torres Strait Island Social Justice Commissioner, *Social Justice Report 2007* (2008), ch 3. At http://humanrights.gov.au/social_justice/sj_report/sjreport07/index.html. (viewed 1 October 2009). See also: James Anaya, *Statement of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya, as he concludes his visit to Australia*, Canberra, 27 August 2009. At ttp://www.un.org.au/files/files/Press%20Release%20-%20Australia%20JA%20final.pdf

overall well-being of these communities in both the short and longer term than measures that respect their human rights.

43. In its response to the NTER Review, the Government has committed to introducing legislation into the Parliament in the Spring sittings of 2009 to remove the provisions in the current NTER Acts that exclude the operation of the RDA and state/territory anti-discrimination legislation.

44. On 21 May 2009, the Government released a discussion paper setting out proposals for the measures affected by the RDA, including the income management measures. Community consultations are underway to assess how these measures might be improved and amended to conform with the RDA.

45. These guidelines are aimed at ensuring that income management measures are designed and implemented so as to be consistent with the RDA and accordingly Australia's international legal obligations under the International Convention on the Elimination of All Forms of Racial Discrimination[11] (ICERD), upon which the RDA is based.

3.4 Making income management consistent with the RDA

46. There are two ways to ensure income management measures are consistent with the RDA:

    - ensure that the structure and implementation of an income management measure avoids racial discrimination, or

    - develop and implement the measure as a 'special measure' under the RDA.

Option 1: Avoiding discrimination in the structure and implementation of the income management measure

47. The RDA seeks to ensure that laws do not breach the rights of people of a particular race (the right to equality before the law, s 10) and prohibits actions that discriminate against people based on their race, colour or national or ethnic origin (the prohibition on discrimination ss 9, 11-5).

48. In the context of income management regimes, it is necessary to consider both

    - the laws that establish the regime to ensure that such laws do not impair the right to equality before the law, and

    - the manner in which such laws are implemented to ensure that such acts do not discriminate based on race.

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[11] Opened for signature 21 December 1965 (entered into force 4 January 1969 except for art 14 which came into force 4 December 1982). ICERD entered into force for Australia on 30 October 1975 and art 14 with effect from 28 January 1993.

Right to equality before the law

49. Section 10 of the RDA creates a general right to equality before the law. The section is concerned with ensuring the equal enjoyment of rights of all persons under law.[12]

50. It provides:

> 10. Rights to equality before the law
>
> (1) If, by reason of, or of a provision of, a law of the Commonwealth or of a State or Territory, persons of a particular race, colour or national or ethnic origin do not enjoy a right that is enjoyed by persons of another race, colour or national or ethnic origin, or enjoy a right to a more limited extent than persons of another race, colour or national or ethnic origin, then, notwithstanding anything in that law, persons of the first-mentioned race, colour or national or ethnic origin shall, by force of this section, enjoy that right to the same extent as persons of that other race, colour or national or ethnic origin.
>
> (2) A reference in subsection (1) to a right includes a reference to a right of a kind referred to in Article 5 of the Convention.

51. It is not necessary for a law to single out people of a particular race for it to engage s 10(1). The section is directed at 'the practical operation and effect' of laws and is 'concerned not merely with matters of form but with matters of substance'.[13]

52. Determining whether s 10(1) has been breached requires asking:

- whether there is a relevant 'right' or 'rights' that are affected by the impugned law, and
- whether persons of a particular race do not enjoy that right or enjoy it to a more limited extent than persons of another race by reason of the impugned law. This requires asking:
  - does the law limit the enjoyment of a right by people of a particular race relative to others, and
  - is the limitation a legitimate one, intended to achieve a non-discriminatory purpose?[14]

What are the relevant 'right' or 'rights' that are affected?

53. Article 5 of ICERD sets out an extensive list of rights, covering civil, political, economic, social and cultural rights. However, s 10(2) makes clear that the rights covered by s 10(1) are not limited to those referred to in ICERD.

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[12] *Gerhardy v Brown* (1985) 159 CLR 70 ('*Gerhardy*'), 99 (Mason J); *Western Australia v Ward* (2002) 213 CLR 1 ('*Ward*'), [105] (Gleeson CJ, Gaudron, Gummow and Hayne JJ).
[13] *Jango v Northern Territory* (2007) 159 FCR 531 [115]; *Gerhardy* (1985) 159 CLR 70, 99 (Mason J); *Ward* (2002) 213 CLR 1, 107 at [126] (Gleeson CJ, Gaudron, Gummow and Hayne JJ).
[14] *Bropho v State of Western Australia* [2008] FCAFC 100 ('*Bropho*'), [81]-[83].

54. The rights protected by s 10 should be understood very broadly. It is not necessary that a right be one that is recognised in Australian law.[15]

55. A 'right' under s 10 should be understood to exist where there is 'a moral entitlement to be treated in accordance with standards dictated by the fundamental notions of human dignity and essential equality which underlie the international recognition of human rights'.[16] A law will engage a right if it impacts upon a persons ability to 'live in full dignity', 'engage freely in any public activity' or 'enjoy the public benefits of… society'.[17]

56. This approach is consistent with the broad purpose of s 10. As its title makes clear, s 10 is intended to guarantee equality before the law. That purpose is also clear from the second reading speech of the Racial Discrimination Bill 1975: 'The Bill will guarantee equality before the law without distinction as to race'.[18]

57. In the context of income management measures, the right to social security is clearly one right that is engaged. Such measures may also impact upon the right to privacy where they allow for, or require, the disclosure of information in determining which people can be made the subject of a measure.[19]

Do persons of a particular race not enjoy a right or enjoy it to a more limited extent than persons of another race by reason of the law?

58. As noted above, there are two aspects to this question.

59. First, does the law limit the enjoyment of a right by people of a particular race relative to others?

60. Section10 (1) of the RDA is engaged where there is unequal enjoyment of rights between racial groups by reason of the law that is being considered. It is not necessary to show that this effect is the intention or purpose of the law. The focus is on its practical operation and effect.[20]

61. The central issue here is whether a law has a disparate impact upon people of a particular racial group.[21]

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[15] *Mabo v Queensland* (1988) 166 CLR 186 ('*Mabo No. 1*'), 217 (Brennan, Toohey and Gaudron JJ). See also *Gerhardy* (1985) 159 CLR 70,126 (Brennan J).
[16] *Mabo No.1* (1988) 166 CLR 186, 229 (Deane J).
[17] *Gerhardy* (1985) 159 CLR 70, 126 (Brennan J).
[18] Commonwealth, *Parliamentary Debates*, Senate, 15 April 1975, 999 (James McClelland, Minister for Manufacturing Industry).
[19] Aboriginal and Torres Strait Island Social Justice Commissioner, *Social Justice Report 2007* (2008), 278. At http://humanrights.gov.au/social_justice/sj_report/sjreport07/index.html. (viewed 1 October 2009).
[20] *Bropho* [2008] FCAFC 100, [73]; *Ward* (2002) 213 CLR 1, 103.
[21] The CERD Committee has noted in General Recommendation 32: 'The term 'non-discrimination' does not signify the necessity of uniform treatment when there are significant differences in situation between one person or group and another, or, in other words, if there is an objective and reasonable justification for differential treatment. To treat in an equal manner persons or groups whose situations are objectively different will constitute discrimination in effect, as will the unequal treatment of persons whose situations are objectively the same. The Committee has also observed that the application of the principle of non-discrimination requires that the characteristics of groups be taken into consideration'. (Committee on the Elimination of Racial Discrimination,

62. In the case of income management, where a measure operates in a particular location that is predominantly populated by people of a particular race, the measure is likely to have a disparate impact upon people of that racial group.

63. Second, is the limitation a legitimate one, intended to achieve a non-discriminatory purpose?

64. As most rights are not absolute, it may be permissible to limit them in pursuit of a legitimate, non-discriminatory goal. In determining whether a limitation is 'legitimate', the following principles should be applied:

- When determining the legitimacy of a limitation of a right, the assessment is an objective one – it is not sufficient, for example, that the law-maker lacks a discriminatory motive or intention.

- Proportionality will be a vital factor in making assessments of what is legitimate – a measure will not be legitimate if its impact upon rights is disproportionate to the claimed purpose or benefit of the measure. In considering proportionality the following should be considered:

    - Is the measure applied only for a specific purpose and directly related to a specific need?

    - Is the regime the least restrictive one available to achieve the lawful objectives pursued? The measure must involve the least possible interference with the right to be free from race discrimination.

- The legitimacy of any limitation upon a right must be assessed in the context of the right in question: not all rights can necessarily be limited in the same ways. Where a right is one that is expressly protected by a convention it is necessary to consider what limitations are permitted under that convention and/or what, if any, limitations are recognised for that specific right.[22]

- Because the 'balancing' of rights is taking place in the context of the right to racial equality before the law and non-discrimination, legitimacy should be judged against the objectives and purposes of ICERD and other relevant human rights instruments such as the ICCPR, ICESCR, CEDAW and the CRC.[23]

General Recommendation 32 - The meaning and scope of special measures in the International Convention on the Elimination of Racial Discrimination (2009), par 8. At http://www2.ohchr.org/english/bodies/cerd/docs/GC32.doc (viewed 1 October 2009)).

[22] United Nations Economic and Social Council Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights, UN Doc E/CN4/1985/4, Annex (1985) ('Siracusa Principles'). This is also consistent with the approach adopted by the CERD Committee for ICERD in General Recommendations 14, 30 and 32 (Committee on the Elimination of Racial Discrimination, *General Recommendation 32 - The meaning and scope of special measures in the International Convention on the Elimination of Racial Discrimination* (2009), par 8. At http://www2.ohchr.org/english/bodies/cerd/docs/GC32.doc (viewed 1 October 2009)).

[23] Opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976, except Article 41 which came into force 28 March 1979). See the Committee on the Elimination of Racial Discrimination, *General Recommendation 14: Definition of Racial Discrimination* (Forty-second session), UN Doc A/48/18 at 114 (1994),

The purpose of the measure should be directly linked to the promotion of another human right. Administrative convenience or efficiency will not be a legitimate purpose upon which a racial distinction can be justified.

- Where an income management measure targets or impacts upon particular groups, working with those groups in the design and implementation of the measure will be important in establishing its legitimacy.

  For Aboriginal and Torres Strait Islander communities, the right to self-determination means that their effective participation and consent is fundamental to the legitimacy of a measure. A standard of free, prior and informed consent should be applied (see Appendix 1). These issues are discussed further above in the context of special measures in 2.3 of the first section.

65. The Commission notes that income management measures that are properly targeted to parents or families in need of assistance to prevent neglect or abuse of children and reduce family violence may limit rights in a manner that is legitimate and accordingly be non-discriminatory.

66. As currently formulated, however, the limitation upon the rights of Aboriginal people under the income management measure applied in declared NT areas under the NTER is not legitimate. This is because the measure has a disproportionate impact upon the rights of the people subject to it:

    - The income management measures apply to all people receiving welfare payments in the relevant communities. This means that the measures apply to individuals that are not responsible for the care of children, are not problem gamblers, do not engage in family violence and do not abuse alcohol or other substances. They also apply equally to responsible and irresponsible parents. There is accordingly no connection for such people between the operation of the measure and the object of addressing family violence and abuse.

    - It is difficult for individuals to be exempted from the income management provisions. Exemption requires a decision by the Minister. It would be more appropriate for the decision making about the applicability of the measure to be inverted; that is, for the measure to operate in relation to a particular individual only if a decision is made, based on clearly defined criteria, that the measure should be applied to that individual.[24]

67. A model that complies with the RDA should include the following features:

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[2]; Human Rights Committee *General Comment 18: Non-discrimination*, (Thirty –seventh session), UN Doc A/45/40 (1989), [13]. For a list of some of the relevant human rights standards to consider see: Aboriginal and Torres Strait Island Social Justice Commissioner, *Social Justice Report 2007* (2008), ch 3. At http://humanrights.gov.au/social_justice/sj_report/sjreport07/index.html. (viewed 1 October 2009).

[24] See further Aboriginal and Torres Strait Island Social Justice Commissioner, *Social Justice Report 2007* (2008) pp 19, 276-7. At http://humanrights.gov.au/social_justice/sj_report/sjreport07/index.html. (viewed 1 October 2009).

- it should be subject to the application of the RDA and state/territory anti-discrimination legislation

- it should not apply automatic quarantining – different options that should be considered may include allow for a voluntary/opt in approach or a last-resort suspension approach for income management

- it should provide for a defined period of income management, where the time-frame for compulsory quarantining would be proportionate to the context and/or subject to periodic review

- it must allow for review and appeal processes, and

- it should include additional support programs that address the rights to food, education, housing, and provide support in the form of financial literacy/budgeting skills development for welfare recipients, safe houses for women and men, alcohol and substance abuse programs.[25]

Discriminatory acts

68. Section 9 of the RDA contains broad prohibitions on acts of racial discrimination.[26] This section does not apply to laws that may be alleged to discriminate against people of a particular race,[27] but it does apply to discretionary acts done under those laws – for example, by administrators implementing the laws.

'Direct' discrimination

69. Section 9(1) prohibits what is generally known as 'direct' race discrimination. It provides:

> (1) It is unlawful for a person to do any act involving a distinction, exclusion, restriction or preference based on race, colour, descent or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of any human right or fundamental freedom in the political, economic, social, cultural or any other field of public life.

70. To ensure that the implementation of an income management measure does not directly discriminate on the basis of race, those implementing the measure must take care not to include do acts that:

- involve a distinction, exclusion, restriction or preference

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[25] For effective human rights based approaches for addressing family violence and child abuse in Indigenous communities in Australia see: Aboriginal and Torres Strait Island Social Justice Commissioner, *Social Justice Report 2007* (2008) ch 2. At http://humanrights.gov.au/social_justice/sj_report/sjreport07/chap2.html (viewed 1 October 2009).

[26] Sections 11 to 15 of the RDA also prohibit acts of race discrimination in specific areas of public life, including in the provision of goods and services (s 13).

[27] *Gerhardy* (1985) 159 CLR, 81 (Gibbs CJ), 92-93 (Mason J), 120 (Brennan J); *Mabo No.1* (1988) 166 CLR 186, 197 (Mason CJ), 203 (Wilson J) and 216 (Brennan, Toohey and Gaudron JJ); *Ward* (2002) 213 CLR 1, 97-98 [102] (Gleeson CJ, Gaudron, Gummow and Hayne JJ); *Bropho* [2008] FCAFC 100, [70].

- are based on race, and
- have a negative impact upon the equal enjoyment by people of a particular racial group of their rights and freedoms in public life.

71. An act will be 'based on' race where there is a 'sufficient connection' between the act and the race of a person or group. It is not necessary to show a *causal* connection.[28]

72. It is not necessary for race to be the sole or dominant reason for the act: it only needs to be *a* reason.[29]

73. It is also not necessary for a person to have a discriminatory intention or motive: an act can still be 'based on race' unintentionally or unconsciously.[30]

'Indirect' discrimination

74. Section 9(1A) of the RDA describes what is generally known as 'indirect' race discrimination. It provides:

> (1A) Where:
>
> (a) a person requires another person to comply with a term, condition or requirement which is not reasonable having regard to the circumstances of the case; and
>
> (b) the other person does not or cannot comply with the term, condition or requirement; and
>
> (c) the requirement to comply has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, by persons of the same race, colour, descent or national or ethnic origin as the other person, of any human right or fundamental freedom in the political, economic, social, cultural or any other field of public life;
>
> The act of requiring such compliance is to be treated, for the purposes of this Part, as an act involving a distinction based on, or an act done by reason of, the other person's race, colour, descent or national or ethnic origin.

75. People implementing an income management measure may therefore indirectly discriminate on the grounds of race if:

- they impose an unreasonable term, condition or requirement

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[28] *Macedonian Teachers' Association of Victoria Inc v Human Rights & Equal Opportunity Commission* (1998) 91 FCR 8 ('*Macedonian Teachers*'), 29-30 cited in *Bropho* [2008] FCAFC 100, [68].
[29] Section 18, RDA.
[30] *Australian Medical Council v Wilson* (1996) 68 FCR 46, 74 (Sackville J); *Macedonian Teachers* (1998) 91 FCR 8, 39.

- a person of a particular race does not or cannot comply with that term, condition or requirement; and

- imposing the requirement has a negative impact upon the equal enjoyment of rights in public life by other people of the same race.

76. Section 123TE of the *Social Security and Other Legislation Amendment (Welfare Payment Reform) Act 2007 - Schedule 1* provides an example of how a discretion may be structured and exercised so as to limit the potential for discrimination.[31] See Text Box 1 below.

Text Box 1: Information to consider for discretionary decisions
(excerpt from Section 123TE of the *Social Security and Other Legislation Amendment (Welfare Payment Reform) Act 2007 - Schedule 1*)

(5) In deciding whether to make a determination under subsection (1), the Minister must have regard to the following matters:

(a) the availability in the relevant Northern Territory area of information setting out:

(i) the proposal to make the determination; and

(ii) an explanation, in summary form, of the consequences of the making of the determination for people who may become subject to the income management regime under section 123UB;

(b) the opportunities that have been made available to people in the area to discuss:

(i) the proposal to make the determination; and

(ii) the consequences of the making of the determination for people who may become subject to the income management regime under section 123UB; with employees or officers of the Commonwealth;

(c) the opportunities that have been made available to potentially affected people in the area to:

(i) discuss their circumstances with officers of Centrelink; and

(ii) give Centrelink information about their expenditure;

(d) the extent to which it will be feasible for the Secretary to take action under Division 6 in relation to people who may become subject to the income management regime under section 123UB;

(e) such other matters (if any) as the Minister considers relevant.

[31] Note, however, that section 123TE (6) allows for the Minister to make a discretionary decision that contravenes section 123TE (5). This undermines the effectiveness of such a clause.

Option 2: Income management measure as a special measure

77. The prohibitions in sections 9 and 10 of the RDA do not apply to 'special measures' that fall within Article 1(4) of ICERD.[32]

78. Article 1(4) of ICERD provides:

> Special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination, provided, however, that such measures do not, as a consequence, lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken to have been achieved.

79. Special measures are typically 'affirmative action' measures that give members of a disadvantaged racial group access to a benefit that is intended to promote substantive equality. For example, Abstudy – a government allowance for Indigenous students – has been held to be a special measure.[33]

80. In the Commission's view, it is preferable that measures that may limit the rights of people of a particular racial group, such as income management measures, are designed so as to be non-discriminatory, rather than justified as special measures.

Features of special measures

81. From the definition in Art 1(4) of ICERD, the following features of special measures can be identified:

- the special measure must confer a benefit on some or all members of a class;
- membership of this class must be based on race, colour, descent, or national or ethnic origin;

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[32] Note, however, that the special measures 'exemption' does *not* apply to laws that authorise management of property owned by Aboriginal or Torres Strait Islander people without their consent or restricts the ability of Aboriginal or Torres Strait Islander people to terminate the management of their property by another: ss 8(1), 10(3).

[33] *Bruch v Commonwealth* [2002] FMCA 29. The CERD Committee has also noted that special measures should not be confused with specific rights pertaining to certain categories of person or community, such as…the rights of indigenous peoples, including rights to lands traditionally occupied by them, and rights of women to non-identical treatment with men, such as the provision of maternity leave, on account of biological differences from men. Such rights are permanent rights, recognised…in human rights instruments…The distinction between special measures and permanent rights implies that those entitled to permanent rights may also enjoy the benefits of special measures. (Committee on the Elimination of Racial Discrimination, *General Recommendation 32 - The meaning and scope of special measures in the International Convention on the Elimination of Racial Discrimination* (2009), par 15. At http://www2.ohchr.org/english/bodies/cerd/docs/GC32.doc (viewed 1 October 2009))

- the special measure must be for the *sole purpose* of securing adequate advancement of the beneficiaries in order that they may enjoy and exercise equally with others human rights and fundamental freedoms;

- the protection given to the beneficiaries by the special measure must be necessary in order that they may enjoy and exercise equally with others human rights and fundamental freedoms; and

- the special measure must not already have achieved its objectives.[34]

82. All parts of a 'special measure' must be 'appropriate and adapted' to the relevant purpose.[35] In other words, the exemption for a special measure does not mean that if some aspects of a measure are a special measure, all aspects of that measure are immune from challenge.[36]

83. To be satisfied that a measure is necessary to ensure that the people it benefits can enjoy their human rights equally with others, you should ask:

- Could the benefits of the measure be achieved in a way that does not make a racial distinction?

- Is there current and credible evidence that supports the need for the measure and shows that it will be effective?

- Are the elements of the measure appropriate and adapted to meet the intended purpose?

- How will the measure be monitored and evaluated to ensure that it is working effectively?

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[34] *Gerhardy* (1985) 159 CLR 70, Brennan J (133). The CERD Committee in General Recommendation 32 has outlined similar requirements of a special measure under ICERD as follows:

> 16. Special measures should be appropriate to the situation to be remedied, be legitimate, necessary in a democratic society, respect the principles of fairness and proportionality, and be temporary. The measures should be designed and implemented on the basis of need, grounded in a realistic appraisal of the current situation of the individuals and communities concerned.
>
> 17. Appraisals of the need for special measures should be carried out on the basis of accurate data, disaggregated by race, colour, descent and ethnic or national origin and incorporating a gender perspective, on the socio-economic and cultural [34]status and conditions of the various groups in the population and their participation in the social and economic development of the country'.
>
> 18. States parties should ensure that special measures are designed and implemented on the basis of prior consultation with affected communities and the active participation of such communities. (Committee on the Elimination of Racial Discrimination, *General Recommendation 32 - The meaning and scope of special measures in the International Convention on the Elimination of Racial Discrimination* (2009), pars 16-18. At http://www2.ohchr.org/english/bodies/cerd/docs/GC32.doc (viewed 1 October 2009))

[35] *Gerhardy* (1985) 159 CLR 70, 105 (Mason J), 149 (Deane J).
[36] *Vanstone v Clark* (2005) 147 FCR 299, 354 [209] (Weinberg J), Black CJ agreeing.

Consultation and consent

84. Consulting with the group that is intended to benefit from a special measure and obtaining their consent to the measure should be given special attention. The Commission is of the view that the level of consultation or consent required will vary depending on whether the measure to be introduced involves a limitation on certain rights or is entirely beneficial in nature.

Consent to 'affirmative action' measures

85. In the context of 'affirmative action' measures (i.e. measures that give members of a racial group access to a benefit that is not available to people of other racial groups), the appropriate approach is to consider the wishes of the beneficiaries to be 'of great importance (perhaps essential)' in establishing whether the measure is a special measure. This means that, at a minimum, consultation with the 'beneficiary' group is essential and consent should be obtained unless there are legitimate reasons for not doing so (for example, because a measure is a short-term one to be introduced at short notice).

86. In the context of a law that granted land rights to a group of Aboriginal people, Brennan J in *Gerhardy v Brown* stated:

> 'Advancement' is not necessarily what the person who takes the measure regards as a benefit for the beneficiaries. The purpose of securing advancement for a racial group is not established by showing that the branch of government or the person who takes the measure does so for the purpose of conferring what it or he regards as a benefit for the group if the group does not seek or wish to have the benefit. The wishes of the beneficiaries for the measure are of great importance (perhaps essential) in determining whether a measure is taken for the purpose of securing their advancement. The dignity of the beneficiaries is impaired and they are not advanced by having an unwanted material benefit foisted on them.[37]

87. It has similarly been observed that:

> Legislators and social welfare administrators should resist their natural inclination to believe that they know better than the recipients what is good for them. Preferential programs should always, where remotely feasible, be developed in consultation with those being helped, and individuals should always be given the opportunity of receiving normal, non-preferential treatment should they so prefer. Where these conditions are not met, doubts about the benignity of a measure may be well founded.[38]

Consent to measures that limit certain rights of a racial group

88. Measures that seek to provide a benefit to a racial group or members of it, but operate by limiting certain rights of some, or all of that group, should be approached with particular care. This includes income management measures.

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[37] *Gerhardy* (1985) 159 CLR 70, 135.
[38] Gareth Evans, *Benign Discrimination and the Right to Equality* (1974) 6 FLR 26, 30.

89. In the Commission's view, such measures will *not* be special measures where they are implemented without the consent of the group to whom they apply (Please refer to Appendix One)

90. An example of such a measure is a restriction on the sale of alcohol to Aboriginal people living in remote communities.[39] Such restrictions will only be special measures where they are introduced with the consent of the relevant community.[40]

91. In the context of measures that apply to Aboriginal and Torres Strait Islander peoples, the concept of 'special measures' must be understood consistently with the right of peoples to self-determination. It is inconsistent with the right to self-determination for a measure that limits the rights of a group to be imposed upon it without the consent of the group.

92. Article 1 of the ICCPR and the ICESCR provides:

> All peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.[41]

93. The Committee on the Elimination of Racial Discrimination has, in its General Recommendation 23, called upon parties to ICERD to:

> ensure that members of indigenous peoples have equal rights in respect of effective participation in public life, and that no decisions directly relating to their rights and interests are taken without their informed consent…[42]

94. The *Declaration on the Rights of Indigenous People*[43] has affirmed the right of Indigenous peoples to self-determination and has endorsed the standard of 'free, prior and informed consent' (FPIC) in dealings with Indigenous peoples. Article 19 states:

> States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.

95. An important part of the principle of FPIC is ensuring that accurate and clear information is provided to affected communities. Prescribed communities, as defined by the NTER legislation, cover over 500 Aboriginal communities and multiple language groups. Information regarding any significant developments with income management programs should be:

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[39] See Race Discrimination Commissioner, *Alcohol Report* (1995), pp 137-49.
[40] It is important to note, however, that alcohol restrictions that apply generally to a community and not just members of a particular racial group may not be discriminatory and may therefore be permissible under the RDA. As discussed above, the first question is whether the measures are discriminatory. Only then is it necessary to consider the question of special measures.
[41] See also art 1 of the International Covenant on Economic, Social and Cultural Rights, 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976).
[42] Committee on the Elimination of Racial Discrimination, *General Recommendation No. 23: Indigenous Peoples* (1997) par 4. At http://www.unhchr.ch/tbs/doc.nsf/0/73984290dfea022b802565160056fe1c?Opendocument (viewed 1 October 2009).
[43] GA Res 61/295, UNGAOR, 62nd sess, 107th plen mtg, Annex, UN Doc A/Res/61/295 (2006).

- translated where necessary and also provided in a plain-English format
- comprehensible for members of affected communities
- provided in summary form so that community members are able to become familiar with content quickly.

96. Government officers should make appropriate use of interpreter services during any consultation process. This will require adequate advance notice to ensure than an interpreter from the required language group is available.

97. Where proposed special measures may have a vastly different impact on the male and female members of a racial group it is crucial to consider ways to maximise broad participation in a consultation process. For example, there may be compelling evidence of family violence across a community, as a result of which women are not necessarily in a position to participate in a general consultation process or consent to a proposed measure.[44]

98. The Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, in commenting on States' duty to consult with indigenous peoples, has noted that where Indigenous peoples' particular interests are affected by a proposed measure, obtaining their consent should, in some degree, be an objective of the consultations.

> The strength or importance of the objective of achieving consent varies according to the circumstances and the indigenous interests involved. A significant, direct impact on indigenous peoples' lives or territories establishes a strong presumption that the proposed measure should not go forward without indigenous peoples' consent. In certain contexts, that presumption may harden into a prohibition of the measure or project in the absence of indigenous consent.'[45]

99. The Special Rapporteur further notes, that in order to achieve a climate of confidence and mutual respect for the consultations, the consultation procedure itself should be the product of consensus. Having observed that, in many instances, consultation procedures are not effective because the affected indigenous peoples were not adequately included in the design and implementation of the consultation procedures.[46]

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[44] M Davis, *International Human Rights Law, Women's Rights and the Intervention,* 10, Indigenous Law Bulletin (2009), pp 11-14.

[45] J Anaya, *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people*, UN Doc A/HRC/12/34 (2009), par 47. At http://www2.ohchr.org/english/bodies/hrcouncil/docs/12session/A-HRC-12-34.pdf (viewed 22 October 2009)

[46] J Anaya, *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people*, UN Doc A/HRC/12/34 (2009), par 51. At http://www2.ohchr.org/english/bodies/hrcouncil/docs/12session/A-HRC-12-34.pdf (viewed 22 October 2009)

Appendices

Appendix 1: Key elements of free, prior and informed consent[47]

WHAT?

Free – should imply no coercion, intimidation or manipulation.

Prior – should imply consent has been sought sufficiently in advance of any authorisation or commencement of activities and respect time requirements of Indigenous consultation/consensus processes.

Informed – should imply that information is provided that covers (at least) the following aspects:

a. the nature, size, pace, reversibility and scope of any proposed project or activity

b. the reason(s) or purpose of the project and/or activity

c. the duration of the above

d. the locality of areas that will be affected.

e. a preliminary assessment of the likely economic, social, cultural and environmental impacts, including potential risks and fair and equitable benefit sharing in a context that respects the precautionary principle

f. personnel likely to be involved in the execution of the proposed project (including Indigenous peoples, private sector staff, research institutions, government employees and others)

g. procedures that the project may entail.

Consent - Consultation and participation are crucial components of a consent process. Consultation should be undertaken in good faith. The parties should establish a dialogue allowing them to find appropriate solutions in an atmosphere of mutual respect in good faith, and full and equitable participation. Consultation requires time and an effective system for communicating among interest holders. Indigenous peoples should be able to participate through their own freely chosen representatives and customary or other institutions.

The inclusion of a gender perspective and the participation of Indigenous women are essential, as is the participation of children and youth as

[47] Australian Human Rights Commission (formerly HREOC), the United Nations and the Queensland Government, *International Conference on Engaging Communities* (2005). At http://www.humanrights.gov.au/social_justice/conference/engaging_communities/fpic_brochure.html (viewed 1 October 2009). See also Principle of Free Prior and Informed Consent. At http://www2.ohchr.org/english/issues/indigenous/docs/wgip23/WP1.doc (viewed 1 October 2009).

appropriate. This process may include the option of withholding consent. Consent to any agreement should be interpreted as Indigenous peoples have reasonably understood it.

2. WHEN?

Free, prior and informed consent (FPIC) should be sought sufficiently in advance of commencement or authorisation of activities, taking into account Indigenous peoples' own decision-making processes, in phases of assessment, planning, implementation, monitoring, evaluation and closure of a project.

3. WHO?

Indigenous peoples should specify which representative institutions are entitled to express consent on behalf of the affected peoples or communities. In FPIC processes, Indigenous peoples, UN Agencies and governments should ensure a gender balance and take into account the views of children and youth as relevant.

4. HOW?

Information should be accurate and in a form that is accessible and understandable, including in a language that the Indigenous peoples will fully understand. The format in which information is distributed should take into account the oral traditions of Indigenous peoples and their languages.

5. PROCEDURE AND MECHANISMS

Mechanisms and procedures should be established to verify FPIC as described above, including mechanisms of oversight and redress, such as the creation of national mechanisms. As a core principle of FPIC, all sides of an FPIC process must have equal opportunity to debate any proposed agreement/development project.

'Equal opportunity' should be understood to mean equal access to financial, human and material resources in order for communities to fully and meaningfully debate in Indigenous language(s) as appropriate, or through any other agreed means, on any agreement or project that will have or may have an impact, whether positive or negative, on their development as distinct peoples, or an impact on their rights to their territories and/or natural resources.

FPIC could be strengthened by establishing procedures to challenge and independently review these processes. Determination that the elements of FPIC have not been respected may lead to the revocation of consent given. Mechanisms and procedures should be established to verify FPIC, including mechanisms of oversight and redress, such as the creation of national mechanisms.

Appendix 2: A brief guide to good practice for community consultations[48]

Following are good practice requirements for community consultations in relation to income management measures.

(i) Pre-consultation phase:

- **Involving Aboriginal and Torres Strait Islander people at the outset**. Community leaders (e.g. traditional owners and traditional elders) may be willing to provide input into planning the consultation process. They will also be able to provide you with information regarding community norms and protocols.

- **Ensuring that all engagement is structured to include all relevant Aboriginal and Torres Strait Islander stakeholders, interests and organisations.** Where proposals will affect Indigenous land, contacting traditional land owners, the Prescribed Body Corporate (PEC) local branches of Aboriginal Land Councils and the regional Native Title Representative Body (NTRB) is vital. Peak bodies such as the National Aboriginal Community Controlled Health Organisation (NACCHO) and Indigenous Coordination Centers may also be good sources of knowledge.

- **Recognising the diversity of Aboriginal and Torres Strait Islander communities**. Be sure not to generalise from understandings gained from one community by applying assumptions about these findings to another community.

- **Ensuring that the consultation process is accessible for broad cross sections of affected communities**. The consultation process should provide sufficient opportunity for grassroots communities to provide input, and not simply focus around individuals/community organisations that are high profile or easy to access. In other words, don't just dialogue with 'experts' or the usual suspects. Where consultations cannot be held across each affected community, free transport should be provided to the nearest local hub where a consultation has been scheduled.

- The consultation process should aim for a **gender balance** in relation to overall participant representation. Government officers should acknowledge the special role of women in discussions about income management. Aboriginal women are the heads of households in many cases and have caring responsibilities for their families and extended families. Consultation sessions should specifically seek information regarding the impacts and effectiveness of any measures on Aboriginal women who are caring

[48] Australian Government, *Best Practice Regulation Handbook* (2007). At http://www.finance.gov.au/obpr/docs/handbook.pdf (viewed 22 June 2009).

for their grandchildren.

- Ensuring that the conduct of consultations allow affected communities to have control over timeframes. Notice of proposed measure/s must be given sufficiently in advance of its authorisation to allow time for the community to reach informed consent or to arrive at considered points of difference.

(ii) Consultation phase:

- Using various **participatory methods** throughout the consultation process (oral, written, electronic and aided by translators) to maximise participation. It is important that government officers check for participant understanding periodically during the course of any consultation session.

- **Ensuring that the consultations provide for a mechanism to obtain agreement with communities over the process and desired outcome of any proposed measure.** Communities are acutely aware of the issues and possible solutions relating to their particular circumstances and will be pivotal to the success of any proposal.

- Acknowledging that it may not be possible to reach a community consensus or agreement about the merit or likely impact/s of a measure in all cases. Where consensus is not attainable, it is important to consult with the broadest cross section of the affected community, to be able to demonstrate that there has been appropriate and adequate consultation and weigh up the diverse views against current evidence.

- **Consultations should be transparent and have clear parameters**. To avoid creating unrealistic community expectations, any aspects of a particular proposal that has already been decided or finalised should be clearly identified and declared. For example, if a decision has been made to continue with an income management regime, the government should clearly explain that they are seeking input on the design and implementation of the policy, rather than the merits of the policy itself.

- Being clear about what ***outcomes(s)*** the proposal seeks to achieve and what ***issue(s*)** the proposal seeks to address.

- Being clear about the potential and real **risks, costs** and **benefits** of the proposed measure. Be clear about what aspects of the proposed measure Aboriginal and Torres Strait Islander peoples will be involved in and if there are specific areas of concern. Consultation sessions should seek information regarding **unintended positive and negative consequences** of the income management measure.

- Identifying how you will **accurately collect** and **record data** during consultations. Provide people with a clear idea of **how their input** will be included in decision making processes.

- Special measures are temporary and therefore do not set out permanent rights or arrangements. Consultation sessions should ask for input regarding whether the measures build long-term capacity in affected communities, develop improved budgeting skills and healthier spending patterns.

- Considering what **specific, time bound and verifiable benchmarks and indicators** you will use to measure progress. Affected communities should have input into developing success measures. Consider what measures will be used to evaluate the **quality** and **effectiveness** of the consultation process.

- Reaching agreement with communities about **how feedback will be provided** after the consultation phase is concluded.

(iii) Post-consultation phase:

- Identifying the best ways to **keep communities informed** about developments regarding the issue/proposal. Explain to community members the likely timeframes for the first phase of implementation. Explain what, if any options community members have to call for a **review of decision making.**

- Government agencies should **publish their consultation protocols**. This information should be made available in plain English formats and in summary form. Where consultation was limited in its scope, explanation should be provided as to why a full process was inappropriate/not feasible. Government agencies should evaluate and continuously improve their consultation processes.

- Remember that consent is *not* valid if it obtained through **coercion** or **manipulation**. Consent cannot be considered valid unless affected communities have been presented with *all* of the information relevant to a proposed measure.[49]

[49] United Nations, *An Overview of the Principle of Free, Prior and Informed Consent and Indigenous Peoples in International and Domestic Law and Practices* (2005). At http://www.un.org/esa/socdev/unpfii/documents/workshop_FPIC_tamang.doc (viewed 22 June 2009).

Appendix 3: A brief guide to good practice for monitoring and evaluation[50]

The following questions need to be considered when developing good practice for monitoring and evaluating income management measures.

(i) Developing indicators and measures

- What are your indicators and how are they measured? Are they sufficiently specific (focused around impacts of the measure) and holistic (the combined impact of the measure and other developments in a community)?
- Has the income management measure worked as a specific initiative or have other factors facilitated or been a barrier to impact/community benefit?
- How will you ensure that you evaluate both the quality of your consultation and overall process and the *impact* of the measure? How will you evaluate immediate, medium and long-term impacts?
- Has the measure caused any unintended positive or negative consequences?
- Have your results suggested that alternative, less intrusive strategies could have achieved similar, positive outcomes?
- What additional support services are required to increase the likely success of the measure?
- How will you know when the measure has achieved its stated purpose?

(ii) Developing monitoring and data collection methods:

- How will you monitor developments in the affected communities? Who will be responsible for the monitoring role in your agency? How will emerging data be captured?
- Do you have a system to collect, organise and analyse anecdotal evidence?
- Is your evaluation plan flexible enough to track and investigate emerging issues?

[50] Australian Government, *Best Practice Regulation Handbook* (2007). At http://www.finance.gov.au/obpr/docs/handbook.pdf (viewed 22 June 2009).

- How will you reduce bias in your data collection and interpretation? Have you considered appointing an independent reviewer or observer?

(iii) Designing an evaluation:

- Will the evaluation be designed and conducted by an independent, external provider?
- Have you developed criteria as part of your procurement process to ensure that your supplier has adequate expertise and cross cultural competence?
- Is your contract with the supplier flexible enough to allow for process changes?
- Has your agency dedicated sufficient resources to plan and conduct a comprehensive evaluation? Has adequate consideration been given to the quantum and type of resources required?
- What is your methodology/evaluation plan? How will you make information regarding your plan available to members of affected communities?
- Has your evaluation been designed to adequately measure the stated objective of your special measure (for example, reducing the incidence of child abuse and family violence)?
- What are your key evaluation questions/themes? Have affected communities had input into the development of these questions/themes?
- Have you developed an evaluation schedule? Have you consulted community leaders in developing this schedule?

(iv) Engaging community participation in the evaluation:

- Have you developed strategies to ensure that you will capture a full or representative range of community views to be included in your evaluation process?
- Have you considered strategies to inform affected communities about your evaluation process and how they can participate?
- Have you considered the likely barriers to community participation in your evaluation process and how you will address them?
- Have you considered if and how you will share the outcomes or your evaluation process?

At a glance: Racial vilification under sections 18C and 18D of the *Racial Discrimination Act 1975* (Cth)

What does the law say?

Section 18C of the Racial Discrimination Act makes it unlawful for someone to do an act that is reasonably likely to "offend, insult, humiliate or intimidate" someone because of their race or ethnicity.

Section 18D of the Racial Discrimination Act contains exemptions which protect freedom of speech. These ensure that artistic works, scientific debate and fair comment on matters of public interest are exempt from section 18C, providing they are said or done reasonably and in good faith.

What is the background to these laws?

Australia has obligations to implement protections against racial hatred under the *International Covenant on Civil and Political Rights* (ICCPR) and the *International Convention on the Elimination of All Forms of Racial Discrimination* (ICERD).

Sections 18C and 18D were introduced in response to recommendations of major inquiries including the *National Inquiry into Racist Violence* and the *Royal Commission into Aboriginal Deaths in Custody*. These inquiries found that racial hatred and vilification can cause emotional and psychological harm to their targets, and reinforce other forms of discrimination and exclusion. They found that seemingly low-level behaviour can soften the environment for more severe acts of harassment, intimidation or violence by impliedly condoning such acts.

Echoing these inquiries, the Australian Law Reform Commission published the 1992 report, *Multiculturalism and the Law*, which recommended the introduction of legislation to deal with racial hatred.

Balancing freedom of speech and freedom from racial vilification

The courts have consistently interpreted sections 18C and 18D as maintaining a balance between freedom of speech and freedom from racial vilification. The courts have held that for conduct to be covered by section 18C, the conduct must involve "profound and serious" effects, not "mere slights". The courts have also found that section 18C is an appropriate measure to implement Australia's obligations to prohibit racial hatred under the ICCPR and ICERD.

While many laws restrict freedom of speech, such as laws applying to defamation, advertising and national security, section 18C fills an important gap in legal protections for those affected by racial hatred and vilification.

Racial vilification complaints made to the Australian Human Rights Commission

Complaints relating to racial vilification under the Racial Discrimination Act can be lodged with the Commission. During the 2012-2013 financial year, the Commission received a 59 per cent increase in complaints under section 18C. Fifty-three per cent of racial vilification complaints in 2012-13 were resolved at conciliation. Four per cent of complaints made under section 18C were terminated or declined for being trivial, misconceived or lacking in substance. And less than three per cent of racial hatred complaints proceeded to court.

Interested in more information? Please see the Commission's website for further information on racial vilification and discrimination.

Examples of racial vilification complaints and cases

Complaint about racial vilification on the internet

The complainant, of Asian background, complained about a website which he said advocated violence against Asians. The comments on the website included: 'Asian People Flood our city with their Asian shops with their language all over them, having their own dedicated "china town" and their own suburb ...' '... we understand everyone has different levels of hate for Asians and so we have ... Yellers. Their job is to Yell at the Asians with passion i.e. "YOU GOOK F**K OFF TO CHINA" and do whatever they can to show Asians they are not welcome in Australia. ... Fighters ... are there to express their anger physically by laying the Gooks out.'

On receipt of the complaint, the Commission contacted the Internet Service Provider, which subsequently disabled the website as it breached the ISP's Acceptable Use Policy.

Complaint about racial vilification in the print media

The complainant, of Aboriginal descent, claimed the respondent newspaper and cartoonist published a cartoon that vilified Aboriginal people. The newspaper and cartoonist said the cartoon was published in the course of a debate, was drawn and published for genuine artistic purposes and contained genuine and fair comments on an event of public interest.

During the conciliation process, the complaint resolved with an agreement that the respondents would visit the complainant's community to listen to community members' stories and teach the children how to draw cartoons.

Complaint about racial vilification in the workplace

The complainant, an Aboriginal person, worked for the respondent government department as a maintenance worker, and claimed that his supervisors called him over by whistling instead of using his name, assigned him 'bad' jobs (including lining the toilet pits after use), called him a 'black c**t, used offensive language when speaking to him and described Aboriginal people as lazy and useless. The complainant also claimed that when he made an internal complaint, the respondent told him this was part of the work culture and that some of that 'stuff' was 'OK'. The complainant said he resigned due to this treatment. The respondents denied the allegations.

The complaint was resolved through a conciliation process and the respondents agreed to pay the complainant $45 000 and provide him with a statement of regret.

Court case involving consideration of Section 18C

The case of *Toben v Jones* (2003) 129 FCR 515 was the first to apply the Racial Discrimination Act's racial vilification provisions to the internet. It involved a complaint about the Adelaide Institute website, established by the respondent, which was argued as being anti-Semitic and vilified Jews. The Adelaide Institute presented as a scholarly centre for Holocaust research.

In this case, the Federal Court of Australia found that certain documents on the website did vilify Jews for a number of reasons, including imputing that Jewish people who are offended by and challenge Holocaust denial are of limited intelligence; and that some Jewish people have exaggerated the number of Jews killed during World War II and the circumstances in which they were killed and have done so for improper purposes such as financial gain.

Court case involving consideration of Section 18D

The *Kelly-Country v Beers & Anor* [2004] FMCA 336 (21 May 2004) case involved a complaint about a comedian's performances, where the comedian, under the name 'King Billy Cokebottle', purports to be an Aboriginal person, performing a comedy monologue. The comedian was not Aboriginal. The performances were on video and audio tape, and available for public purchase. It was alleged that Aboriginal people were portrayed as rude, stupid, unable to speak English properly, dirty, always drunk or drinking and swearing, among other things. It was also alleged that matters involving aspects of sacred tribal activities were referred to in performances, which could only be discussed by and in the presence of initiated male Aboriginal people.

The Federal Magistrates Court of Australia noted the acts and tapes were 'impolite and offensive' to many groups within Australia, but just because they were offensive or insulting did not mean they were unlawful under the Racial Discrimination Act. The Court noted the performances and tapes were comedic in intention, and were not to be taken literally or seriously and had no overt political context. The Court found the performances fell within the term 'artistic work', as found the exemption in section 18D.

Australian Human Rights Commission

A step-by-step guide to preventing discrimination in recruitment*

1. Deciding on the recruitment process

Employers go about recruiting in different ways. Some may use in-house human resources personnel; others may hire a recruitment agent to short-list the applicants and help select the successful candidate.

In-house recruitment

If you are using your own staff to recruit to a position, you must make sure they are aware of their obligations under the law and are dedicated to a fair process.

If you do not take reasonable measures to prevent your staff from acting in a discriminatory way, you may be held responsible for their actions (see the fact sheet *Vicarious liability* at www.humanrights.gov.au/employers).

Recruitment agents

An employer that hires a recruitment agent to short-list applicants must make sure the agent is aware of their legal obligations when it comes to discrimination.

The same applies if you are a recruitment agent. While many employers are aware of their obligations, some may not be. As such, they may be at risk of unintentionally discriminating in the recruitment process. Because of this, recruitment agents have an important role in educating and reminding employers about their legal obligations.

Recruitment agents must not follow through with discriminatory requests from an employer that relate to a person's age, sex, race, disability or any other characteristic protected under state or federal anti-discrimination laws. If you are a recruitment agent and you receive a discriminatory request from a client, you must inform them that they are acting against the law. Let them know that they are putting themselves and you at risk of receiving complaints of discrimination. Remind the employer that they are unnecessarily limiting their options in the job market by not seeking a wider range of applicants.

Discuss the key requirements of the job with the employer, not irrelevant personal characteristics. Giving the employer information about what can and cannot be included in a job description is important. Providing the employer with a copy of this factsheet may also be useful.

As a recruitment agent, you too can be held responsible for the actions of your staff and consultants. Make sure you provide them all with information and training on equal opportunity principles. You also need to provide training to your consultants about how to deal with discriminatory requests for certain types of applicants and the consequences of acting on discriminatory instructions from employers.

* Based on material provided by the Victorian Equal Opportunity and Human Rights Commission. See *Guideline for the recruitment industry and employers* available at www.humanrightscommission.vic.gov.au.

2. Creating the job description

When you create a job description, you need to carefully consider the specific requirements of the job so that all potential applicants can clearly understand the skills and duties.

When you are clear about the genuine requirements of the job, you can identify what specific information you need from the job applicants and why you need it. This is important because it helps you to avoid seeking unnecessary and potentially discriminatory information from applicants when you develop selection criteria or prepare interview questions.

You must avoid using discriminatory language in the job description and avoid references to personal characteristics – such as age, race or sex – unless they are part of the genuine requirements of the job (see below: *Advertising the job*).

Write the job description using clear, easy-to-read language and make sure it:

- outlines the duties and skills required
- differentiates between 'essential' and 'desirable' criteria.

Consider including a diversity statement in the job description that encourages people from different backgrounds to apply, including Aboriginal and Torres Strait Islander peoples, people from culturally and linguistically diverse (CALD) backgrounds and people with disabilities.

3. Deciding on the application process

Some application processes may disadvantage certain people. Think about whether you need to adjust the process to accommodate the needs of applicants from different cultural backgrounds or people with disabilities.

Some strategies you can use to remove barriers for applicants include:

- simplifying requirements to respond to any selection criteria
- ensuring any online job portals are accessible and easy to navigate
- simplifying application procedures
- not requesting unnecessary information.

Examples of discriminatory application processes

Asking applicants to submit a comprehensive written statement on why they want the job might not be necessary for a cleaning position. It could also discourage people with limited English language skills from applying for the job.

Using only an online portal for applications could deter applicants with certain forms of disabilities from applying, as they may have difficulty accessing the system or navigating through the application process. Consider offering an alternative application process for these applicants.

4. Advertising the job

Discriminatory advertising is against the law, with fines applying to organisations and individuals.

A discriminatory advertisement can also limit the range of applicants you attract. It is in your best interests to cast the net as widely as possible to attract a diverse range of applicants.

A good advertisement will focus exclusively on the skills and abilities needed to perform the job. You may only mention personal characteristics – such as age, sex or race – if they are part of the genuine requirements of the job.

Your job advertisement should be written in a way that does not discourage some people from applying or imply that only certain applicants will be considered. For example, using phrases like 'join a dynamic team' or 'seeking mature, experienced professional' suggests that you will only consider applicants of a certain age. Ensure your advertisement does not include words, phrases or euphemisms that could be seen as restrictive or discriminatory.

Encourage as many suitable people as possible to apply. Depending on your organisation and the type of position, you may consider advertising internally and externally. Try using specialist media outlets and networks, as well as mainstream media, local newspapers, informal networks, community groups, industry groups and other forums.

As with the job description, consider including a diversity statement in the advertisement that encourages people from different backgrounds to apply, including Aboriginal and Torres Strait Islander peoples, people from CALD backgrounds and people with disabilities.

5. Short-listing applicants

Employers and recruitment professionals must have a clear understanding of the job requirements. Request and review information from all applicants about their capacity to perform the job based on their skills and experience.

Short-list applicants according to the requirements of the job. Do not allow personal bias, myths or stereotypes to influence your decision.

When short-listing applicants, make sure you:

- evaluate applicants using the selection criteria; matching skills, ability and experience with the job requirements
- are consistent with your decision-making
- clearly document your reasons for making decisions to help you to provide feedback to applicants later.

Example of discrimination when short-listing

The manager of a large hotel is responsible for recruiting a receptionist and engages a recruitment agency to short-list applicants. The manager tells the recruitment consultant that they don't want anyone with an accent in the role because it will affect their image.

The recruitment agency complies with the request and does not forward the details of Anna, a recently-arrived migrant from China with excellent English language skills and many years' experience working in large hotels. Anna may make a complaint of race discrimination if she felt that she was not put forward for the role because of her race.

The hotel may be liable for discrimination if it was found that Anna could have met the requirements of the job, regardless of her accent or country of origin. The recruitment agency may also be liable for assisting the discrimination.

6. Interviewing applicants

The interview is an important opportunity for applicants to talk about their suitability for the position and what they have to offer. Employers and recruitment professionals should carefully review and plan their interview process. Make sure all applicants have an equal opportunity to participate in their interview and explain why they are the best person for the job.

Preparing for the interview

The interview should be conducted at a venue that is accessible to people with disabilities.

Ask the interview candidate if they need any special assistance to participate in the interview. For example, a person who has a hearing impairment may need an Auslan interpreter or some other kind of adjustment to the interview process. You can ask these questions when you inform the candidate about what will happen at the interview. This will mean the candidate and the interviewer or the panel are fully prepared.

You should also develop a set of common interview questions that all candidates will be asked. These should focus on the skills and abilities they will need to do the job.

Example of discrimination at an interview

Richard is invited to attend an interview for a role working on a ship. It is a position for which he already has employment experience. On the phone, he asks if there are many stairs at the interview premises as he has slight mobility problems due to a muscular disorder. The person on the phone advises him that there are a few stairs and then goes on to say that there is probably no point interviewing him. Richard says he will be fine if there are only a few stairs.

Richard arrives at his interview the next day and has trouble entering the venue. Arrangements are made for him to attend the interview the next day at a different venue.

At the interview, the person interviewing Richard doesn't bring any notes and then goes on to speak on his mobile phone. Richard feels the company is simply going through the motions of conducting the interview and is not seriously considering him as a candidate. When he is unsuccessful in his application for the job, Richard makes a complaint of disability discrimination. He has worked well previously in a similar job and feels he would be a strong candidate for the role.

Myths and stereotypes

You should not allow myths and stereotypes to influence your decision when selecting an applicant – you could miss out on a potentially valuable employee. It is crucial to focus on the individual's ability to do the job, not on stereotypes about how 'someone like them' will behave.

For example:

- **Pregnancy:** Despite the progress that has been made with regard to sex and pregnancy discrimination, negative assumptions about employing women still persist, including that women workers who may become pregnant are a burden or are unreliable.
- **Age:** Mature-age workers can be subjected to a range of stereotypes when they are working or looking for work. These may include that they will be slow to learn new skills or technologies, will have trouble fitting in with a younger team or will retire soon. Younger workers can be discriminated against based on assumptions that they 'won't stick around' or that they have attitude problems.
- **Race:** Aboriginal and Torres Strait Islander people and people from CALD backgrounds may be disadvantaged in a recruitment process where assumptions are made about their behaviour due to their culture, leading to perceptions that they 'won't fit in' with the culture of the organisation.

7. Conducting the interview

When you are speaking with the interview candidate, do not make assumptions based on the person's behaviour or body language that may be the result of a disability or his or her cultural background. For example, a person who does not shake hands may be showing the appropriate level of respect or courtesy within their culture.

Ask all candidates the same set of common questions. This will help you to ensure you only seek relevant information from candidates about their skills and abilities, and how these relate to the genuine requirements of the job. When seeking further information, or asking supplementary questions to particular applicants, be mindful of questions that may be invasive or potentially discriminatory.

Seeking information from an applicant who is pregnant

You may, in certain circumstances, have to ask a candidate for information about her pregnancy to determine whether she will be able to perform the requirements of the job, or to assess any health and safety risks for the candidate or her unborn child in your workplace. These risks may only exist if there is a real likelihood that the work will pose a risk to her health and safety.

Seeking information from a candidate with a disability

You may, in certain circumstances, have to ask a candidate with a disability for information about the disability so that you can determine whether he or she will be able to perform the requirements of the job, or to assess any health and safety risks for the candidate or others in your workplace. You might also need this information to identify any adjustments you could make in the workplace for the candidate (see the *Disability discrimination* fact sheet at www.humanrights.gov.au/employers).

In the interview, do not focus on the condition or the diagnosis. You should instead seek to understand how the disability might affect the candidate's ability to meet the job requirements, what strategies he or she can use to achieve this and what adjustments you could make to the workplace. At the same time, always discuss the skills and experience that the candidate has to offer.

Example of discriminatory interview questions

Cheryl attends an interview for a position in fashion retail. The interview panel engages in small talk with Cheryl at the start of the interview and one panel member asks Cheryl if she has any children. Cheryl says that she has two young children. If the employer relies on this information in deciding not to offer her the job, Cheryl could make a complaint of discrimination based on her parental status.

Example of seeking relevant information in a non-discriminatory way

You are interviewing candidates for a position that will require interstate travel. In this situation, you can ask applicants whether they will be able to perform the genuine job requirements – including interstate travel – without asking them potentially discriminatory questions about their family responsibilities or making assumptions about their childcare arrangements.

Example of discrimination based on mental health

Sarah attends a job interview for a position as an accountant. At the interview, Sarah is told that the workload will be high and that the job can be stressful at times. When the interviewer asks Sarah whether she is confident she can handle stress, Sarah mentions that she had suffered from anxiety in the past. She goes on to say how she has spent time getting her condition under control, has learnt specific strategies to deal with stress and has performed well in similar jobs with tight deadlines.

A week later, Sarah is told she has not been selected for the role. When she asks why, she is told 'we do not think you can handle the pressure'. Sarah has recent good experience in stressful roles, which the interviewer may have overlooked in making assumptions about the previous mental health issues Sarah disclosed. Sarah could make a complaint of disability discrimination.

Avoid unnecessary or offensive questioning about the disability. Do not ask questions about the precise nature of the disability, how they acquired it or anything else that does not have a bearing on whether he or she can do the job.

Be aware that psychiatric disabilities and work-related injuries are also protected under the federal Disability Discrimination Act. Follow the same principles that apply to interviewing people with other disabilities when interviewing candidates with these characteristics.

Injuries and previous workers' compensation claims

It may be against the law to ask job applicants whether they have ever made a workers' compensation claim, how much sick leave they took in the previous year or other questions about health conditions that do not relate to their ability to perform the job.

As with other forms of disability, you may need to know about a candidate's existing illness or injury in order to determine whether he or she will be able to perform the requirements of the job, or to assess any health and safety risks for the candidate or others in your workplace. You might also need this information to identify any adjustments you could make in the workplace to assist the candidate to perform the role.

Example of discrimination based on a previous workers' compensation claim

A factory refuses to employ Bill because he has previously made a WorkCover claim. The employer could be directly discriminating against Bill if the decision was based on an assumption that he still has the disability or that he is more likely than other applicants to be injured at work.

8. Gathering information after the interview

After you have conducted the job interviews, you may gather additional information about the candidates that will be used to select the successful candidate. You must make sure that you do not discriminate against any of the candidates when using this information.

The additional information you may use to select the successful candidate can come from:

- referees
- medical tests
- psychological and aptitude tests
- criminal records checks.

Referees

It is best to seek information from referees after you have formed an opinion about the applicant from the interview. You should use referees to confirm what you already know about the candidate and to enquire about his or her suitability for the job based on the selection criteria.

Apply the same principles you used when developing the position description and preparing the interview questions. In other words, do not ask questions of a personal nature that do not relate directly to the job requirements.

Medical tests

It may be necessary for candidates to undergo medical testing to assess potential health risks. These risks could be high for candidates with particular health problems given the nature of the job – for example, jobs involving heavy lifting for people with a spinal injury or disease.

It is against the law to refuse to employ a person based on information from a medical examination that discloses a health problem or disability if the information is not related to how adequately the person could perform the job.

If you require medical testing as part of the selection process, you should:

- inform those conducting the medical examinations about the precise nature of the job requirements
- not invade the candidate's privacy by enquiring into areas of the candidate's health that are not related to potential health risks associated with the job requirements
- ensure test results remain strictly confidential
- advise the candidate of the results.

Psychological and aptitude tests

Only use these kinds of tests if you reasonably require them to determine whether a person will be able to perform the specific requirements of the job. You should only use them to assess a candidate's suitability for a position based on the selection criteria. Do not use them to seek irrelevant information about a person's private life or personality.

These tests should also be adjusted to accommodate the needs of people with disabilities or those from different cultural backgrounds.

Criminal record checks

Discrimination on the basis of criminal record is not unlawful under federal law. However the Commission may investigate complaints of discrimination in employment on the basis of criminal record and, where appropriate, try to resolve them by conciliation. When a complaint cannot be resolved by conciliation, and the Commission finds that there has been discrimination, it may prepare a report for the federal Attorney-General which must be tabled in Parliament. Therefore employers should carefully consider when and how they use criminal record checks.

It is not discrimination under federal law to refuse a person a job if his or her criminal record means that he or she is unable to perform the *inherent requirements* of a particular job. However this must be determined on a case-by-case basis, according to the nature of the job and the nature of the criminal record. Employers in certain industries may also be legally obliged to refuse employment to people with certain types of criminal records.

For more information on criminal record, see *On the Record: Guidelines for the prevention of discrimination in employment on the basis of criminal record* at www.humanrights.gov.au/human_rights/criminalrecord/on_the_record/index.html. These guidelines provide practical solutions to the problems faced by employers in the area of discrimination on the basis of criminal record.

Example of discriminatory medical testing

Lara applies for a position as an ambulance officer. She is denied the position because a pre-employment test indicates she has diabetes. The employer claims that Lara's medical condition puts her at risk of low blood sugar levels, which could cause a risk for patients and colleagues. However, Lara's condition could be easily managed by taking regular meal breaks. The risks associated with the condition are also so low that they do not pose a real risk to the safety or health of Lara or others. Lara could make a disability discrimination complaint.

Example of psychological testing that is not discriminatory

A person applying for a job as a police officer may be required to undertake a psychological assessment seeking information about personal characteristics such as self-control and ability to deal with confrontation. This kind of information is necessary to determine whether he or she can meet the genuine requirements of the job.

9. Offering the job

You have now reached the last step in the process – selecting your candidate and offering them the position.

To make sure your selection is fair and non-discriminatory, you should:

- focus on the selection criteria and how the candidates' skills and abilities match these
- check that your decision is not influenced by personal bias, myths or stereotypes
- use all information available, including the application, information gathered at the interview and reference checks, to make your final decision
- record your decisions and the reasons for them.

Employers and recruitment agents should give clear reasons to the unsuccessful candidates as to why they were not selected. Offer constructive feedback on how they fared against the selection criteria or their performance at the interview.

You can use the following checklist to help guide your decisions and to ensure you have considered your obligations under federal anti-discrimination laws.

Checklist: Preventing discrimination in recruitment

- ☐ plan your approach to ensure you comply with your obligations to prevent discrimination in recruitment processes
- ☐ educate others involved in the recruitment process about their obligations
- ☐ cast the net as widely as possible to attract a diverse pool of applicants
- ☐ be consistent and fair in the way you treat candidates
- ☐ accommodate people who require adjustments
- ☐ do not seek irrelevant personal information from applicants
- ☐ focus on the essential requirements of the job
- ☐ set aside personal bias, myths and stereotypes
- ☐ keep records of your decisions
- ☐ select the person best suited to the job.

Further information

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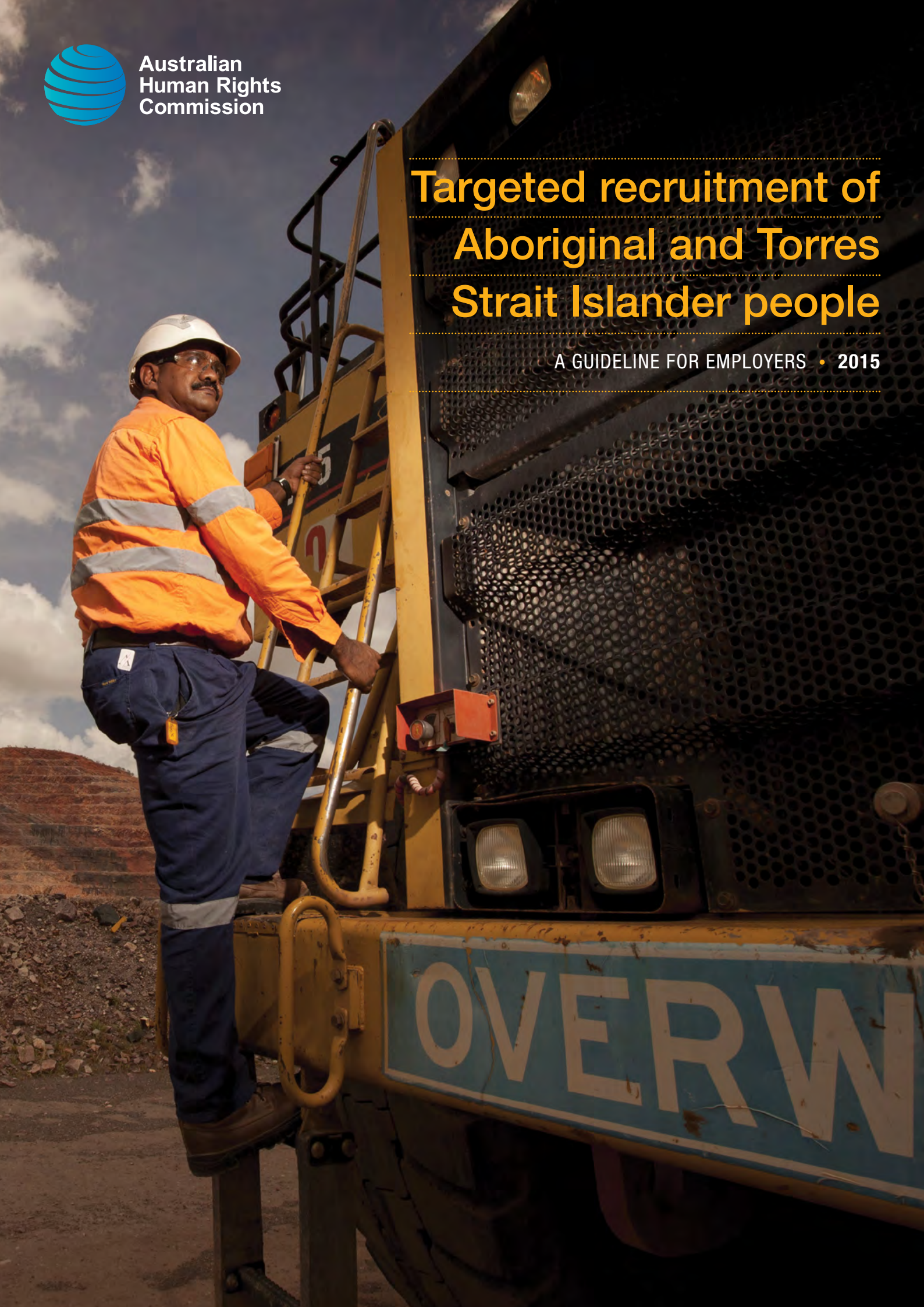
These documents provide general information only on the subject matter covered. It is not intended, nor should it be relied on, as a substitute for legal or other professional advice. If required, it is recommended that the reader obtain independent legal advice. The information contained in these documents may be amended from time to time.

Revised November 2014.



Australian Human Rights Commission

Targeted recruitment of Aboriginal and Torres Strait Islander people

A GUIDELINE FOR EMPLOYERS • **2015**

This guideline has been endorsed by:

- **ACT Human Rights Commission**
- **Anti-Discrimination Board of NSW**
- **Northern Territory Anti-Discrimination Commission**
- **Anti-Discrimination Commission Queensland**
- **Equal Opportunity Commission of South Australia**
- **Office of the Anti-Discrimination Commissioner of Tasmania**
- **Victorian Equal Opportunity and Human Rights Commission**
- **Equal Opportunity Commission of Western Australia.**

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Cover photograph: Glen Campbell/Fairfax Syndication (2012). Caption: Lionel Bulsey, 42, drives a monster truck at the Argyle Diamonds mine in the Northern Territory. Argyle Diamonds, a subsidiary of Rio Tinto, mines 90 per cent of the world's supply of champagne and cognac diamonds and all of its rare pink diamonds. It now employs more Indigenous Australians than any other company in the nation.

Please be aware that this publication may contain the names or images of Aboriginal and Torres Strait Islander people who may now be deceased.

Unless otherwise indicated, images are stock photos and are used for illustrative purposes only.

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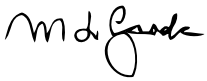
Glen Campbell/Fairfax Syndication (2012)

Message from the Aboriginal and Torres Strait Islander Social Justice Commissioner and the Race Discrimination Commissioner

Most people are aware of the entrenched disadvantage that Aboriginal and Torres Strait Islander people experience, particularly in employment. The employment gap between Aboriginal and Torres Strait Islander peoples and non-Indigenous Australians has in fact widened in recent years.* According to the Prime Minister's most recent *Closing the Gap* report, the proportion of Aboriginal and Torres Strait Islander people aged 15-64 years who are employed fell to 47.5 per cent in 2012–13, while the proportion of non-Indigenous Australians who are employed increased to 75.6 per cent.

Increasingly, employers are seeking to address this issue by providing opportunities in their workplaces. We welcome recruitment strategies that are designed to increase the representation of Aboriginal and Torres Strait Islander people in the workforce. Unfortunately, there is some misunderstanding that discrimination laws are an obstacle to addressing the inequality experienced by Aboriginal and Torres Strait Islander people in employment. On the contrary, discrimination laws recognise that some groups, including racial groups, have suffered historical disadvantage and do not enjoy their human rights equally with others. These laws permit employers to adopt 'special measures' to assist disadvantaged racial groups so that they can have similar access to opportunities as others in the community.

This guideline will help employers to use the 'special measure' provisions in the federal *Racial Discrimination Act 1975* (Cth) and state and territory discrimination laws, to target Aboriginal and Torres Strait Islander people for recruitment. We believe this is an important resource for employers seeking to advance the rights of Aboriginal and Torres Strait Islander peoples.



Mick Gooda
Aboriginal and Torres Strait Islander Social Justice Commissioner

Dr Tim Soutphommasane
Race Discrimination Commissioner

* **Note – Use of the terms 'Aboriginal and Torres Strait Islander peoples' and 'Indigenous peoples' in this guideline:** The Australian Human Rights Commission recognises the diversity of the cultures, languages, kinship structures and ways of life of Aboriginal and Torres Strait Islander peoples. The terminology 'Aboriginal and Torres Strait Islander peoples' is used throughout this guideline. Sources quoted in this guideline may use various terms including 'Indigenous Australians', 'Aboriginal and Torres Strait Islanders', 'Aboriginal and Torres Strait Islander people(s)' and 'Indigenous people(s)'. Also, Australian governments use the terms 'Aboriginal and Torres Strait Islander people/s', 'indigenous people/s', 'Aboriginals', and other variations in their documents. This usage is preserved in quotations and extracts from these documents, and in the names of documents, to ensure consistency.

Executive Summary

An Indigenous Engagement Survey conducted by the Business Council of Australia (BCA) in 2014 revealed that almost 70 per cent of respondent companies had Indigenous employment strategies and most respondents also indicated they planned to recruit Indigenous employees in 2015.

Implementing targeted recruitment strategies that address the discrimination Aboriginal and Torres Strait Islander people face in securing work opportunities is key to increasing their positive employment outcomes.

However, some employers have raised concerns that by conducting a targeted recruitment strategy for Aboriginal and Torres Strait Islander people they risk breaching discrimination laws. Many employers believe that they need to apply for an exemption from such laws before undertaking these programs. However, other than in New South Wales, this is not the case.

This guideline explains how targeted recruitment strategies for Aboriginal and Torres Strait Islander people can be consistent with discrimination laws. This is because discrimination laws (other than in NSW) permit 'special measures' which promote equal opportunity for disadvantaged groups. The unique situation in NSW is explained in section 4 of this guideline.

'Special measure' provisions in discrimination laws allow employers to implement such strategies for the benefit of Aboriginal and Torres Strait Islander people without breaching prohibitions on racial discrimination.

Provided a targeted recruitment strategy meets the requirements of a special measure set out in section 2 of this guideline, it is lawful under discrimination law (except in NSW, where an employer is required to seek an exemption).

The Australian Human Rights Commission (the Commission) has prepared this guideline, in the exercise of the Commission's function under s 20(d) of the *Racial Discrimination Act 1975* (Cth).[1] It has been prepared in consultation with the state and territory discrimination/equal opportunity authorities, to assist employers seeking to implement targeted recruitment strategies to increase the representation of Aboriginal and Torres Strait Islander people in the workforce.

'Targeted recruitment strategies' for Aboriginal and Torres Strait Islander people may include:

- **reserving certain positions for Aboriginal and Torres Strait Islander applicants**
- **guaranteed interview schemes**
- **work placements, traineeships or mentoring programs**
- **engaging an Indigenous Recruitment Service to hire trainees, graduates and fill other roles**

This document provides guidance to employers on designing and documenting these targeted recruitment strategies to meet the requirements of a 'special measure' in all Australian jurisdictions. The guideline is intended to apply nationally, to assist employers who want to conduct targeted employment in multiple states and/or territories. It also includes advice on practical steps employers can take to implement a targeted recruitment strategy as a 'special measure'.

It is based on the extensive experience and expertise of the Commission and state and territory discrimination/equal opportunity authorities in the administration of discrimination laws, and is intended to provide guidance on how those laws operate.

Whilst this guideline is not legally binding, in the view of the Commission and the state and territory discrimination/equal opportunity authorities, employers who can demonstrate that their targeted recruitment strategy for Aboriginal and Torres Strait Islander people meets the requirements set out in this guideline can have confidence that it is compatible with discrimination law (other than in NSW).

Simon Schluter/Fairfax Syndication

In the event of a complaint, the detailed documentation gathered in accordance with this guideline would provide a strong basis for an employer to establish that their strategy is a special measure and therefore consistent with discrimination law.

This guideline has been endorsed by:

- ACT Human Rights Commission
- Anti-Discrimination Board of NSW
- Northern Territory Anti-Discrimination Commission
- Anti-Discrimination Commission Queensland
- Equal Opportunity Commission of South Australia
- Office of the Anti-Discrimination Commissioner of Tasmania
- Victorian Equal Opportunity and Human Rights Commission
- Equal Opportunity Commission of Western Australia.

Finally, please note that this guideline is designed to address the requirements under Australian law for the specific 'special measure' of targeted recruitment of Aboriginal and Torres Strait Islander people. It is not intended as guidance on special measures generally – for broader guidance on special measures, including applicable principles of international human rights law, please see *Guidelines to understanding 'Special measures' in the Racial Discrimination Act 1975* (Cth).[2]

1. Application of discrimination laws

Discrimination laws in all Australian jurisdictions prohibit discrimination on the basis of race, including in connection with employment. **An employer is required to comply with both the federal Racial Discrimination Act and the relevant discrimination law which applies in the states and/or territories in which it operates.**

All of these laws contain exceptions to the general rule that people must be given the same opportunities regardless of their race. There are two types of exceptions which can apply in the case of targeted recruitment of Aboriginal and Torres Strait Islander people: 'special measure' provisions and 'genuine occupational requirement' provisions.

Laws which prohibit racial discrimination

Law by jurisdiction	Exception for 'special measures' which includes recruitment?	Exception for genuine occupational requirements?
Cth – *Racial Discrimination Act 1975*	Yes – s 8	No
ACT – *Discrimination Act 1991*	Yes – s 27	Yes – s 42
NSW – *Anti-Discrimination Act 1977*	No[3]	Yes – s 14
NT – *Anti-Discrimination Act 1996*	Yes – s 57	Yes – sub-s 35(1)(b)(ii)
Qld – *Anti-Discrimination Act 1991*	Yes – s 105	Yes – s 25
SA – *Equal Opportunity Act 1984*	Yes – s 65	Yes – sub-s 56(2)
Tas – *Anti-Discrimination Act 1998*	Yes – ss 25 & 26	Yes – s 41
Vic – *Equal Opportunity Act 2010*	Yes – s 12	Yes – sub-s 26(3) and s 28
WA – *Equal Opportunity Act 1984*	Yes – s 51	Yes – s 50

1.1 'Special measures' – positive actions to promote equality for disadvantaged groups

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.

An example of a special measure is a program which targets Aboriginal and Torres Strait Islander people for employment opportunities to redress their under-representation in a workplace.

All discrimination laws 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 will not be considered unlawful discrimination.[4] 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 guideline they will be referred to generally as 'special measures'.

Discrimination law recognises 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. Although special measures necessarily involve treating different racial groups differently, this differential treatment is not against the law if it meets certain criteria.

This means that **if an action taken to ameliorate the disadvantage experienced by a particular racial group meets the requirements of a special measure, it is not unlawful discrimination. It is therefore unnecessary for an employer to apply for an exemption from discrimination law to take such action**, unless they are operating in New South Wales.

As is explained in section 4 of this guideline, 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.

In Tasmania, the Anti-Discrimination Commissioner encourages employers to seek an exemption for a targeted recruitment strategy even if it meets the requirements of a special measure. This is discussed further in section 5 of this guideline.

1.2 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.[5]

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. For example, a company may create the position of an Aboriginal Liaison Officer, to provide support and information to Aboriginal and Torres Strait Islander staff and service users.

The wording and scope of the genuine occupational requirement provisions vary across the different jurisdictions. Employers will need to check the wording of the law in the jurisdiction/s in which they operate to see if the jobs they intend to advertise would fall within the provision.

If this provision does apply to the particular position, it is recommended that in advertisements for the position the employer include prominent wording to the effect that:

> '[Name of employer] considers that being Aboriginal or a Torres Strait Islander is a genuine occupational requirement for this position under s 42 of the *Discrimination Act 1991* (ACT)/ s 14 of the *Anti-Discrimination Act 1977* (NSW)/ sub-s 35(1)(b)(ii) of the *Anti-Discrimination Act 1996* (NT), s 25 of the *Anti-Discrimination Act 1991* (Qld)/ sub-s 56(2) of the *Equal Opportunity Act 1984* (SA)/ s 41 of the *Anti-Discrimination Act 1998* (Tas)/ sub-s 26(3) or s 28 of the *Equal Opportunity Act 2010* (Vic)/s 50 of the *Equal Opportunity Act 1984* (WA) [select applicable].'

Note however that the federal Racial Discrimination Act does not include an exception for genuine occupational requirements. This means that **even if being Aboriginal or Torres Strait Islander is a genuine occupational requirement for a position, an employer will still need to satisfy him or herself, and be prepared to demonstrate, that recruitment for this position also meets the criteria for a special measure** (set out in section 2 of this guideline) in order to comply with that Act.

The Age/Fairfax Syndication (2011)

1.3 Minimising risk of complaints when conducting targeted recruitment strategies

While an employer may be satisfied that their targeted recruitment strategy meets the criteria of a special measure, it is important to note that this does not necessarily prevent a person from making a complaint about the measure under discrimination law.

Complaints under discrimination laws must first be made to the Commission (in the case of complaints under federal discrimination law) or the relevant state or territory discrimination/equal opportunity authority, except in Victoria where a complaint can be made directly to the Victorian Civil and Administrative Tribunal.

These bodies generally attempt to resolve the complaint through conciliation between the parties. If the complaint is rejected, dismissed, terminated, referred or otherwise not resolved by the Commission or state or territory discrimination/equal opportunity authority, there may be a formal hearing of the matter before a relevant tribunal, or in the case of federal complaints, the Federal Court or Federal Circuit Court.

In the event that a complaint is lodged, an employer will generally be provided with the opportunity to provide information which supports the existence of a genuine occupational requirement, or the assertion that the strategy is a special measure.

If an employer follows the practical steps set out in the following sections of this guideline, this will assist in demonstrating that the strategy is a special measure which is consistent with discrimination law.

If the relevant decision-maker (i.e. the Commission/er, tribunal or court) is satisfied that the legislative requirements for a special measure are met, the complaint or claim against the measure would not be successful, because the measure would not be unlawful.

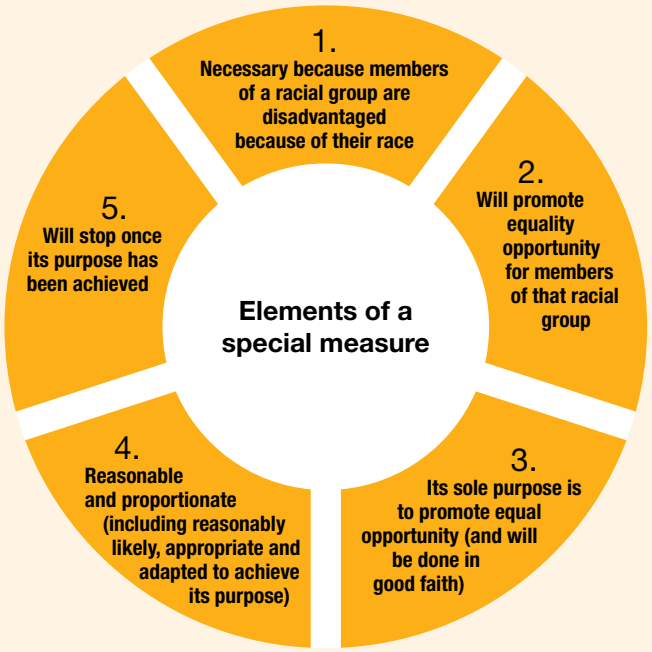
In some states, although legally unnecessary, an exemption for a special measure **may** be granted by a state or territory discrimination/equal opportunity authority or a tribunal (see section 5 and Appendix 3 of this guideline). If granted, an exemption provides greater certainty that a complaint relating to the measure would not be successful.

It should be noted that it is rare for the Commission or state or territory discrimination/ equal opportunity authorities to receive complaints about targeted recruitment strategies for Aboriginal and Torres Strait Islander people. In the last three years the Commission has not received any such complaints. Similarly, the discrimination/equal opportunity authorities in most other jurisdictions report that they too have received few or no such complaints in recent years.

2. Requirements for targeted recruitment strategies for Aboriginal and Torres Strait Islander people to qualify as special measures (except in New South Wales)

The purpose of this section is to provide a nationally consistent set of requirements for a 'special measure' targeted recruitment strategy for Aboriginal and Torres Strait Islander peoples.

The core elements of a special measure are essentially the same under all federal, state and territory discrimination laws. However, the wording of the criteria in the legislation of each jurisdiction differs slightly.[6]



The set of requirements below represents a consolidation of the various requirements under the federal Racial Discrimination Act and state and territory discrimination laws. It reflects the strictest requirements across the jurisdictions, so that an employer who can demonstrate that their recruitment strategy meets all of these criteria can have confidence that they would meet the test in every jurisdiction. Employers can use the template provided in Appendix 1 of this guideline to record how their program meets these criteria.

Note that each requirement must be met, and that the requirements are interrelated and overlapping, and therefore should not be read in isolation.

2.1 Demonstrate that the targeted recruitment strategy is necessary because members of a racial group are disadvantaged because of their race

An action can only be considered a special measure and therefore consistent with discrimination law when that action is necessary for members of a disadvantaged racial group to enjoy their human rights equally with others.

To demonstrate that a special measure is necessary, an employer will need to provide recent and reliable data as evidence that Aboriginal and Torres Strait Islander people experience disadvantage in employment because of their race.

The Australian Bureau of Statistics (ABS) provides data which can be relied upon to demonstrate disadvantage and therefore that a special measure is necessary.[7] For example, in its 2011 *Census of Population and Housing: Characteristics of Aboriginal and Torres Strait Islander Australians*, the ABS found that:

- about two in five Aboriginal and Torres Strait Islander people aged 15 years and over were employed, compared with about three in five non-Indigenous people
- Aboriginal and Torres Strait Islander people were about three times more likely than non-Indigenous people to be unemployed.[8]

The annual *Closing the Gap* reports released by the Prime Minister may also provide relevant data. For example, the Prime Minister's 2015 report concludes that the gap in employment outcomes between Indigenous and non-Indigenous Australians has widened in recent years. The proportion of Aboriginal and Torres Strait Islander people aged 15-64 years who are employed fell from 53.8 per cent in 2008 to 47.5 per cent in 2012–13, while the proportion of non-Indigenous Australians who are employed increased from 75.0 per cent to 75.6 per cent.[9]

If an employer has data on the percentage of its workforce that is made up of Aboriginal and Torres Strait Islander people, and/or the levels of employment of Aboriginal and Torres Strait Islander people within the industry in which it operates, this would also be relevant.

Wherever possible, employers should consult with Aboriginal and/or Torres Strait Islander communities in the areas in which they operate to ascertain whether targeted recruitment strategies are necessary. The Commission supports the view that '[p]referential programs should always, where remotely feasible, be developed in consultation with those being helped, and individuals should always be given the opportunity of receiving normal, non-preferential treatment should they so prefer.'[10]

Support of Aboriginal and Torres Strait Islander communities for a targeted recruitment strategy would assist an employer in demonstrating not only that the program is necessary, but also that the program meets requirements 2, 3 and 4 below. This support from Aboriginal and Torres Strait Islander communities will generally lead to more effective implementation of the program.

A targeted Aboriginal and Torres Strait Islander recruitment strategy may also be included in the negotiation of an Indigenous Land Use Agreement (ILUA) with the local Aboriginal and /or Torres Strait Islander community which includes employment opportunities to be filled through targeted recruitment strategies. An example of an ILUA which includes agreement about employment outcomes is the Argyle Diamond Mine Participation Agreement, discussed in the box below.

Case study:
Argyle Diamond Mine Participation Agreement

The Argyle Diamond Mine Participation Agreement (the Argyle Agreement) is a registered Indigenous Land Use Agreement (ILUA) between Traditional Owners of the East Kimberley region of Western Australia, the Kimberley Land Council and Argyle Diamond Mine (Argyle Diamonds). The Argyle lease occupies the traditional country of the Mirriuwung and Gidja peoples as well the Malgnin and Woolah peoples.

In 2001, Argyle Diamonds and the traditional owners came to the table to renegotiate and renew the relationship between the traditional owners and the mining company. The ILUA negotiations were conducted by two committees, that of the traditional owners and of Argyle Diamonds.

A significant focus of the Argyle Agreement is to achieve training and employment outcomes for local Aboriginal people. Argyle Diamonds has made a commitment to give support and preference to local Aboriginal people for jobs and training at the mine. The Training and Employment Management Plan that is part of the Argyle Agreement includes business and employment principles that aim to achieve and maintain a 40 percent local Aboriginal employment quota on commencement of the underground mine in 2008, continuing until the mine closes.

2.2 Explain how the targeted recruitment strategy will promote equal opportunity for (and therefore provide a benefit to) members of a racial group

The special measure must be designed to improve the circumstances of a disadvantaged racial group by promoting equality of opportunity for that group. A targeted program aimed at increasing employment of a disadvantaged racial group is a clear example of a benefit which promotes equality of opportunity.

It is well-established in every jurisdiction that Aboriginal and Torres Strait Islander peoples constitute racial groups (both separately and as a combined group).[11]

Glen Campbell/Fairfax Syndication (2012)

2.3 Show that the sole purpose of the targeted recruitment strategy is to promote equal opportunity for members of the disadvantaged group (and that it will be undertaken in good faith for that purpose)

A special measure should have as its sole purpose a specific and clear aim of addressing the situation where members of a racial group have experienced inequality.

The purpose of a special measure is determined by looking at the stated intention of the person undertaking the strategy, in this case, the employer.[12]

Accordingly, employers need to document their intention in conducting targeted recruitment strategies for Aboriginal and Torres Strait Islander people, for example, by using the template attached at Appendix 1 of this guideline. That documentation should include reference to the evidence which demonstrates why the measure is necessary, as mentioned above. A detailed record of the planning and rationale behind the measure will serve both as evidence of its purpose, and of the good faith of the employer undertaking it.

The question of whether the sole purpose of the measure is to advance the rights of a disadvantaged group is closely related to the requirement for proportionality, discussed immediately below.

2.4 Show that the targeted recruitment strategy is generally reasonable and proportionate, including that it is reasonably likely, appropriate and adapted to achieve its purpose

A special measure must be designed to effectively address the actual disadvantage of the targeted group, that is, it must be 'appropriate and adapted' to its purpose.

An employer needs to show there is a rational connection between the planned strategy and its stated objective in such a way that it is reasonably likely that the strategy will be successful.

A special measure must also be proportional to the degree of disadvantage experienced by the target population.

All of these criteria are linked to the requirement to demonstrate by reference to the evidence why the measure is necessary, that is, to identify the disadvantage suffered by the particular group. Once the particular disadvantage is identified, the measure must be designed to address that disadvantage.[13]

The principle of proportionality requires that the means adopted to address the disadvantage must not go beyond what is necessary to do so.

Case study:
Reasonableness and proportionality

In *The Ian Potter Museum of Art (Anti-Discrimination Exemption)* [2011] VCAT 2236), the Victorian Civil and Administrative Tribunal considered the proposal by the Ian Potter Museum of Art (part of the University of Melbourne) to recruit an Indigenous person in the role of an Assistant Curator. The Tribunal held that the proposal was proportionate and reasonably likely to achieve its purpose of increasing the representation of Aboriginal and Torres Strait Islander people on the staff of the Museum and the University. The Tribunal held that the proposal was reasonably likely to achieve its purpose because, upon an Aboriginal or Torres Strait Islander person being employed in the position, this would increase the level of employment of Aboriginal and Torres Strait Islander people in the University. The Tribunal held that the proposal was also a proportionate measure as:

> **At present, out of a staff of 15, only one employee of the applicant is Indigenous. As at June 2009, across the University as a whole Indigenous employees represented less than 0.5% of the staff. That figure is dramatically less than the number required to represent the proportion of Indigenous people in the wider population. In these circumstances, the proposed conduct is a proportionate means of achieving the applicant's purposes.**

To demonstrate that a targeted recruitment strategy meets these requirements, an employer should refer back to the evidence of the disadvantage which needs to be addressed as mentioned above. An employer should then explain that the strategy is an appropriate way of increasing employment of Aboriginal and Torres Strait Islander peoples. If an employer has unsuccessfully attempted to employ Aboriginal and Torres Strait Islander people in the past without implementing a targeted program, this history would be relevant to include.

The test for proportionality will be the same whether the targeted recruitment strategy includes individual or bulk recruitment. Given the significant gap in employment outcomes between Aboriginal and Torres Strait Islander peoples and non-Indigenous Australians, a bulk recruitment strategy targeting Aboriginal and Torres Strait Islander people by an employer is unlikely to fail the test of proportionality.

2.5 Show that the targeted recruitment strategy will stop once its purpose has been achieved

A special measure must be temporary, and cannot permanently establish separate rights for a particular group. However, the appropriate duration of a special measure is determined by whether it has achieved its purpose, not by a predetermined passage of time.[14] A special measure can continue for an extended period, so long as it ends once its objective has been achieved. Therefore, it is recommended that an employer designing a targeted recruitment program build in periodic reviews to evaluate its effectiveness in achieving its purpose.

An employer may set targets for the number of Aboriginal and Torres Strait Islander people intended to be employed as part of an Indigenous Employment Strategy or a particular recruitment program. The targeted recruitment program should end once those targets have been reached. However, a new program with different (higher) targets could then be undertaken.

Generally speaking, targeted recruitment strategies for Aboriginal and Torres Strait Islander peoples will no longer qualify as special measures once Indigenous Australians enjoy the same employment levels as non-Indigenous Australians.

3. Practical guidance on designing and implementing 'special measure' recruitment strategies

This section sets out practical steps an employer can take to make it clear that a targeted recruitment program for Aboriginal and Torres Strait Islander people is a special measure. Taking these steps will minimise the risk of complaints that such measures are discriminatory, and provide a strong basis to dispute such a claim in the unlikely event a complaint is made.

3.1 Record in writing the intent, design and evidence for the targeted recruitment strategy to be a special measure

It is very important for an employer to document why and how a targeted recruitment strategy will be a special measure to benefit Aboriginal and Torres Strait Islander peoples. This documentation should address all the requirements mentioned in the section above (i.e. the intent of the employer, the evidence of the need for the measure etc). The template attached as Appendix 1 to this guideline can be used for this documentation.

The recruitment should be consistently documented as an employment strategy to address the underrepresentation of Aboriginal and Torres Strait Islander peoples in the employer's staff/industry/local area. Reference should be made to the need to help address the general employment gap between Aboriginal and Torres Strait Islander peoples and non-Indigenous Australians.

A written record of the intent and evidence for the special measure will not only be important to demonstrate that the recruitment strategy is a special measure in the unlikely event of a complaint, but also will be useful in gaining executive support for the program within organisations.

An employer can also use this information to measure the success of the program, to determine whether and when its objective has been achieved.

3.2 In all documents make reference to the 'special measure' provisions which provide the legal basis for the targeted recruitment strategy

It is good practice for employers to clearly identify that their decision to target Aboriginal and Torres Strait Islander candidates for a certain position or group of positions has a legal basis. This will minimise the risk of other applicants challenging the employment as a possible breach of discrimination laws.

The Commission and state and territory discrimination/equal opportunity authorities recommend that all advertisements and selection documentation for the special measures position(s) contain the wording:

> 'The filling of this position is intended to constitute a special/equal opportunity measure under section 8(1) of the *Racial Discrimination Act 1975* (Cth), and [select appropriate jurisdiction/s from: s 27 of the *Discrimination Act 1991* (ACT) / s 57 of the *Anti-Discrimination Act 1996* (NT) / s 105 of the *Anti-Discrimination Act 1991* (Qld) / s 65 of the *Equal Opportunity Act 1984* (SA) / ss 25 and/or 26 of the *Anti-Discrimination Act 1998* (Tas) / s 12 of the *Equal Opportunity Act 2010* (Vic) and s 8(4) of the *Charter of Human Rights and Responsibilities Act 2006* (Vic) / s 51 of the *Equal Opportunity Act 1984* (WA)].
>
> The position/s is/are therefore only open to Aboriginal or Torres Strait Islander applicants.'

Case study:

Comments from the Queensland Civil and Administrative Tribunal

In *Re AP Eagers Limited* [2012] QCAT 567, the Queensland Civil and Administrative Tribunal suggested that the employer Eagers include in its advertisement for targeted recruitment positions *'Eagers considers this advertisement to be an equal opportunity measure under s105 of the Anti-Discrimination Act 1991'*. In *Downer EDI Mining* [2013] QCATA 276 the Tribunal stated that using such wording can be useful 'to assist with limiting the potential for any complaint' and to 'indicate the Company's intentions to raise this exemption should a complaint be made'.

Case study:
Connecting a special measure to an Indigenous Employment Strategy

The Ian Potter Museum of Art (part of the University of Melbourne) wanted to recruit an Indigenous person in the role of an Assistant Curator. When asked to consider whether this recruitment was a special measure, the Victorian Civil and Administrative Tribunal looked at the University's *Indigenous Employment Framework 2010–2013*. This document recognised the disadvantage suffered by Indigenous Australians, included reference to relevant statistics from the Australian Bureau of Statistics and the number of Indigenous staff at the University, and stated the University's commitment to increase its number of Indigenous employees. This document contributed to the Tribunal's finding that the recruitment met the test for a special measure (see *The Ian Potter Museum of Art (Anti-Discrimination Exemption)* [2011] VCAT 2236).

3.3 Consider linking the recruitment strategy to an Indigenous Employment Strategy and/or Reconciliation Action Plan

An existing Indigenous Employment Strategy can provide useful context and support for the employer's action in implementing a special measure. Such a document makes clear to the public the employer's commitment to reducing unemployment for Aboriginal and Torres Strait Islander peoples.

An Indigenous Employment Strategy can be adopted as a separate policy document, or as part of a broader Reconciliation Action Plan (RAP). A RAP outlines practical action that an organisation can take to build strong relationships and enhance respect between Aboriginal and Torres Strait Islander peoples and other Australians. It also sets out an organisation's aspirational plans to drive greater equality.

If an employer's RAP makes specific reference to the intention to conduct targeted recruitment strategies to increase employment of Aboriginal and Torres Strait Islander people, this provides further evidence of the purpose, good faith and proportionality of the program.

More information on RAPs, including how to develop one, is available on Reconciliation Australia's website: www.reconciliation.org.au/raphub/

Case study:
Including targeted recruitment strategies in a Reconciliation Action Plan

In Crown Resorts' *Elevate Reconciliation Action Plan 2015–17* it recognises that 'providing meaningful employment for Aboriginal and Torres Strait Islander Australians is central to reconciliation'. The Plan contains a commitment to 'employ, develop and promote Aboriginal and Torres Strait Islander people at our properties, at every opportunity'.

In its Plan, Crown states that it made a commitment in 2009 to hire 300 Aboriginal and Torres Strait Islander people; a goal which it achieved in 2013. Its current target for its Indigenous Employment Program is to provide 2,000 job opportunities by 2021.

Its Plan also contains the shorter-term measurable goal of hiring 200 new Aboriginal and Torres Strait Islander employees by July 2017.

3.4 Communicate the intention of the recruitment strategy throughout the recruitment process

Communicating the intention of a targeted recruitment strategy throughout its development and implementation is crucial to minimising the risk that its rationale might be misunderstood. The employer's intention, including the legal provision relied upon, should be reflected in the internal documentation prepared in planning the measure, the job description, advertisements for the position/s, the information provided at a formal interview, and any recruitment documentation provided to the successful applicant/s.

If applicable, the employer can include links to its Indigenous Employment Strategy or Reconciliation Action Plan in any online advertisements for the position/s.

Employers can also consider the involvement of an Indigenous Liaison Officer as a point of contact for applicants for any targeted positions. This Officer could assist Aboriginal and Torres Strait Islander people with the recruitment process, and also explain the concept of and justification for special measures if required.

4. New South Wales: Applying for an exemption for a targeted recruitment strategy

Glen Campbell/Fairfax Syndication (2012)

New South Wales is the only jurisdiction that does not have a clear special measures provision in its discrimination legislation. Therefore **an employer wanting to conduct a targeted recruitment strategy for Aboriginal and Torres Strait Islander people in NSW must apply for an exemption from the *Anti-Discrimination Act 1977* (NSW)** (the NSW Act). The only exception to this is if being of a particular race or ethnic background is a 'genuine occupational requirement' for the position advertised and the employment involves one or more of the circumstances set out in s 14 of the NSW Act.

For guidance on how to apply for an exemption in NSW to conduct targeted recruitment of Aboriginal and Torres Strait Islander people, see Appendix 2 of this guideline.

Employers recruiting in NSW must also be able to show that a targeted recruitment strategy meets the requirements of a special measure (set out in section 2 of the guideline), **even if they are granted an exemption from the *Anti-Discrimination Act 1977* (NSW) to conduct the program (or can rely on the genuine occupational requirements provision)**. This is because an employer recruiting in NSW must comply with both the NSW Act and the federal Racial Discrimination Act, the latter of which does not allow for exemptions.

See Appendix 2 for guidance on how to apply for an exemption in NSW to conduct targeted recruitment of Aboriginal and Torres Strait Islander people.

5. Applying for exemptions for targeted recruitment other than in New South Wales

As outlined in this guideline, in all jurisdictions except NSW, the granting of an exemption is not a legal prerequisite for conducting a targeted recruitment strategy, as long as the recruitment program meets the requirements of a special measure.

This is because the purpose of an exemption is to exclude the application of a particular law to certain conduct which would otherwise breach that law. However, an action that meets the requirements of a special measure will not be unlawful, because it already falls within a recognised *exception* to discrimination law. You do not need an exemption for something that is not unlawful.

Despite this, some employers may choose to apply for an exemption for a targeted recruitment strategy, and may be granted one in some jurisdictions, even though the proposed conduct meets the requirements of a special measure. In Tasmania for example, the Anti-Discrimination Commissioner encourages organisations to apply for exemptions for targeted recruitment strategies for Aboriginal and Torres Strait Islander people (for further detail, see Appendix 3). Using the template contained in this guideline for demonstrating that a recruitment program is a special measure would increase the likelihood of an exemption being granted.

While in some jurisdictions an employer may be successful in obtaining an exemption from the relevant discrimination law for targeted recruitment, employers should generally be aware that:

- Other than in NSW, special measure provisions are built into discrimination laws for the specific purpose of protecting actions which confer benefits on disadvantaged racial groups. The criteria for exemptions from these laws vary between jurisdictions.
- Unless the targeted recruitment program meets the criteria for a special measure, getting an exemption from the discrimination law in one state or territory will not mean the conduct will be lawful in another jurisdiction.
- There is no exemption process under the federal Racial Discrimination Act. This means that even if an employer is granted an exemption under a state or territory discrimination law, its targeted recruitment program must still meet the criteria for a special measure, outlined in section 2 of this guideline, to comply with the federal law.

- When employers apply for exemptions to protect 'special measure' conduct, they may not be successful.[15] The granting of exemptions is discretionary, and the case law in some jurisdictions is inconsistent. Generally, the bodies with the power to grant exemptions consider whether an applicant requires an exemption in order to avoid breaching discrimination law. If the conduct meets the requirements for a special measure which is permitted under the relevant law, these bodies may refuse to grant an exemption. For example, in the case below, the Queensland Civil and Administrative Tribunal refused to grant an exemption to Downer EDI Mining because the company's conduct was likely covered by the 'special measure' provision in s 105 of the Queensland *Anti-Discrimination Act 1991*.

Case study:
Refusal to grant an exemption for a special measure

In 2013 Downer EDI Mining applied for an exemption from the *Anti-Discrimination Act 1991* (Qld) in order to designate, advertise and appoint specific roles to Aboriginal and Torres Strait Islander people. The Queensland Civil and Administrative Tribunal dismissed the application on the basis Downer EDI Mining did not need an exemption, primarily because the recruitment was likely to meet the requirements of an 'equal opportunity measure' which was permitted under s 105 of the Act.

Downer EDI Mining appealed, arguing that it did need the exemption, as even if s 105 applied, the company would still be open to claims of discrimination from non-Indigenous applicants who applied for the positions. In *Downer EDI Mining* [2013] QCATA 276 the Tribunal rejected this appeal, holding that 'the application of section 105 is arguably open to Downer EDI and in the circumstances …there is no need or necessity to grant an [sic] discretionary exemption.'

Employers considering applying for an exemption will also need to factor in the time it will take for an exemption application to be processed and finalised. This may be an issue if the employer needs to fill a vacancy by a certain date.

For more information about the process of seeking, and likelihood of obtaining, an exemption for a targeted recruitment strategy in a particular jurisdiction, please contact the relevant discrimination or equal opportunity authority (details are in the following section).[16]

6. Contact for more information

If you have any questions about planning and implementing a targeted recruitment strategy so that it meets the criteria for a special measure, please contact the Australian Human Rights Commission and/or the discrimination/ equal opportunity authority in the jurisdiction in which you wish to conduct the recruitment:

Jurisdiction	Discrimination law	Agency	Contact details
Cth	*Racial Discrimination Act 1975* (Cth)	Australian Human Rights Commission	www.humanrights.gov.au/contact-us-2
ACT	*Discrimination Act 1991* (ACT)	ACT Human Rights Commission	http://hrc.act.gov.au/contact-us/
NSW	*Anti-Discrimination Act 1977* (NSW)	Anti-Discrimination Board NSW	www.antidiscrimination.justice.nsw.gov.au/Pages/adb1_contactus/adb1_contactus.aspx
NT	*Anti-Discrimination Act 1996* (NT)	NT Anti-Discrimination Commission	www.adc.nt.gov.au/contacts.html
Qld	*Anti-Discrimination Act 1991* (Qld)	Anti-Discrimination Commission Queensland	www.adcq.qld.gov.au/contact-us
SA	*Equal Opportunity Act 1984* (SA)	South Australian Equal Opportunity Commission	www.eoc.sa.gov.au/contact-us
Tas	*Anti-Discrimination Act 1998* (Tas)	Office of the Anti-Discrimination Commissioner (Tasmania)	www.antidiscrimination.tas.gov.au/contact_details
Vic	*Equal Opportunity Act 2010* (Vic)	Victorian Equal Opportunity & Human Rights Commission	www.humanrightscommission.vic.gov.au/index.php/how-we-can-help
WA	*Equal Opportunity Act 1984* (WA)	Western Australian Equal Opportunity Commission	www.eoc.wa.gov.au/contact-us

Appendix 1:

Template for record of targeted recruitment strategy addressing special measure criteria

Description of recruitment strategy:

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Declaration of intention to fill the above position/s through a 'special measure':

The position/s will only be open to Aboriginal or Torres Strait Islander applicants.

The filling of this position/these positions is intended to constitute a special/equal opportunity measure under section 8(1) of the *Racial Discrimination Act 1975* (Cth), and [select appropriate jurisdiction/s from: s 27 of the *Discrimination Act 1991* (ACT) / s 57 of the *Anti-Discrimination Act 1996* (NT) / s 105 of the *Anti-Discrimination Act 1991* (Qld) / s 65 of the *Equal Opportunity Act 1984* (SA) / ss 25 and/or 26 of the *Anti-Discrimination Act 1998* (Tas) / s 12 of the *Equal Opportunity Act 2010* (Vic) and s 8(4) of the *Charter of Human Rights and Responsibilities Act 2006* (Vic) / s 51 of the *Equal Opportunity Act 1984* (WA)].

1. **Why is the targeted recruitment strategy necessary? (Provide evidence that members of the racial group are disadvantaged because of their race)** (for example data from the Australian Bureau of Statistics, or *Closing the Gap* reports)

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2. **How will the targeted recruitment strategy promote equal opportunity for (and therefore provide a benefit to) members of a racial group?**

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3. **Explain how the sole purpose of the targeted recruitment will be to promote equal opportunity for members of the disadvantaged group (and that it will be undertaken in good faith for that purpose)** (include here reference to any Reconciliation Action Plan or Indigenous Employment Strategy)

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4. **Explain how the targeted recruitment strategy is generally reasonable and proportionate, (including reasonably likely, appropriate and adapted to achieve its purpose)** (include why alternatives are not possible or will be ineffective)

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5. **How long will the strategy continue, and how will the strategy's success in achieving its purpose be measured?** (explain the timeframe for the strategy, any relevant employment targets and proposed time for review to assess whether the strategy is working)

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Appendix 2:

Applying for an exemption from the *Anti-Discrimination Act 1977* (NSW)

The Anti-Discrimination Board NSW has published guidelines on how to apply for exemptions to the *Anti-Discrimination Act 1977* (NSW), available here: www.antidiscrimination.justice.nsw.gov.au/Pages/adb1_antidiscriminationlaw/adb1_exemptions/adb1_exemptions.aspx.

An employer wanting to conduct targeted recruitment would need to apply for the exemption to the President of the Anti-Discrimination Board NSW under s 126 of that Act (unless the employer can rely upon the genuine occupational requirements exception in s 14).

The Anti-Discrimination Board's guidelines set out that an exemption is likely to be granted 'where the purpose of a targeted job is to give the particular group an opportunity that was previously unavailable to them, in order to redress past disadvantage or discrimination.' The guidelines give the following as an example of an employment exemption that is likely to be granted:

> An organisation wishes to set aside several positions for Aboriginal and Torres Strait Islander people because their research shows that they are traditionally under-represented in the particular industry. In its s 126 exemption application the organisation shows that it intends to provide training and ongoing support for new recruits and has ensured that there will be career opportunities for them in the future.

In recent years applications for exemptions for recruitment of Aboriginal and Torres Strait Islander people have been the most common type of exemption applications received by the Anti-Discrimination Board NSW.

In the guidelines the Anti-Discrimination Board lists the information an employer must provide to the President as part of their application, and the six criteria that the employer must address to convince the President to grant the exemption.[17] Much of the information mentioned above in this guideline as necessary to establish that a recruitment program is a special measure would be relevant to an application for an exemption under s 126 of the NSW Act.

For example, to be granted an application the employer must address:

- **how targeting the position, service or program would further equal employment opportunity in its workplace** – very similar to requirement 2 of a special measure
- **how long** the employer would like the exemption for **and the reasons for that length of time** – this relates to the requirement 5 that a special measure not continue once it has achieved its purpose
- whether the proposed exemption is **appropriate or reasonable** – very similar to requirement 4 of a special measure
- whether the proposed exemption is **necessary** – same as for requirement 1 of a special measure, an employer can demonstrate necessity by providing recent statistical information about the disadvantage suffered by Aboriginal and Torres Strait Islander peoples
- whether there are any **non-discriminatory ways** of achieving the objects or purposes for which the proposed exemption is sought – this is also related to requirement 4 for a special measure (particularly the concept of proportionality). Much of the information which would address that requirement would be relevant here – particularly any evidence that past non-targeted recruitment strategies used by the employer did not increase its number of Aboriginal and Torres Strait Islander employees
- whether the proponent of the proposed exemption has taken **reasonable steps**, or is able to take any reasonable steps, to **avoid or reduce the adverse effect** of a particular act or action before seeking the exemption – to show this an employer could point to other recruitment programs it runs which are not restricted to Aboriginal and Torres Strait Islander persons, and therefore provide employment opportunities to non-Indigenous persons
- the public, business, social or other community **impact** of the granting of the proposed exemption – an employer can refer here to the positive impact that the targeted recruitment will have in terms of increasing employment of Aboriginal and Torres Strait Islander peoples

- any conditions or limitations to be contained in the proposed exemption – note that the duration of an exemption will generally be tied to the length of time the employer demonstrates it will be funding the program (i.e. the position/s) for.

An exemption under s 126 of the NSW Act can be granted for a maximum of 10 years.[18]

Employers recruiting in NSW must also be able to show that a targeted recruitment strategy meets the requirements of a special measure (set out in section 2 of this guideline), **even if they are granted an exemption from the *Anti-Discrimination Act 1977* (NSW) to conduct the program (or can rely on the genuine occupational requirements provision)**. This is because an employer recruiting in NSW must comply with both the NSW Act and the *Racial Discrimination Act 1975* (Cth) (the latter of which does not allow for exemptions).

Appendix 3: Targeted recruitment in Tasmania

In the event a complaint is made to the Anti-Discrimination Commissioner about targeted recruitment in Tasmania, the complaint (if not resolved through conciliation) would have to be referred to the Anti-Discrimination Tribunal for inquiry.

Under the Tasmanian *Anti-Discrimination Act 1998*, exceptions under the Act, including the special measures exceptions (sections 25 and 26), must be proven on the balance of probabilities.[19]

While the Anti-Discrimination Commissioner has some authority to determine whether or not a special measure exception properly applies, the Commissioner may not always have authority to determine that sections 25 and/or 26 apply to a complaint either at initial assessment or after investigation.

It would therefore be at the inquiry by the Tribunal that an employer would have to prove, on the balance of probabilities, that the exception applied to its conduct and, as a result, the conduct was not unlawful.

However, if an exemption is granted for targeted recruitment, the Anti-Discrimination Commissioner has express authority to reject or dismiss a complaint of conduct that falls within the scope of the exemption granted.[20]

Because of this, the Anti-Discrimination Commissioner encourages employers seeking to engage in targeted recruitment in Tasmania to apply for an exemption under the *Anti-Discrimination Act 1998* (Tas). This provides protection against a complaint about any conduct that falls within the scope of the exemption granted. In applying for an exemption, providing material that satisfied the requirements set out in section 2 of this document is likely to be sufficient.

The Tasmanian Anti-Discrimination Commissioner has published information on how to apply for exemptions to the *Anti-Discrimination Act 1998* (Tas) available here: www.antidiscrimination.tas.gov.au/exemptions/applying_for_an_exemption.

Endnotes

1 Section 20(d) of the *Racial Discrimination Act 1975* (Cth) provides for the Commission to prepare, and to publish in such manner as the Commission considers appropriate, guidelines for the avoidance of infringements of the operative provisions of the Act.

2 Available at www.humanrights.gov.au/publications/guidelines-understanding-special-measures-racial-discrimination-act-1975-cth-2011 (viewed 15 July 2015).

3 Note that the exception for 'special needs programs and activities' in s 21 of the *Anti-Discrimination Act 1977* (NSW), which permits certain measures to promote equal access to facilities, services and opportunities for persons of a particular race, is currently interpreted by the New South Wales Anti-Discrimination Board as not including employment.

4 *Racial Discrimination Act 1975* (Cth), s 8(1); *Discrimination Act 1991* (ACT), s 27; *Anti-Discrimination Act 1996* (NT), s 57; *Anti-Discrimination Act 1991* (Qld), s 105; *Equal Opportunity Act 1984* (SA), s 65; *Anti-Discrimination Act 1998* (Tas), ss 25 and 26; *Equal Opportunity Act 2010* (Vic), s 12 (see also *Charter of Human Rights and Responsibilities Act 2006* (Vic), s 8(4)); *Equal Opportunity Act 1984* (WA), s 51.

5 See *Discrimination Act 1991* (ACT), s 42; *Anti-Discrimination Act 1977* (NSW), s 14; *Anti-Discrimination Act 1996* (NT), sub-s 35(1)(b)(ii); *Anti-Discrimination Act 1991* (Qld), s 25; *Equal Opportunity Act 1984* (SA), sub-s 56(2); *Anti-Discrimination Act 1998* (Tas), s 41; *Equal Opportunity Act 2010* (Vic), sub-s 26(3) and s 28; *Equal Opportunity Act 1984* (WA), s 50.

6 For the wording in a particular jurisdiction, see: *Racial Discrimination Act 1975* (Cth), s 8(1); *Discrimination Act 1991* (ACT), s 27; *Anti-Discrimination Act 1996* (NT), s 57; *Anti-Discrimination Act 1991* (Qld), s 105; *Equal Opportunity Act 1984* (SA), s 65; *Anti-Discrimination Act 1998* (Tas), ss 25 and 26; *Equal Opportunity Act 2010* (Vic), s 12 (see also *Charter of Human Rights and Responsibilities Act 2006* (Vic), s 8(4)); *Equal Opportunity Act 1984* (WA), s 51.

7 See, for example, *The Ian Potter Museum of Art (Anti-Discrimination Exemption)* [2011] VCAT 2236, [25]-[26] and [39].

8 Australian Bureau of Statistics, *Census of Population and Housing: Characteristics of Aboriginal and Torres Strait Islander Australians, 2011*, ABS cat no 2076.0 (2012). At www.abs.gov.au/ausstats/abs@.nsf/Lookup/2076.0main+features802011 (viewed 2 June 2015).

9 Department of the Prime Minister and Cabinet, Australian Government, *Closing the Gap: Prime Minister's Report 2015* (2015) p 13, available at www.dpmc.gov.au/pmc-indigenous-affairs/publication/closing-gap-prime-ministers-report-2015#jobs (viewed 2 June 2015).

10 G Evans, 'Benign Discrimination and the Right to Equality' (1974) 6 *Federal Law Review* 26, 30.

11 See further the definitions of 'race' in *Racial Discrimination Act 1975* (Cth), sub-s 8(1) (and see *International Convention on the Elimination of All Forms of Racial Discrimination*, 1965, art 1(1) and (4)); *Discrimination Act 1991* (ACT), Dictionary; *Anti-Discrimination Act 1977* (NSW), s 4; *Anti-Discrimination Act 1996* (NT), s 4; *Anti-Discrimination Act 1991* (Qld), Dictionary; *Equal Opportunity Act 1984* (SA), s 5; *Anti-Discrimination Act 1998* (Tas), s 3; *Equal Opportunity Act 2010* (Vic), s 4; *Equal Opportunity Act 1984* (WA), s 4.

12 'Any fact which shows what the persons who took or who promoted the taking of a measure intended it to achieve casts light upon the purpose for which it was taken provided the measure is not patently incapable of achieving what was so intended': *Gerhardy v Brown* (1985) 159 CLR 70, 135 (Brennan J).

13 In *Gerhardy v Brown* Brennan J stated 'The need must match the purpose': 159 CLR 70, 137.

14 See for example Committee on the Elimination of Discrimination Against Women, *General Recommendation 25, on article 4, paragraph 1, of the Convention on the Elimination of All Forms of Discrimination against Women, on temporary special measures*, (2004), para 20. At: www.un.org/womenwatch/daw/cedaw/recommendations/General%20recommendation%2025%20(English).pdf (viewed 18 June 2015).

15 For example in Victoria the Victorian Civil and Administrative Tribunal has dismissed applications for exemptions where the conduct is a special measure (because it is therefore not necessary to grant the applicant an exemption), but has made a declaration that the proposed recruitment is a special measure under s 12 of the *Equal Opportunity Act 2010*. For more information about the process in Victoria, contact the Victorian Equal Opportunity and Human Rights Commission.

16 There are also factsheets available on the processes for applying for an exemption from the discrimination laws in Tasmania and Queensland: see *Applying for Exemption under the Tasmanian Anti-Discrimination Act 1998*, at www.antidiscrimination.tas.gov.au/exemptions/applying_for_an_exemption (viewed 15 June 2015); *Applying to QCAT for an exemption under the Anti-Discrimination Act 1991* (Qld), at www.adcq.qld.gov.au/resources/brochures-and-guides/fact-sheets/qcat-exemptions (viewed 15 June 2015)

17 See *Anti-Discrimination Regulation 2014* (NSW) reg 6.

18 *Anti-Discrimination Act 1977* (NSW), s 126(3).

19 *Anti-Discrimination Act 1998* (Tas), s 101.

20 *Anti-Discrimination Act 1998* (Tas), s 64(1)(h).

Further Information

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Australian Human Rights Commission
www.humanrights.gov.au

Race hate and the RDA

Race Discrimination

Thursday 8 September, 2016

Listen

Racial vilification is dealt with under sections 18C and 18D of the *Racial Discrimination Act 1975* (RDA).

Section 18C of the RDA makes it unlawful to 'offend, insult, humiliate or intimidate' someone because of their race or ethnicity.

Exemptions under Section 18D of the RDA ensure that artistic works, scientific and academic inquiry, and fair comment on matters of public interest are exempt from section 18C, provided they are done reasonably and in good faith.

The vast majority of claims under 18C are either conciliated through the Australian Human Rights Commission, or are withdrawn or dismissed. Many cases end with a simple apology. Racial hatred complaints comprise only a fraction of cases under the RDA dealt with by the

Commission.

If conciliation fails at the Commission, a complaint can proceed to the Federal Court or Federal Circuit Court. This happens in a very small number of cases. In 2015-16, the Commission finalised 86 complaints about racial hatred. Only one complaint about racial hatred proceeded to court.

The RDA does not make racial vilification a criminal offence, and offers only a civil remedy. Where a court finds a contravention of the Act, it may make orders for an apology or a correction, and/or award monetary damages.

What is the background to these laws?

Sections 18C and 18D were introduced to the RDA in 1995 in response to recommendations of major inquiries including the *National Inquiry into Racist Violence*, the *Royal Commission into Aboriginal Deaths in Custody*, and the Australian Law Reform Commission's *Multiculturalism and the Law* report.

These inquiries found that targets of racist violence or harassment had little recourse to existing civil remedies under common law. The introduction of racial vilification provisions reflected a recognition that racial abuse and harassment could escalate to racial violence.

The Australian Human Rights Commission's role

The Australian Human Rights Commission is not a judicial body or a tribunal*. It does not make judicial determinations about the Act. Its role is to investigate and conciliate complaints.

The Race Discrimination Commissioner plays no role in the investigation or conciliation of complaints, but promotes understanding and acceptance of the Act. The Australian Human Rights Commission President is responsible for final decisions

In 2015-16, the Commission received 77 complaints under section 18C, and 52 per cent of racial vilification complaints were resolved at conciliation. During this year, 12 per cent of complaints were withdrawn and only one complaint of racial hatred proceeded to court.

Each year, the Commission publishes relevant data in its annual reports (https://www.humanrights.gov.au/our-work/commission-general/publications/annual-reports) about the volume and nature of complaints received and resolved.

Some case histories:

- Walsh v Hanson [2000] (http://www.austlii.edu.au/au/cases/cth/HREOCA/2000/8.html). DISMISSED: In 2000, the Commission dismissed a series of complaints alleging racial discrimination following the publication of the book, *Pauline Hanson, The Truth*, which claimed 'that Aboriginal people were savages who ate babies'. The book's author was anonymous, but the copyright was owned by Ms **Pauline Hanson**, an elected politician. The Hon J. A. Nader QC found that by virtue of section 18D (http://www.austlii.edu.au/au/legis/cth/consol_act/rda1975202/s18d.html) of the RDA, the respondents had not acted unlawfully.
- Jones v Toben [2000]. (http://www8.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/HREOCA/2000/39.html) UPHELD: In 2000, the Commission upheld a complaint against the Adelaide Institute after it published material on its website which appeared to deny the Holocaust. The Institute was represented **by Dr Fredrick Toben**, who contended that his website was concerned with the extent to which the Holocaust had been 'mythologised'. The complainant said he had received complaints from 'a distressed child of a Holocaust survivor' among others who found the content insulting and derogatory. The Commission ordered the online material be removed and an apology be published.
- Bropho v HREOC & Anor [2005] (http://www8.austlii.edu.au/cgi-bin/viewdoc/au/other/HCATrans/2005/9.html). DISMISSED: In 2001, the Commission dismissed a complaint following publication of a cartoon entitled '**Alas Poor Yagan**' in *The West Australian* newspaper. The cartoon depicted Yagan, an ancestor of the Indigenous complainants, who became the subject of legal proceedings to arrange the return of his head from London to Australia. The cartoon depicted the head of Yagan saying 'Crikey, give me a warm beer and a quiet pommy pub any day'. Two appeals to the Federal Court of Australia and the Full Court of the Federal Court of Australia were dismissed. The High Court of Australia dismissed an application for special leave.

- Eatock v Bolt [2011]. (http://www.austlii.edu.au/au/cases/cth/FCA/2011/1103.html) UPHELD: In 2011, the Federal Court upheld a complaint against columnist **Andrew Bolt** and the Herald & Weekly Times. The complainant alleged the articles conveyed offensive messages about fair-skinned Aboriginal people, implying they were not genuinely Aboriginal and were pretending to be Aboriginal in order to access benefits that are available to Aboriginal people. The Federal Court of Australia concluded that the conduct of Mr Bolt and the Herald & Weekly Times was not exempted by section 18D of the RDA because the respondents had not acted reasonably and in good faith.

Section 18C and free speech

Section 18C of the RDA is accompanied by section 18D, which protects any fair comment or reporting on a matter of public interest, and any sentiment expressed 'in the course of any statement, publication, discussion or debate made or held for any genuine academic, artistic or scientific purpose'. Provided something is done reasonably and in good faith, any fair comment or public discussion will be exempt from being in breach of section 18C. The Racial Discrimination Act is one of the few legislative instruments in Australian law that contains an explicit protection of free speech. It has struck a balance between freedom of expression and freedom from racial vilification. The broad protection of free speech in section 18D means that the law extends to acts that offend, insult, humiliate or intimidate because of race, but which have not been done reasonably or in good faith, or which have not involved a genuine purpose in the public interest.

Section 18D exemptions

There have been numerous cases considered by the courts, where something has caused racial offence, insult, humiliation or intimidation, but has been held to enjoy the protection of section 18D. For example, in the case of *Bropho*, cartoons published in the West Australian, about which Aboriginal people had complained, were deemed to have been artistic work and fair comment enjoying the exemption of section 18D. The section has also prevailed in the *Kelly-Country v Beers* case involving a satirical performer who purported to be an Aboriginal person called 'King Billy Coke Bottle'. In that case, the court noted that while the act may have been offensive or insulting, but it fell within the category of artistic work protected by section 18D.

Free speech or racist speech?

No right or freedom is ever absolute. Where acts impinge upon the rights and freedoms of others, it is only right that we hold it to account. We accept many limitations of what people can say – for example, those imposed by national security laws, defamation laws, trade practices laws, and criminal summary offence laws. Laws against racial vilification reflect our society's commitment to civility, respect and tolerance.

Section 18C is concerned with acts that offend, insult, humiliate or intimidate because of someone's race or ethnicity. This is a different thing to acts that merely offend or insult. Racial offence and racial insult can strike at the heart of a person's being and their dignity, the part of their identity that comes from their background and ancestry. Having a law that covers acts that offend, insult, humiliate or intimidate because of race is aimed at nipping racial hatred in the bud – at preventing it from escalating into acts that cause graver harm.

There are occasions when the President of the Australian Human Rights Commission will terminate complaints that are trivial, misconceived or lacking in substance. The typical cases involving section 18C that courts have considered indicate the kind of racial hatred that attracts the attention of the law. These include cases where Aboriginal people have been described as 'criminal trash' and 'scum' that should be used as landfill (*Clarke v Nationwide News*), where a man was verbally abused in a building foyer and called a 'Singaporean prick' and told to go back to Singapore (Kanapathy v In De Braekt), or where a website published material denying the Holocaust and expressing virulent anti-Semitism (*Jones v Toben*).

Profound and serious effects

The courts have held that the standard to be met for section 18C to be contravened is conduct that has 'profound and serious effects', which are 'not be liked to mere slights'. The test for whether an act breaches section 18C is also an objective one. The provision makes it unlawful to do an act that is *reasonably likely, in all the circumstances*, to offend, insult, humiliate or intimidate on the grounds of race and ethnicity. The fact that someone feels they have been racially offended, insulted, intimidated or humiliated is not enough to mean that there has been something unlawful.

Useful links

- Learn about making complaints under the RDA (https://humanrights.gov.au/our-work/complaint-information-service/complaints-under-racial-discrimination-act)
- Read AHRC publication Freedom from Discrimination: Report on the 40th anniversary of the RDA (http://www.humanrights.gov.au/our-work/race-discrimination/publications/freedom-discrimination-report-40th-anniversary-racial)
- Commit to learning to address racism in a meaningful way on the It Stops With Me (https://itstopswithme.humanrights.gov.au/commit-to-learning) website
- Review the Guideline for Employers (https://humanrights.gov.au/our-work/aboriginal-and-torres-strait-islander-social-justice/publications/targeted-recruitment) regarding the targeted recruitment of Aboriginal and Torres Straight Islander peoples
- Understand the Australian Human Right's Commission work on Race Discrimination (https://humanrights.gov.au/our-work/race-discrimination)
- Review the Australian Human Rights Commission's Anti-Racism Framework (https://humanrights.gov.au/our-work/race-discrimination/publications/national-anti-racism-framework-scoping-report)

***Note:** Up until 1992, the Human Rights and Equal Opportunity Commission (as the Australian Human Rights Commission was then known) could make determinations in response to complaints of racial discrimination, but these determinations were not binding. Legislative changes in 1992 and 1993 allowed for HREOC determinations to be registered with the Federal Court. A registered determination had the effect of being an order of the Court. However, a High Court decision in 1995 invalidated those changes on the basis that they purported to allow the Commission to exercise judicial power. See *Brandy v Human Rights & Equal Opportunity Commission (1995) 183 CLR 245* (http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/cth/HCA/1995/10.html)

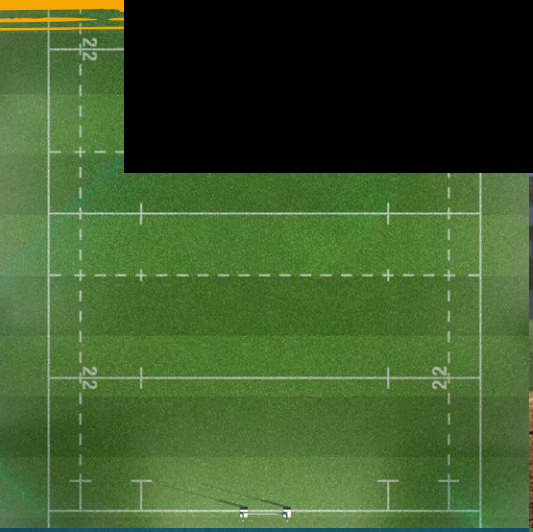
Tags

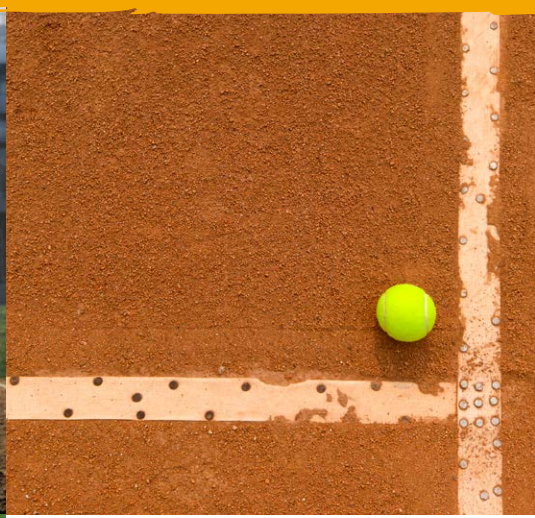
Race Discrimination (/our-work/projects?keys=Race Discrimination)

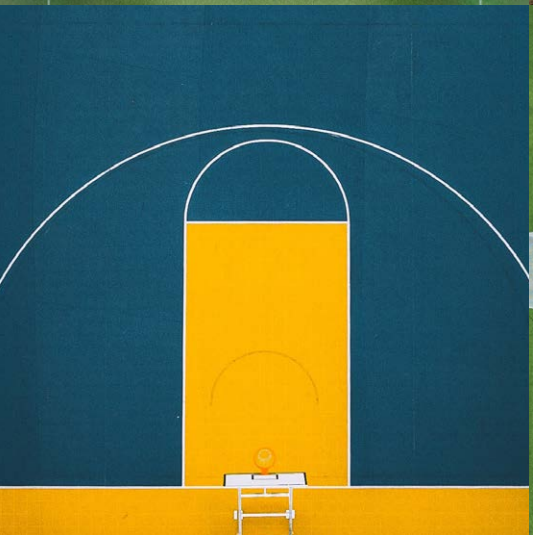
RACISM. IT STOPS WITH ME

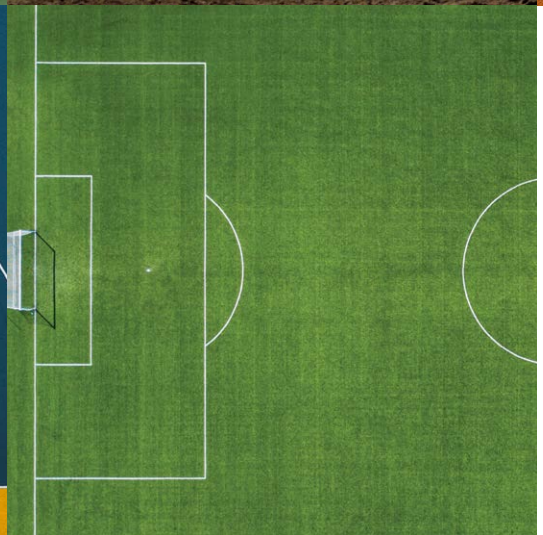
RACISM. NOBODY WINS.

GUIDELINES FOR ADDRESSING SPECTATOR RACISM IN SPORTS









Australian Human Rights Commission

RACISM.
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GUIDELINES FOR ADDRESSING SPECTATOR RACISM IN SPORTS

FOREWORD

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Sport is an arena in which values of equality, fairness and participation are celebrated. Sport also holds a unique place in Australian society and can contribute to building social cohesion. However, spectator racism at sporting events is a difficult matter to address. There have been recent occurrences at professional sporting events across different sporting codes. Anecdotal evidence from sporting codes also suggests it is a challenge that exists at community sporting events.

These guidelines are intended to promote best practice responses to spectator racism. At all times, responses to spectator racism should centre on the experiences of those targeted by racism, and others (including witnesses) who may be affected by it. Sporting codes, clubs, venues and associated stakeholders are encouraged to implement these guidelines as part of broader strategies to address the ongoing issue of racism in sports, including racism perpetuated online.

The guidelines seek to identify actions that can be taken consistently across sporting events to ensure that spectators, officials, and players alike are safe, and aware of what to do and how to respond to incidents of spectator racism. They also propose measures that are proactively focused to prevent racism from occurring in the first place.

Feedback during the development of these guidelines indicated that sporting codes and venue operators would appreciate guidance that supports their policies, procedures and other efforts to address racism. While there will be variance in the nature, prevalence and type of racism experienced, there are common foundational elements to responding to racism where it exists.

These materials are developed as part of the ***Racism. It Stops With Me*** campaign, which has often worked with sporting codes to promote anti-racism initiatives, and to educate sports fans and participants on racism and racial discrimination. This experience has placed the campaign in a unique position to develop, promote, and share common guidance and practice.

In developing these guidelines, the Commission notes that experiences of racism also intersect with other discriminatory practices (e.g. discrimination on the basis of gender, age, disability or sexuality). Responses to racism should factor in the intersectional experience of those targeted and respond to the entirety of the harm experienced.

Resources to support the implementation of these guidelines are available at **https://humanrights.gov.au/our-work/race-discrimination/publications/guide-addressing-spectator-racism-sports-2021.**

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GUIDELINES FOR ADDRESSING SPECTATOR RACISM IN SPORTS

THE GUIDELINES: PREPARE

Be prepared for the reality of racism and the possibility of racist incidents occurring at sporting events.

1. **Create policies that explicitly state a zero-tolerance approach to racial discrimination and racial vilification. These should include:**
   - clear definitions of racial discrimination and racial vilification
   - concrete steps that will be taken by officials/staff when racist incidents occur
   - inclusion of terms and conditions of entry to games in ticketing arrangements that reflect a zero-tolerance approach to racism and vilification
   - recognition that responses to racism should be appropriate to the age and understanding of perpetrators, especially in the case of children and young people, is important.

2. **Have in place clear procedures for the safe and swift reporting of racist incidents. This should include:**
   - avenues through which:
     - spectators can alert officials/staff to incidents of spectator racism (such as SMS hotlines, web-based tools on sporting code websites)
     - players can alert officials/staff to incidents of spectator racism (such as stopping play or alerting team captain)
     - officials/staff can alert nominated officials about incidents of spectator racism (such as SMS hotlines, managers or nominated match officials (such as a game day Integrity Officer).
   - ensuring the safety of players, spectators and others, by creating:
     - clear processes for handling incidents and who is responsible.

3. **Train players, officials and staff (including security officers) in relevant policies to ensure their application. Training should:**
   - identify referral pathways, including to security officers or police
   - identify de-escalation techniques, incorporating a trauma-informed approach and anti-racist practice
   - occur on a regular basis and be of a high quality.

4. **Publicise the position of sporting codes and venues on spectator racism on a regular basis, including creating resources that educate spectators about racism and inform them of:**
   - the implications of a zero-tolerance approach to racism
   - what to do in the event of an incident (including how to engage in bystander intervention, record an incident of racism and support the target)
   - how their complaint will be handled (including what is required of them as the complainant).

5. **Clearly communicate policies and educational resources to supporters and spectators.**

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GUIDELINES FOR ADDRESSING SPECTATOR RACISM IN SPORTS

THE GUIDELINES: ADDRESS

Decisively address incidents of spectator racism.

6. Sporting code, club and venue officials take decisive action to immediately respond to racist incidents. This might involve removing the spectator from the grounds.

7. Incidents of racism are appropriately recorded and monitored. Sporting codes set reporting standards across clubs and relevant venues and undertake reviews of progress on addressing racism. These review processes incorporate guidance and partnerships with diverse players, staff, spectators, and community organisations.

8. Sporting codes and venues take decisive action in response to spectator racism whenever possible. This might include membership pauses, bans or making re-entry contingent on participation in anti-racism training.

9. Sporting codes support both the targets of racism (see further below) and those who report or engage in bystander interventions (e.g. such as providing information on free/affordable and culturally sensitive counselling and social support services).

10. Sporting codes and venues provide education and support mechanisms for spectators to engage in bystander intervention when they witness a racist incident (as long as it is safe and practicable to do so). This might include supportive in-venue or social media messaging.

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GUIDELINES FOR ADDRESSING SPECTATOR RACISM IN SPORTS

THE GUIDELINES: SUPPORT

Ensure targets of racism are heard, supported, and that appropriate action is taken.

11. When responding to racist incidents, sporting codes, venues and clubs should:
    - provide opportunities for targets of spectator racism to speak about their experiences
    - provide targets of spectator racism with access to free/affordable and culturally sensitive counselling and social support services
    - ensure that all investigations into racist incidents guarantee procedural fairness and provide avenues for redress.

12. Sporting codes and venues should reflect on organisational culture and consider organisation-wide improvements, including:
    - communications to players, staff, supporters, cheer squads members and sponsors about the club's position on racism and cultural diversity
    - review of the management of racism and race hate on a club's social media platforms
    - ways to actively promote anti-racism initiatives such as events, workshops and campaigns.

13. Sporting codes provide senior leadership support for anti-racism initiatives, and look to address racism in a holistic manner by ensuring inclusive practices that positively reflect on the value of diversity to the club and that promote social cohesion (as a necessary complement to addressing racism).

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www.humanrights.gov.au

This resource has been created by the Australian Human Rights Commission, in collaboration with national, state and territory-based sporting organisations and venues. For additional resources and information about the project, please visit **https://humanrights.gov.au/our-work/race-discrimination/publications/guide-addressing-spectator-racism-sports-2021.**

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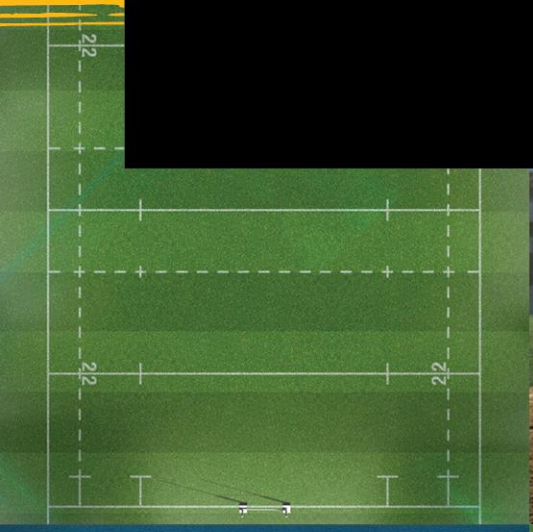
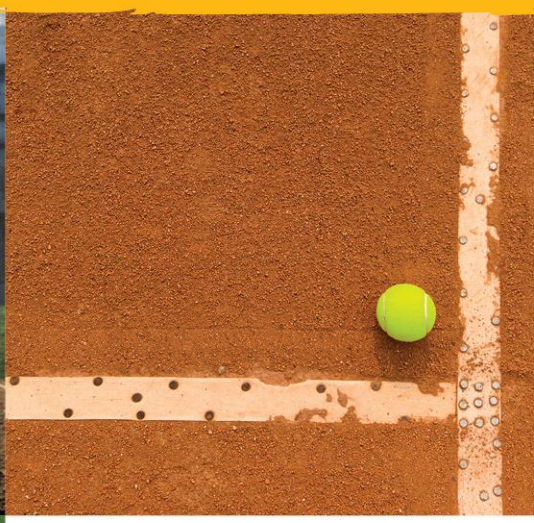
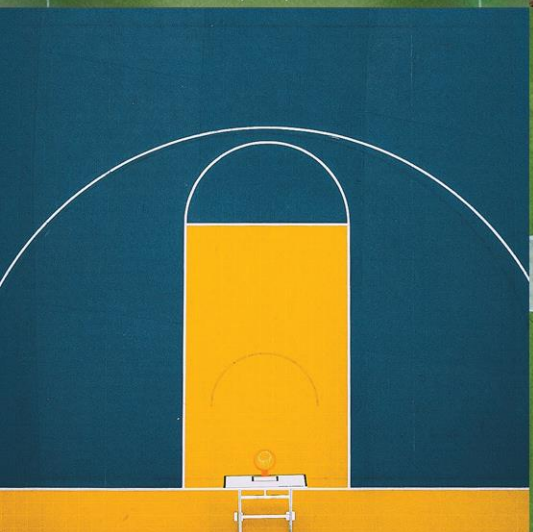
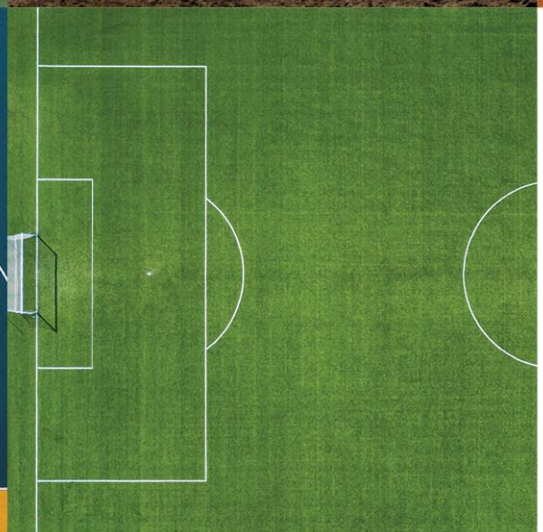
RACIAL DISCRIMINATION POLICY TEMPLATE









Australian Human Rights Commission

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RACIAL DISCRIMINATION POLICY

BACKGROUND TO THIS TEMPLATE

This **template*** will help you create your own workplace anti-racism and racial discrimination and harassment policy. It covers topics relevant to the *Racial Discrimination Act 1975 (Cth)*.

Other Federal and state/territory laws may also apply to your workplace.

You may wish to customise, add or remove topics.

Read the instructions below to create your own document, and delete this page from your final version.

INSTRUCTIONS

1. Where you see **<Organisation name>** replace it with your business's legal trading name. The quickest way to do this is to use the Edit > Replace function.
2. Where you see [Guidance note (delete this later)] read and then delete the text. We have added guidance notes to help you complete the template. They are not intended to be part of your final version.
3. Once you have finished work on the template, delete this instruction page.
4. Finally, refresh the page numbers in the table of contents. Right mouse click on the Table of Contents > choose 'Update Field' > choose 'Update entire table'.
5. You may wish to print this document on a letterhead or add your logo.

NOTE: DELETE THIS PAGE ONCE YOU COMPLETE THE TEMPLATE.

*This template was developed by the AHRC and was modified with permission from the Victorian Equal Opportunity and Human Rights Commission 'Right Smart Employers'. Toolkit available at: https://humanrights.gov.au/our-work/employers/workplace-discrimination-and-harassment-policy-template

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RACIAL DISCRIMINATION POLICY

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1. SCOPE

This policy applies to all the following personnel, whether they are in a paid, unpaid or voluntary capacity:

- individuals sitting on boards, committees, sub-committees or other formal structures within **<Organisation name>**
- all staff, including managers and supervisors; full-time, part-time or casual, temporary or permanent staff; job candidates; student placements, apprentices, contractors, sub-contractors and volunteers
- coaches and assistant coaches; support personnel (e.g. physiotherapists, psychologists, masseurs, dieticians and sport doctors); athletes and players; referees and other officials; and spectators.

This policy also covers:

- how **<Organisation name>** provides services to customers, suppliers, members and patrons and how it interacts with other members of the public
- all aspects of employment, recruitment and selection; conditions and benefits; training and promotion; task allocation; hours; leave arrangements; workload; equipment and transport
- on-site, off-site or after-hours work; work-related social functions; conferences – wherever and whenever staff may be as a result of their **<Organisation name>** duties
- staff treatment of other staff, of clients, and of other members of the public encountered during their **<Organisation name>** duties
- how **<Organisation name>** interacts and manages volunteer and spectator behaviour
- how **<Organisation name>** interacts and uses social media and online communications.

2. AIMS

[Guidance note (delete this later): This section could also directly quote from relevant parts of your organisation's vision, mission or values.]

<Organisation name> is committed to providing a safe, inclusive, flexible and respectful environment for staff and clients free from all forms of racism, racial discrimination and harassment.

All **<Organisation name>** staff are required to treat others with dignity, courtesy and respect.

By effectively implementing our *Workplace Racial Discrimination Policy* we **<Organisation name>** commit to providing an environment for all workplace participants that promotes respectful and positive behaviour and values.

3. STAFF RIGHTS AND RESPONSIBILITIES

All staff are entitled to:

- recruitment, selection, retention and internal progression decisions that are based on an equity framework that strives to create a culturally diverse and inclusive workplace
- a workplace free from racial discrimination and harassment
- the right to raise issues or to make an enquiry or complaint in a reasonable, respectful and confidential manner without being victimised
- reasonable flexibility in working arrangements, especially where needed to accommodate any family, cultural, kinship responsibilities or religious beliefs.

All staff must:

- follow the standards of behaviour outlined in this policy
- respect the confidentiality of the complaint resolution procedures
- treat everyone with dignity, courtesy and respect at all times
- act in accordance with the member protection policy, to be responsible and accountable for their behaviour at all times.

3.1. ADDITIONAL RESPONSIBILITIES OF MANAGERS AND SUPERVISORS

Managers and supervisors must also:

- model appropriate standards of behaviour
- take steps to educate and make staff aware of their obligations under this policy and the law
- intervene quickly and appropriately when they become aware of inappropriate behaviour
- report complaints about breaches of this policy in accordance with the relevant complaint handling policy <Guidance note: link to your complaint handling policy>
- ensure staff who raise an issue or make a complaint are not victimised
- ensure that recruitment decisions are based on an equity framework and that no discriminatory requests for information are made
- consider requests for flexible work arrangements in accordance with the employer's legal obligations.

4. UNACCEPTABLE CONDUCT

Racism, racial discrimination and harassment, racial vilification, and racial hatred, are unacceptable at **<Organisation name>**.

Staff (including managers) found to have engaged in such conduct might be counselled, warned or disciplined. Severe or repeated breaches can lead to formal discipline up to and including dismissal.

4.1. RACIAL DISCRIMINATION

Racial discrimination occurs when a person is treated less favourably, or not given the same opportunities, as others in a similar situation, because of their race, the country where they were born, their ethnic origin or their skin colour. The *Racial Discrimination Act 1975 (Cth)* (RDA) makes it unlawful to discriminate against a person in Australia because of their race, colour, descent, national origin or ethnic origin, or immigrant status. The RDA protects people from racial discrimination in many areas of public life, including employment, education, getting or using services, renting or buying a house or unit, and accessing public places.

Racial discrimination can occur:

Directly, when a person or group is treated less favourably than another person or group in a similar situation because of a personal characteristic protected by law (see list below).

[Guidance note (delete this later): Include your own organisation specific example here] *For example, an athlete is harassed and humiliated by other athletes on social media because of their race.*

Indirectly, when an unreasonable requirement, condition or practice is imposed that has, or is likely to have, the effect of disadvantaging people with a personal characteristic protected by law (see list below).

[Guidance note (delete this later): Include your own organisation specific example here] *For example, a club says that participants must not wear any headwear in games, as this is likely to have an unfair effect on other players from certain racial or ethnic backgrounds.*

Protected personal characteristics under Federal (racial) discrimination law include:

- race
- colour
- descent
- national origin
- ethnic background
- immigrant status
- religion.

It is also against the law to treat someone unfavourably because you assume they have a personal characteristic or may have it at some time in the future, or because they have an association with someone who has, or is assumed to have, one of these characteristics.

[Guidance note (delete this later): Include your own organisation specific example here] *For example, calling a player a derogatory name because their family is from a particular ethnic community.*

4.2. RACIAL HATRED

Racial hatred is also unlawful under the RDA. Racial hatred involves behaviour such as saying something in public that is reasonably likely to offend, insult, humiliate or intimidate a person or group because of their race, colour, or national or ethnic origin.

4.3. VICTIMISATION

Victimisation is subjecting or threatening to subject someone to a detriment because they have asserted their rights under the law, made a complaint, helped someone else make a complaint, or refused to do something because it would be discrimination or victimisation.

[Guidance note (delete this later): Include your own organisation specific example here] *For example, telling a player not to make a complaint as it may cost them a place on the team.*

Victimisation is against the law.

It is also victimisation to threaten someone (such as a witness) who may be involved in investigating an equal opportunity concern or complaint.

Victimisation is a very serious breach of this policy and is likely (depending on the severity and circumstances) to result in formal discipline against the perpetrator.

<Organisation name> has a zero-tolerance approach to victimisation.

4.4. CONFIDENTIALITY

Confidentiality is central to the complaint handling process. Breaching confidentiality can have significant negative consequences for all those involved, and as such needs to be respected by all parties.

It is unacceptable for staff at **<Organisation name>** to talk with other staff members, customers, suppliers or other workplace participants about any complaint of racial discrimination.

Breaching the confidentiality of a complaint investigation or inappropriately disclosing personal information is a serious breach of this policy and may lead to formal discipline.

5. JOB EQUITY AT <ORGANISATION NAME>

All recruitment, job selection and retention decisions at **<Organisation name>** will be based on an equity framework that recognises the value of a culturally diverse and inclusive workplace.

The equity framework should include regular assessments of potential barriers to recruitment and internal progression for people of culturally and linguistically diverse, or First Nations communities, and implementing measures to address these.

It is unacceptable and may be against the law to ask job candidates questions, or to in any other way seek information, about their personal characteristics, unless this can be shown to be directly relevant to a genuine requirement of the position.

6. RESOLVING ISSUES AT <ORGANISATION NAME>

<Organisation name> strongly encourages any staff member who believes they have been discriminated against, harassed, vilified or victimised to take appropriate action by [Guidance note (delete this later): explain how to make a complaint and provide for an initial contact person. Reference appropriate policy].

<Organisation name> also strongly encourages any staff member who may have witnessed others being discriminated against, harassed, vilified, or victimised to take appropriate action by [Guidance note (delete this later): explain how to make a complaint and provide for an initial contact person]. More information is available via the “Bystander Intervention” resource, which can be accessed at https://humanrights.gov.au/our-work/race-discrimination/publications/guide-addressing-spectator-racism-sports-2021.

Staff who do not feel safe or confident to take such action may seek assistance from [Guidance note (delete this later): list contacts.] for advice and support or action on their behalf.

Resolving issues should follow the **<Organisation name>** complaint handling policy and should:

- centre the experiences of the target person/s
- follow a trauma-informed complaint handling process
- include employer obligations regarding support for the target of the alleged discrimination as well as the alleged perpetrator
- be transparent and clear, and ensure the target is aware of the steps that may be taken, and is regularly informed of the progress and actions as they are taken
- provide the opportunity to make a complaint without reprisal
- incorporate a review of organisational practices and structures that potentially contributed to the alleged instance of racial discrimination, harassment, vilification or victimisation
- prompt the organisation to seek advice from independent experts to meet any cultural or mental health needs throughout the complaints handling process.

6.1. SUPPORTING PERSON/S INVOLVED IN A RACIAL DISCRIMINATION ISSUE

<Organisation name> understands that person/s involved in a racial discrimination issue may require additional support during and after the complaint handling process.

<Organisation name> has developed a set of resources to provide to the person/s during the process so that they may access support. [Guidance note (delete this later): support services should aim to be local, culturally appropriate, free and accessible. The resource “Support services for targets of racism” may be helpful to develop your <organisation name> resources].

[Guidance note (delete this later): keep the below section if your organisation has an EAP]

<Organisation name> staff are entitled to a certain amount of free, professional counselling from our employee assistance program. To access the employee assistance program, contact [Guidance note (delete this later): provide contact details to access this service.].

Employee assistance program counselling is confidential, and nothing discussed with a counsellor will be communicated back to **<Organisation name>**. Employee assistance program counselling is available free to **<Organisation name>** staff regardless of whether the issue is related to a workplace problem or some other issue for the staff member.

7. OTHER RELEVANT <ORGANISATION NAME> POLICIES

Staff, especially managers and supervisors, are encouraged to read this policy in conjunction with other relevant **<Organisation name>** policies, including [Guidance note (delete this later): list relevant policies and provide links to them wherever possible. See below suggestions.].

- Member Protection Policy
- Codes of Conduct/Behaviour
- Complaints handling policy
- Workplace sexual harassment policy
- Flexible work arrangements policy
- Pregnancy and work procedure and policy
- Occupational health and safety policy
- Discipline procedure
- Mission, vision and values statements
- Enterprise agreements [Guidance note (delete this later): list relevant agreements.]
- Service agreement [Guidance note (delete this later): any document that outlines the rights of clients and customers to complain about the service they are receiving.]

8. MORE INFORMATION

If you have a query about this policy or need more information, please contact [Guidance note (delete this later): list contacts].

9. REVIEW DETAILS

This policy was adopted by **<Organisation name>** on [insert date].

This policy was last updated on [insert date].

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General enquiries
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www.humanrights.gov.au

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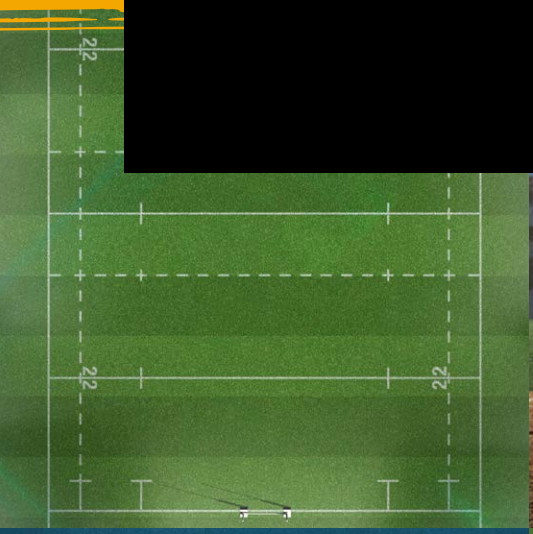
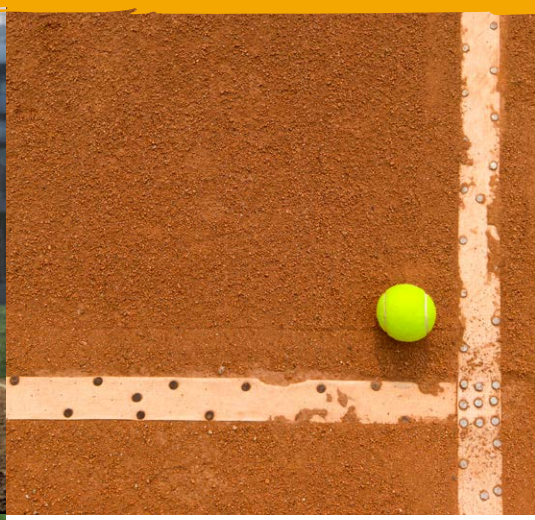
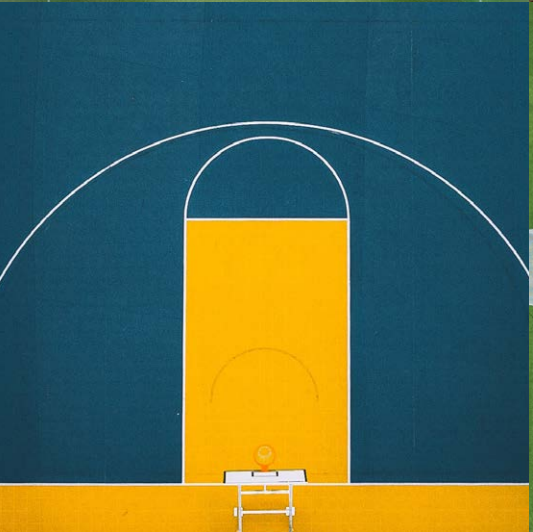
RACISM. IT STOPS WITH ME

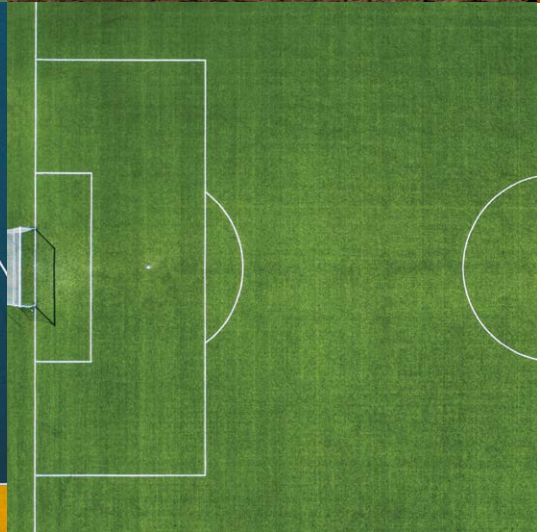
RACISM. NOBODY WINS.

CHECKLIST FOR CREATING ANTI-SOCIAL BEHAVIOUR REPORTING MECHANISMS









Australian Human Rights Commission

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CHECKLIST FOR CREATING ANTI-SOCIAL BEHAVIOUR REPORTING MECHANISMS

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FOREWORD

The checklist below is designed for sporting organisations to minimise spectator racism and identify practical steps they can take to promote a safe and respectful environment for all.

RECOGNISING SPECTATOR RACISM

☑ **Do you have guidelines in place for people to use when they have witnessed spectator racism?**

a. Is there information about the guidelines when purchasing tickets?

b. At a community event, where can someone find these guidelines?

c. Is there information about the guidelines at the entry gate?

☑ **Do you have any signage or posters about spectator racism and the club's anti-discrimination and anti-racism policy?**

☑ **Do you have ground announcement scripts or videos to play at events about spectator racism?**

☑ **Is your organisation's position on anti-racism clear on social media and/or other electronic communications to spectators and members?**

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CHECKLIST FOR CREATING ANTI-SOCIAL BEHAVIOUR REPORTING MECHANISMS

RACISM REPORTING MECHANISM[1]

- ☑ Do you have a range of reporting mechanisms and methods in place?
- ☑ Do these mechanisms centre the experience of the target and use a trauma-informed approach?
- ☑ Do the mechanisms cater for a diverse range of people, such as:
  - a. People with disabilities
  - b. People from culturally and linguistically diverse backgrounds
  - c. People with limited access or use of technology?

SUGGESTION FOR REPORTING MECHANISMS

1. Sending text messages to a designated spectator racism reporting phone number.
2. Having QR codes around the venue that link to reporting forms.
3. Posting the links to the forms on social media pages.
4. Having a designated email for reporting racism.
5. Having a clearly identified official at the facility who can provide 'on the ground' assistance when incidents occur, such as a Ground Marshall or Member Protection Information Officer.
6. Make sure these methods user-friendly and accessible.

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CHECKLIST FOR CREATING ANTI-SOCIAL BEHAVIOUR REPORTING MECHANISMS

RACISM REPORTING INFORMATION[2]

☑ **Does your reporting ensure that adequate information is recorded? Suggested information to include:**

a. Name (or the option for anonymity)

b. Contact details
   i. phone number
   ii. email

c. Location of incident
   i. Venue
   ii. Seating section (row, seat number)
   iii. Game

d. Details of the perpetrator if any (e.g. supporter, player, employee etc)

e. Date and time of incident

f. Details of incident
   i. What happened?
   ii. Who was involved (their names if known)?

g. Was the incident reported to any other officials? If yes, please provide details.

☑ **Will the person reporting the incident have the ability to amend their report after submitting?**

☑ **Is there clear and accessible information on what happens when a report is made?**

☑ **Is there information about supports available to the person making the report?**

☑ **Will the person making the report know the report has been received and will they be provided with some information about the process that will be followed and the outcome of the report?**

☑ **Are mediation processes available to those involved?**

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CHECKLIST FOR CREATING ANTI-SOCIAL BEHAVIOUR REPORTING MECHANISMS

WHAT HAPPENS AFTER THE REPORT HAS BEEN MADE?[3]

Do you have a procedure in place for handling reports?
A possible procedure could include:

STAGE 1.	Notify relevant personnel (e.g., security, club staff etc.) of the incident to ensure the immediate safety of the target, bystanders and staff.
STAGE 2.	Ensure that the target/s are safe and have been offered initial support after the incident.
STAGE 3.	Ensure that the perpetrator/s have been removed from the premises or taken to another location for the safety of all involved.
STAGE 4.	Ensure the incident report has been received and documented.
STAGE 5.	Ensure the person who has reported has been given information on what to expect, processes, and the timeline for the outcome.
STAGE 6.	Send the report to relevant management to be analysed, investigated and fact checked.
STAGE 7.	Handle the complaint report as per code or club regulatory policy on racial discrimination. This should include ongoing support for the target of the racist incident using a trauma-informed approach.
STAGE 8.	Implement necessary actions.
STAGE 9.	Provide an update to the target/s on the outcome of the matter.
STAGE 10.	Give ongoing support to the target of the incident, if required.

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CHECKLIST FOR CREATING ANTI-SOCIAL BEHAVIOUR REPORTING MECHANISMS

ENDNOTES

[1]'Kick it Out', *Other Reporting Mechanisms* (Web Page, September 2021) https://www.kickitout.org/other-reporting-methods

[2]'MCG', *Contact Us* (Web Page, August 2021) https://www.mcg.org.au/about-us/contact-us

[3]Australian Human Rights Commission, *Guidelines: Equal opportunity for women and girls in golf* (Report, March 2019) https://humanrights.gov.au/our-work/sex-discrimination/publications/guidelines-equal-opportunity-women-and-girls-golf-2019

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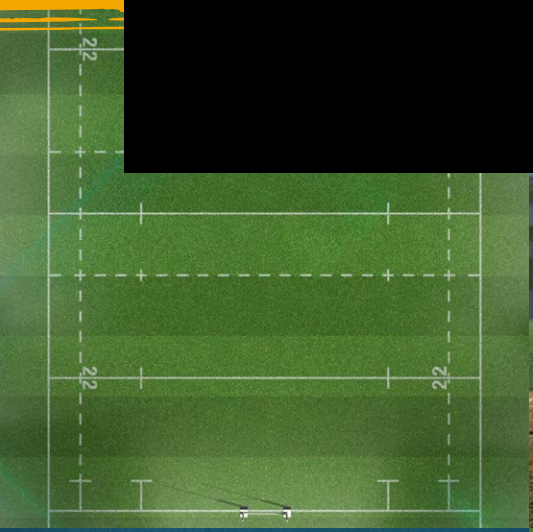
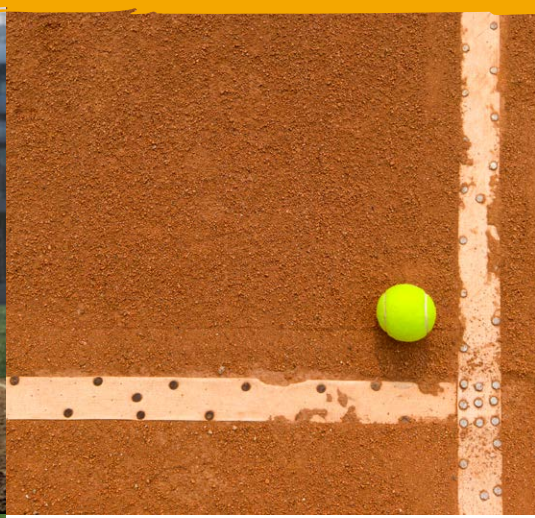
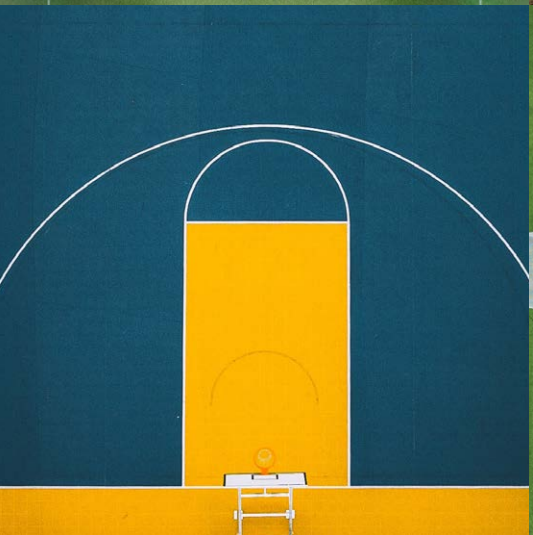
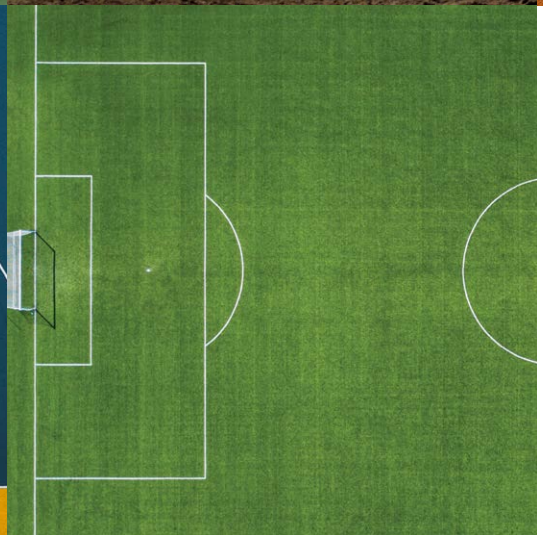
DEFINITIONS OF KEY TERMS









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RACISM.
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RACISM.
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DEFINITIONS OF KEY TERMS

RACISM

Racism takes many forms and can happen in many places. It includes prejudice, discrimination or hatred directed at someone because of their colour, ethnicity or national origin. People often associate racism with acts of abuse or harassment. However, it doesn't need to involve violent or intimidating behaviour.

Racism can be revealed through people's actions as well as their attitudes. It can also be reflected in systems and institutions that operate in ways that lead to unequal outcomes. Racism is more than just words, beliefs and actions. It includes all the barriers that prevent people from enjoying dignity and equality because of their race.[1]

RACISM CAN BE:

Interpersonal racism – this occurs during interactions between individuals and can include, making negative comments about a particular ethnic group in person or online, calling others racist names, and bullying, hassling or intimidating others because of their race.

Institutional racism – encompasses the policies, practices and procedures that inform and direct the everyday operation of organisations, businesses and enterprises.[2] An example of this would be an organisation banning the use of swimming caps created specifically for individuals with black hair, as enforcement of such a rule prevents and excludes the participation of members from some culturally diverse communities in sports.[3]

Systemic racism – refers to the history, ideology, culture and interactions of institutions and policies that work together to perpetuate inequity. It describes the way in which institutions and structures fail to provide adequate service provision and equal opportunities to people because of their racial or cultural background. Systemic racism is responsible for certain communities experiencing poor life outcomes, lower pay, and less opportunities for advancement within leadership positions.[4] Sometimes groups and organisations can have rules that seem to be fair to everyone, but they actually make things more difficult for people from particular cultural or ethnic backgrounds. For example, when an organisation has a policy of not hiring people who have been educated at an overseas school or university.[5]

RACISM.
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DEFINITIONS OF KEY TERMS

ANTI-RACISM

Anti-racism is an active process, unlike the passive stance of 'non-racism'. Anti-racism work requires consistent, committed and targeted action and attention. Racism operates at systemic, institutional, interpersonal and individual levels. Typically, individual and interpersonal racism receives more focus than institutional and systemic racism, and as a result deeper, systemic racial injustice continues to flourish. Anti-racism involves focusing on systemic racism.[6]

RACIAL DISCRIMINATION

Racial discrimination occurs when a person is treated less favourably, or not given the same opportunities, as others in a similar situation, because of their race, the country where they were born, their ethnic origin or their skin colour. The Racial Discrimination Act 1975 (RDA) for example makes it unlawful to discriminate against a person in Australia because of their race, colour, descent, national origin or ethnic origin, or immigrant status. The RDA protects people from racial discrimination in many areas of public life, including employment, education, getting or using services, renting or buying a house or unit, and accessing public places.[7]

Racial hatred is also unlawful under the RDA. Racial hatred involves behaviour such as saying something in public that is reasonably likely to offend, insult, humiliate or intimidate a person or group because of their race, colour, or national or ethnic origin.[8] Some limited exemptions and exceptions apply.

HARASSMENT

Harassment can be against the law when a person is treated less favourably on the basis of certain personal characteristics, such as race. Some limited exemptions and exceptions apply.

Harassment can include behaviour such as:

- telling insulting jokes about particular racial groups
- making derogatory comments or taunts about someone's race.

The law also has specific provisions relating to certain types of harassment, including:

- offensive behaviour based on racial hatred is against the law. Racial hatred is defined as something done in public that offends, insults, humiliates or intimidates a person or group of people because of their race, colour or national or ethnic origin.

A one-off incident can constitute harassment. All incidents of harassment require employers or managers to respond quickly and appropriately.

Employers can also be held liable for harassment by their employees. This is called 'vicarious liability'.[9]

RACISM.
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DEFINITIONS OF KEY TERMS

VICTIMISATION

The legal definition of victimisation is when someone "subjects or threatens to subject the other person to any detriment". Victimisation is treating someone badly or unfairly, or threatening to treat someone badly or unfairly, because they have asserted their rights under the law, made a complaint about discrimination or racial and religious vilification, helped someone else make a complaint, or it is believed they intend to make a complaint. Victimisation is against the law.[10]

BYSTANDER

A person or persons, not directly involved as a target or perpetrator, who observes an act of racially motivated violence, discrimination or other unacceptable or offensive behaviour.[11] Although not actively partaking in racist conduct, bystanders have a choice to respond to these incidents. Bystander actions may include aiming to stop the perpetrator of racism, reducing its escalation, supporting a target of racism, formally reporting the incident or seeking assistance from others.[12] Often, someone who chooses to take action in this instance is called an Upstander.[13]

TRAUMA-INFORMED APPROACH

Trauma-informed practice is a strengths-based framework grounded in an understanding of and responsiveness to the impact of trauma, that emphasises physical, psychological, and emotional safety for everyone, and that creates opportunities for survivors of trauma to rebuild a sense of control and empowerment.

Becoming trauma-informed is about supporting people to feel safe in their interactions with others in their environments. Trauma-informed approaches utilise meaningful collaboration with people who have experienced trauma, to design organisations which accommodate the vulnerabilities of trauma survivors and minimise the risk of re-traumatisation.[14] In regard to racial trauma, typically this would involve consultation with people who are the targets of racism and acting on their thoughts and ideas on how to address racism.

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DEFINITIONS OF KEY TERMS

SUPERVISORS

This covers a broad range of roles and responsibilities typically found in sporting organisations, such as coaches, officials, ground managers, classifiers, chaperones and other roles where supervision of participants is a requirement.

TARGET (OF RACISM)

The term 'target' of racism is used throughout the spectator racism resources. This refers to the person/s who are recipients of racism and the targets of abuse. This term is preferred to other terms, such as *victim*, as it is a neutral term that is not disempowering to individuals who are targets of abuse.

ENDNOTES

[1]Australian Human Rights Commission, 'What is Racism?', *Race Discrimination* (Web Page) https://humanrights.gov.au/our-work/race-discrimination/what-racism

[2]'Learn more about racism', *Creative Equity Toolkit* (Web Page) https://creativeequitytoolkit.org/topic/organisational-culture/racism/

[3]Priya Elan, 'Swimming caps for natural black hair rules out of Olympic Games', The Guardian (Online Article, 2 July 2021) https://www.theguardian.com/sport/2021/jul/02/swimming-caps-for-natural-black-hair-ruled-out-of-olympic-games-alice-dearing; Evan Nicole Brown, 'How a Ban on a Swim Cap Galvanized Black Swimmers', *The New York Times* (Online Article, 1 August 2021) https://www.nytimes.com/2021/07/14/style/olympics-soul-cap-ban-swimming.html

[4]'Learn more about racism', *Creative Equity Toolkit* (Web Page) https://creativeequitytoolkit.org/topic/organisational-culture/racism/

[5]Australian Human Rights Commission, 'What is Racism?', *Race Discrimination* (Web Page) https://humanrights.gov.au/our-work/race-discrimination/what-racism

[6]'Learn more about racism', *Creative Equity Toolkit* (Web Page) https://creativeequitytoolkit.org/topic/organisational-culture/racism/

[7]Australian Human Rights Commission, *Racial Discrimination* (Report, November 2014) https://humanrights.gov.au/sites/default/files/GPGB_racial_discrimination.pdf

[8]Australian Human Rights Commission, *Racial Discrimination* (Report, November 2014) https://humanrights.gov.au/sites/default/files/GPGB_racial_discrimination.pdf

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DEFINITIONS OF KEY TERMS

[9]'Harassment', *Australian Human Rights Commission* (Web Page) https://humanrights.gov.au/quick-guide/12040

[10]'Victimisation', *Victorian Equal Opportunity and Human Rights Commission* (Web Page) https://www.humanrights.vic.gov.au/for-individuals/victimisation/

[11]Zachary Russell et al, *Choosing to act: Bystander action to prevent race-based discrimination and support cultural diversity in the Victorian Community* (Research report, June 2013) 3.

[12]Jacqueline K. Nelson, Kevin M. Dunn and Yin Paradies, 'Bystander Anti-Racism: A Review of the Literature' (2011) 11(1) *Analyses of Social Issues and Public Policy 263*, 264-265.

[13]ReachOut, 'How to be an Upstander', *Bystander* (Web Page) https://au.reachout.com/articles/how-to-be-an-upstander

[14]'Trauma-informed Services', *Blue Knot Foundation* (Web Page) https://professionals.blueknot.org.au/resources/trauma-informed-services/

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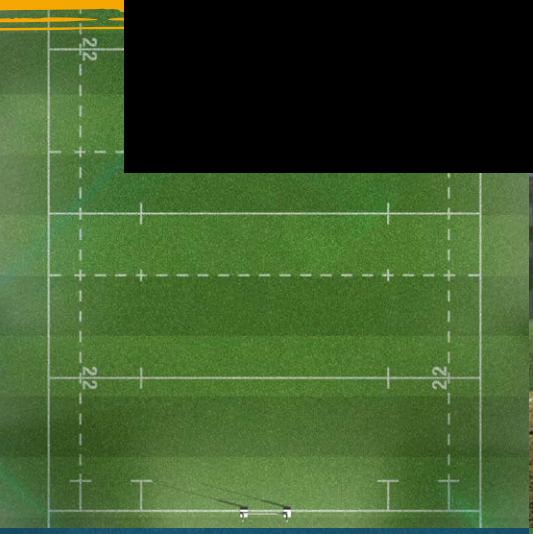
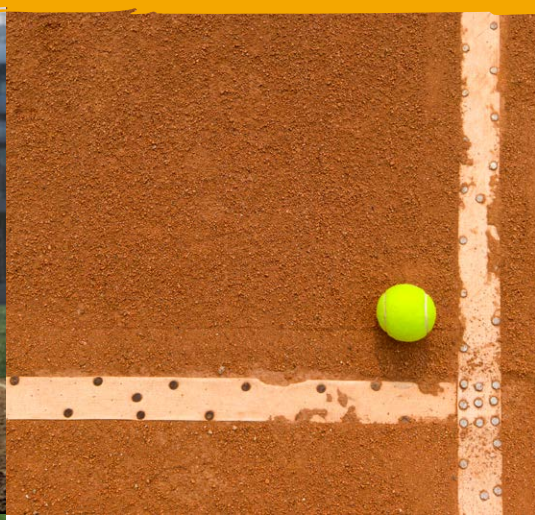
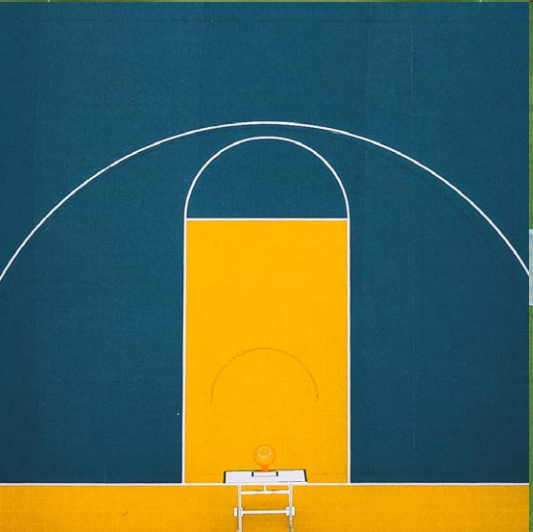
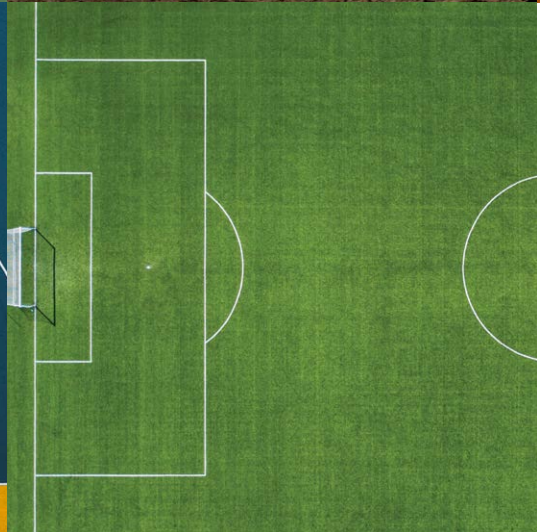
INFORMATION ON SUPPORT SERVICES AVAILABLE FOR TARGETS OF RACISM









Australian Human Rights Commission

RACISM.
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INFORMATION ON SUPPORT SERVICES AVAILABLE FOR TARGETS OF RACISM

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RACISM.
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INFORMATION ON SUPPORT SERVICES AVAILABLE FOR TARGETS OF RACISM

FOREWORD

This resource includes information on:

- responding to racism
- where to report
- where to access support.

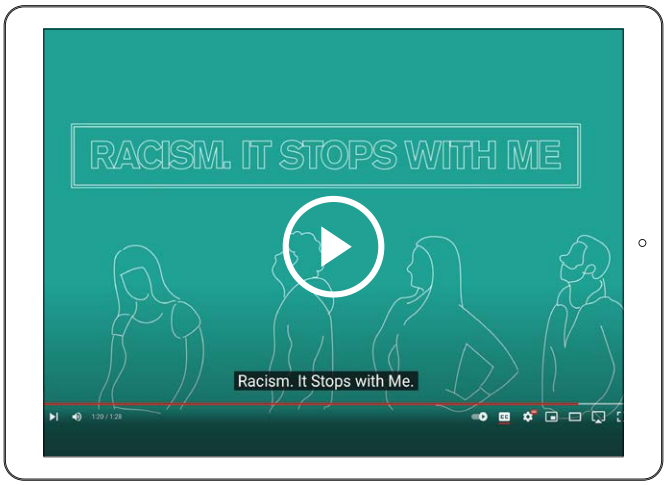
RESPONDING TO RACISM

Racism comes in many forms, and is not limited to racist incidents, vilification, harassment or abuse. However, the following video provides information on responding to racist incidents that happen in public and online. It may be a useful resource for spectators.

If you see or experience racism in a sporting context, such as other spectators shouting racist abuse, there are actions you can take. These actions should never put you or others in any danger. Situations may be quite volatile and emotional so always keep in mind your own and others' personal safety.

Information on reporting is below but an important action that will help authorities appropriately address incidents of racism is to make a record of what you experience or see. You can video an incident, take pictures and write down what occurred, when it occurred and who was involved. It's important to do this at the time or shortly after the incident/s occur to help ensure your records are as accurate as possible. These simple actions can go a long way in helping authorities address racism.

What should you do if you see or experience racism?[1]



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INFORMATION ON SUPPORT SERVICES AVAILABLE FOR TARGETS OF RACISM

WHERE TO MAKE A REPORT

There are many places you can make a report. Depending on the nature of the incident, some may be more appropriate than others.

POLICE

If you think you or somebody else may be threatened or in danger, call the police on 000. You can also report behaviour that you think might be a criminal offense after an incident by phoning the police on 131 444.

AUSTRALIAN HUMAN RIGHTS COMMISSION

Federal anti-discrimination law says that people can make complaints to the Australian Human Rights Commission about unlawful race discrimination. There is no cost in making a complaint.[2]

The Commission is an independent agency whose role is to get both sides of the story and where appropriate, help those involved to resolve the complaint. The Commission is not a court and does not have the power to decide if what you are complaining about is unlawful discrimination. However, in some cases, for example, where your complaint is not resolved, you may be able to take your complaint to court. The court can decide if what you are complaining about is unlawful discrimination.

The types of behaviour that can be dealt with by the Commission include:

- racial discrimination in areas including employment, education, accommodation, getting or using services or accessing public places
- racially abusive comments at sporting events by players, spectators, coaches or officials
- racially offensive material on the internet, in the media or any other publications
- racially abusive comments in a public place, such as a shop, workplace, park, on public transport or at school.

You can make a complaint about racism or discrimination via email at complaintsinfo@humanrights.gov.au or via an online form https://humanrights.gov.au/complaints/make-complaint.
You can also phone the Commission for advice on 1300 656 419 or 02 9284 9888.

More information about the complaints process can be found at https://humanrights.gov.au/our-work/complaint-information-service/complaints-under-racial-discrimination-act-0

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INFORMATION ON SUPPORT SERVICES AVAILABLE FOR TARGETS OF RACISM

OFFICE OF THE ESAFETY COMMISSIONER

If the incident happens online, you can report it to the Office of the eSafety Commissioner. You can help to collect and preserve evidence by taking a screenshot of the offensive post or content. It can help authorities identify the perpetrator and ensure appropriate action can be taken in response to their behaviour. You can make the report online at https://www.esafety.gov.au/report

STATE AND TERRITORY ANTI-DISCRIMINATION COMMISSIONS

You can also make a complaint with your local state or territory-based commission. What is unlawful varies across jurisdictions, therefore more information about the reporting process can be found at the below websites.

Anti-discrimination NSW:
https://antidiscrimination.nsw.gov.au/anti-discrimination-nsw/complaints/how-to-make-a-complaint.html

Queensland Human Rights Commission:
https://www.qhrc.qld.gov.au/complaints/making-a-complaint

Victorian Equal Opportunity and Human Rights Commission:
https://www.humanrights.vic.gov.au/dispute-resolution/what-happens-when-you-make-a-complaint/

South Australia Equal Opportunity Commission:
https://www.eoc.sa.gov.au/complaints/making-a-complaint

Northern Territory Anti-Discrimination Commission:
https://adc.nt.gov.au/complaints

Western Australia Equal Opportunity Commission:
https://www.wa.gov.au/service/community-services/social-justice-and-equity/make-discrimination-and-harassment-complaint

Equal Opportunity Tasmania:
https://equalopportunity.tas.gov.au/complaints

ACT Human Rights Commission:
https://hrc.act.gov.au/complaints/

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INFORMATION ON SUPPORT SERVICES AVAILABLE FOR TARGETS OF RACISM

SPORTS REPORTING MECHANISMS

Your club, state organisation and national body will have complaint handling policies and processes in place. They should also have designated contacts for complaints within the organisation, such as a Member Protection Information Officer (MPIO) or a Complaints Manager. Reports should be made to the appropriate contact within the organisation – this will help ensure that the proper actions are taken to address incidents of racism.

The National Sports Tribunal also offer dispute resolution services for harassment and discrimination. Note that there is a fee for this service. More details about the process can be found at https://www.nationalsportstribunal.gov.au/dispute-resolution-services

OTHER REPORTING MECHANISMS

Islamophobia Register: Making a report to the Islamophobia Register does not involve a formal investigation, however it is a secure reporting mechanism to build knowledge around incidents of Islamophobia and anti-Muslim sentiments that are occurring across Australia. There is also access to victim support through the organisation. You can make a report online and access support at https://www.islamophobia.com.au/report/

Asian Australian Alliance Register: You can make a report to the COVID-19 Racism Incident Report to help collect data around incidents of racism for Australians who are of Asian background. You can make a report online at https://asianaustralianalliance.net/covid-19-coronavirus-racism-incident-report/

Victorian Equal Opportunity and Human Rights Commission Community Reporting Tool: If you want to share your experience but do not want to make a formal complaint, the community reporting tool can be useful to understand the nature of racism and discrimination happening within communities. You can report online at https://www.humanrights.vic.gov.au/get-help/community-reporting-tool/

You may also be aware of other community-based reporting mechanisms that provide culturally appropriate avenues for reporting racism.

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INFORMATION ON SUPPORT SERVICES AVAILABLE FOR TARGETS OF RACISM

WHERE TO SEEK SUPPORT

Being the target of racism can be distressing and traumatising. Targets of racism might need to talk to someone after an incident of racism occurs. Support may come from family, friends or people within the target's community, but more formal support services are also available.

NATIONAL SUPPORT SERVICES

Emergency services	000
Lifeline	call 13 11 14 or text 0477 13 11 14
Suicide Call Back Service	1300 659 467
MensLine	1300 789 978
Beyond Blue	1300 22 4636
Kids Helpline	1800 55 1800
Q Life	1800 184 527
eHeadspace	https://headspace.org.au/eheadspace/

If you need an interpreter to help speak with any of the above services, please call the Translating and Interpreting Service (TIS National) on 131 450.

If you require hearing or speech assistance, please call the National Relay Service on1300 555 727 (Speak and Listen) or via https://internet-relay.nrscall.gov.au

ABORIGINAL AND TORRES STRAIT ISLANDER SERVICES

Brother to Brother 24/7 Crisis Line for Aboriginal men.
Call 1800 435 799. The line is staffed by Aboriginal men and Elders who a lived experience of various issues.[3]

Well Mob is a social, emotional and cultural wellbeing online platform:
https://wellmob.org.au/

Find your nearest Aboriginal Community Controlled Health Organisation at
https://www.naccho.org.au/map

National Indigenous Postvention Service.
Call 1800 805 801. The line is staffed by Aboriginal or Torres Strait Islander Advocates to support individuals, families, and communities affected by suicide or other significant trauma.[4]

Yarning Safe'n'Strong 24/7 phone counselling.
Call 1800 959 563 or visit https://www.vahs.org.au/yarning-safenstrong/

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INFORMATION ON SUPPORT SERVICES AVAILABLE FOR TARGETS OF RACISM

MULTICULTURAL SERVICES

Transcultural Mental Health Service provides translated mental health factsheets, and can be found online at https://www.dhi.health.nsw.gov.au/transcultural-mental-health-centre-tmhc/resources/in-your-language. Access to free bilingual counselling is only for people residing within NSW who are already connected to a NSW Mental Health Service.

Health Translations Victoria provides translated mental health factsheets, which can be found online at https://healthtranslations.vic.gov.au/bhcv2/bhcht.nsf/PresentEnglishResource?Open&x=&s=Mental_health

Embrace Multicultural Mental Health provides multilingual mental health information and community services. https://embracementalhealth.org.au/community

SBS Settlement Guide provides a state-based directory of culturally responsive mental health services. https://www.sbs.com.au/language/english/mental-health-services-in-australia-in-your-language#toc-mod-article_module-1-0

SPORT-SPECIFIC SERVICES

Support may also be available within your sport or recreation organisation. Many national and state sports organisations now have athlete and member welfare support programs. Athlete Welfare Officers provide athletes and members with specific avenues for support and help, including supporting targets of racism in their sport. Check your own sports/recreation organisation to see what support they offer.

Nationally, there is the **Mental Health Referral Network** developed by the Australian Institute of Sport, which provides athletes, coaches or support members with free access to a range of confidential support services. For more information of how to access their services, visit https://www.ais.gov.au/MHRN

Hey Sport, RU OK is a campaign specifically developed to benefit all participants, officials, administrators, and supporters across the grass roots sporting community. There are resources to help sports organisations build a positive RU OK culture for their athletes and players. You can access the resources at https://www.ruok.org.au/sport

ENDNOTES

[1]'What should you do if you see or experience Racism?', *Australian Human Rights Commission* (Video, 3 September 2020) https://www.youtube.com/watch?v=TOOtOvv9i3c&t=11s

[2]Australian Human Rights Commission, 'Complaints under the Racial Discrimination Act' (Fact Sheet) https://humanrights.gov.au/our-work/complaint-information-service/complaints-under-racial-discrimination-act-0

[3]'Brother to Brother 24 Hour Crisis Line', *Dardi Munwuhro* (Web Page) https://www.dardimunwurro.com.au/brother-to-brother/

[4]'Postvention Services', *Thirrili* (Web Page) https://thirrili.com.au/nips/postvention-services

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RACISM. IT STOPS WITH ME

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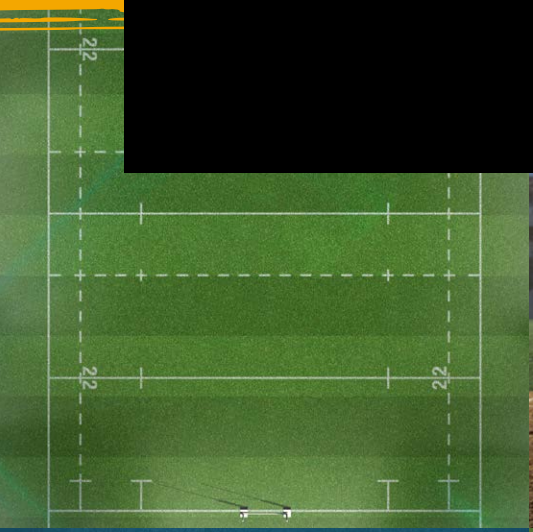
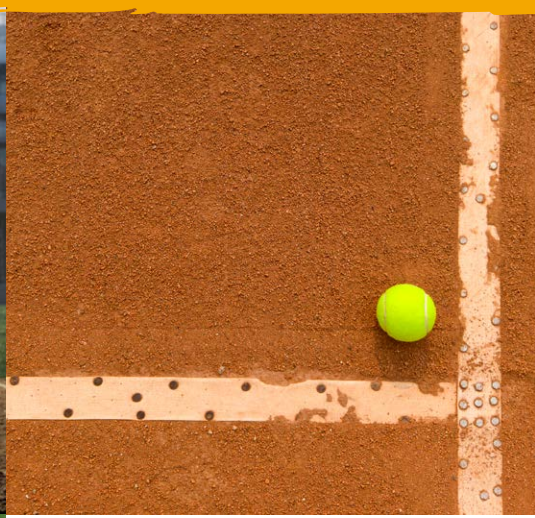
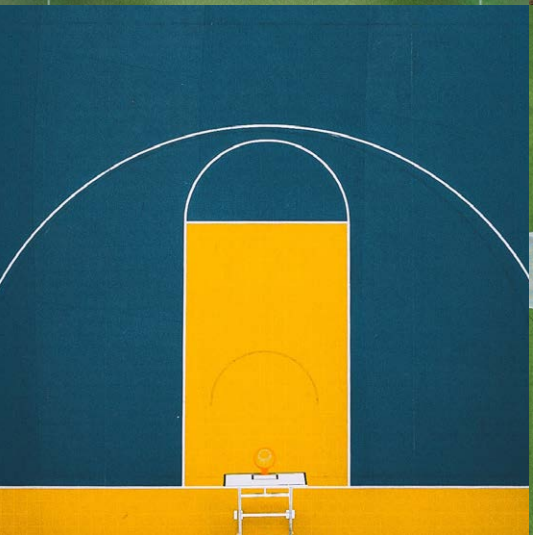
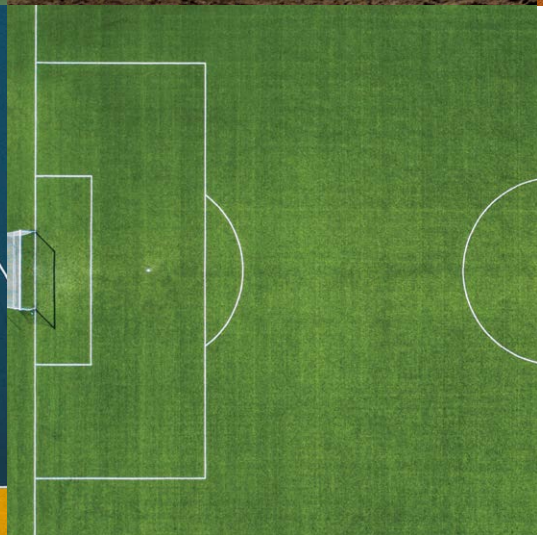
GUIDE TO BYSTANDER INTERVENTION









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GUIDE TO BYSTANDER INTERVENTION

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FOREWORD

A bystander is anyone who witnesses a racist incident. Bystander anti-racism is action taken by spectators or others in response to incidents of interpersonal racism. At sporting events, racism can occur in many forms that are often not recognised or are denied as racism. This can include jokes, and snide or discriminatory comments. Racism can occur between and toward spectators, players and officials. Racism can also occur in any setting including at events, training, meetings, in car parks and online.

Bystanders can play an important role in calling out racism, challenging perpetrators and providing support to targets of racism. Often, when bystanders speak up, others speak up in support. When a few people come together as strangers to speak against racism, it sends a powerful message for change.

RACISM.
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WITH ME

However, taking bystander action can be challenging at times. The below information may be useful for organisational staff, players, spectators, match officials, volunteers, and other relevant personnel. It details some actions that can be taken when witnessing an incident of interpersonal racism. For more information, please visit the ***Racism. It Stops With Me*** website: https://itstopswithme.humanrights.gov.au/.

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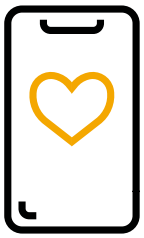
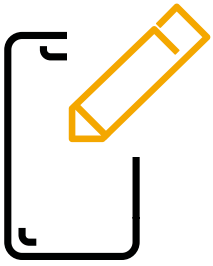
GUIDE TO BYSTANDER INTERVENTION

BYSTANDER INTERVENTION



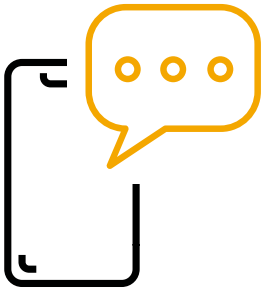
SUPPORT

- If you witness someone being racially targeted in public, an important way to support the target is to stand with them and check if they're feeling safe.
- If the situation is unsafe, try to remove yourself and the target to a safer location.
- If it is safe to do so, try to diffuse the situation by remaining calm and asking the perpetrator to stop saying or doing harmful things.
- Another approach to diffuse the situation is to ask open-ended questions of the perpetrator. This might include questions such as, "Why did you say that?". It is important to identify the behaviour or comment as racist or discriminatory.



RECORD

- Recording the incident by video or audio can help provide evidence to authorities for further investigation.
- If recording the incident is not an option, you could make a few notes such as time, date and location. It may also be useful to make a written or audio record of the physical appearance of the perpetrator and details of the incident (what happened, what was said or done etc.) afterwards to help remember the details.
- If there are other witnesses who may give further evidence, it would be helpful to get their contact details if they consent.



REPORT

- Calling the police on 000 may be the best response if you think you or somebody else may be in danger. You can also report behaviour that you think might be a criminal offense by phoning the police assistance line on 131 444. In some cases, it may not be practical to call the police.
- Where possible, report the incident to any relevant authorities such as a member of staff or security guard as soon as practicable. If you are at a sporting match, there may be hotlines or SMS lines you can contact to report a racist incident – check for this information on stadium screens, posters or on stadium or sporting social channels.
- Sporting clubs often have a designated complaint handling officer. This process may be used to facilitate an ongoing investigation into the incident.

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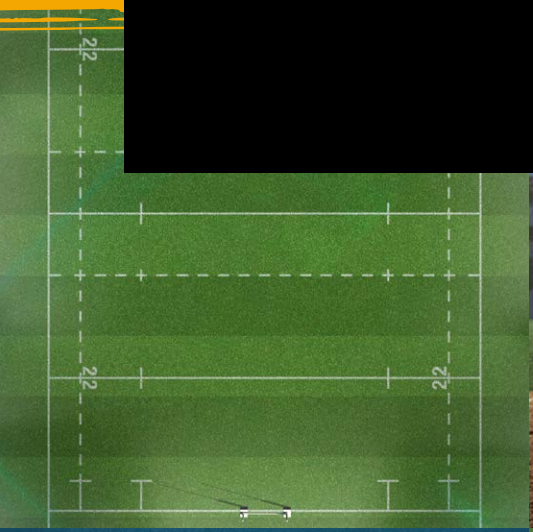
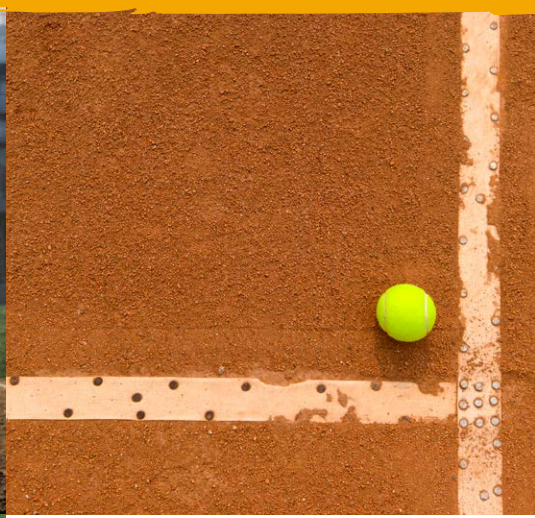
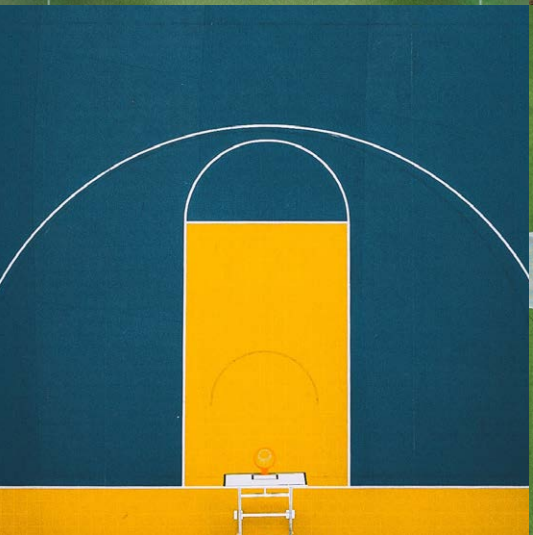
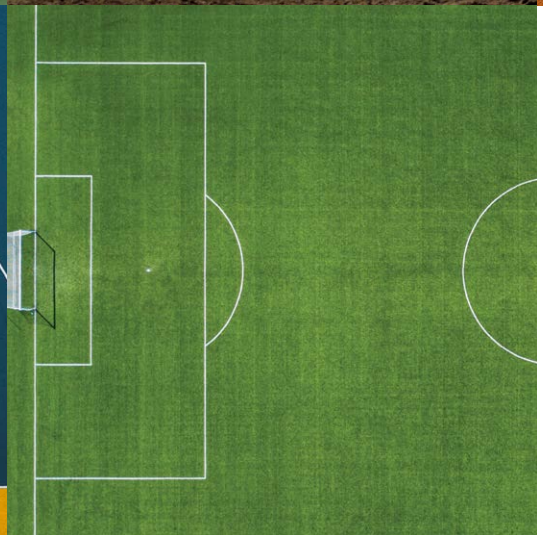
GUIDE TO RACISM COMPLAINTS HANDLING POLICY









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GUIDE TO RACISM COMPLAINTS HANDLING POLICY

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FOREWORD

The handling of complaints about racism and racial discrimination received by your organisation may be categorised as either informal or formal; depending on the nature of the complaint, the circumstances, and the wishes of the person/s targeted. The action taken by your organisation will need to take into consideration the severity and circumstances of the complaint, the wishes of the targeted person/s, along with the organisation's policies and procedures. As complaints are investigated and more evidence emerges, escalation of the issue may be appropriate, and all parties involved must be notified and kept informed throughout the process.

CORE PRINCIPLES

Regardless of the nature of the incident, all complaints should be handled with consideration of the following principles:

- Centring the targeted person/s and their experience, acting in accordance with the principles of a trauma-informed approach.
- The process should be managed in an efficient and timely manner, avoiding unnecessary delays.
- Keeping confidentiality in mind, act with transparency in all dealings, including the disclosure of all relevant information, progress and decisions. In addition, providing the person making the complaint with a copy of the organisation's Member Protection Policy and Codes of Behaviour and explaining how these documents relate to the issue/concern.
- The process should be accessible, easily understood and appropriately available in different languages.
- Allowing for the target/s to withdraw or escalate the process at any time, and retain control of the process.
- Maintaining impartiality in the management of the complaint ensuring each party to the complaint has an opportunity to present their perspective and the opportunity to respond to any matters raised.
- Adhering to the principles of confidentiality and conducting all meetings and discussions in locations or places that are private or away from others.
- Keeping all parties involved informed throughout the process and communicating all developments, changes and decisions as soon as possible.
- Always offering support to all parties involved and ensuring that access to culturally appropriate and accessible supports are available.
- Ensuring that the person/s tasked with dealing with complaints are appropriately trained and supported.

In all matters, the choice of an informal or formal process to resolving complaints is always retained by the targeted person/s. There are benefits and limitations to each process, and it is important that the complainant feels comfortable to purse either option without fear of repercussion.

INFORMAL PROCESSES

The informal complaints handling process should only be carried out when requested by the targeted person/s. The informal process should only occur when there are no other mitigating factors influencing the targeted person/s decision to proceed informally, such as pressure to maintain relationships, fear of repercussions or organisational cultures. Informal processes may also be appropriate when the incident or issue involves children or young people, and the parents/guardians request informal resolution. It is important to ensure that the targeted person/s are provided information and support around escalating the complaint at any stage.

Play by the Rules[1] has further information about informal complaint handling processes and can be accessed at: https://www.playbytherules.net.au/complaints-handling/complaints-procedures-discrimination

FORMAL PROCESSES

The formal complaints handling process may be appropriate in situations of racism and racial discrimination, where the target has requested a formal process.

Issues/incidents that involve aggression, threats or threatening behaviour, bullying, vilification, physical altercations or unlawful actions are examples where the formal complaints process is the most appropriate, and can be requested at any time by the complainant.

The target/s retain the right to discontinue a complaint at any stage of the process. However, it is important to recognise and respond to other factors that may be influencing the targets decision to withdraw from the process, such as further victimisation.

Play by the Rules[2] has further information about formal complaint handling processes can be accessed at: https://www.playbytherules.net.au/complaints-handling/complaints-procedures-discrimination

ENDNOTES

[1]Play by The Rules, *Informal Process Fact Sheet* (Fact Sheet, August 2020) https://www.playbytherules.net.au/complaints-handling/complaints-procedures-discrimination

[2]Play by The Rules, *Formal Process Fact Sheet* (Fact Sheet, September 2020) https://www.playbytherules.net.au/complaints-handling/complaints-procedures-discrimination

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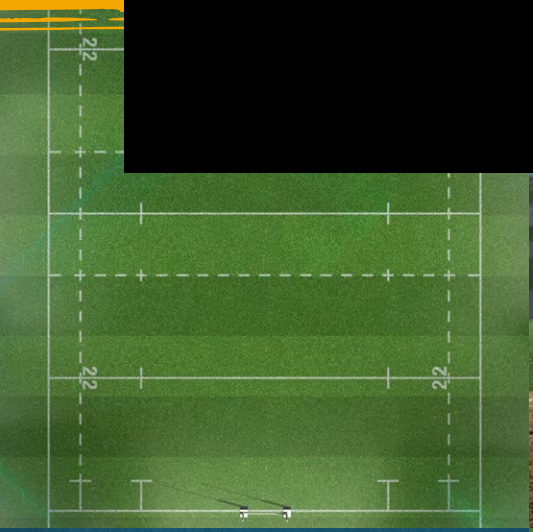
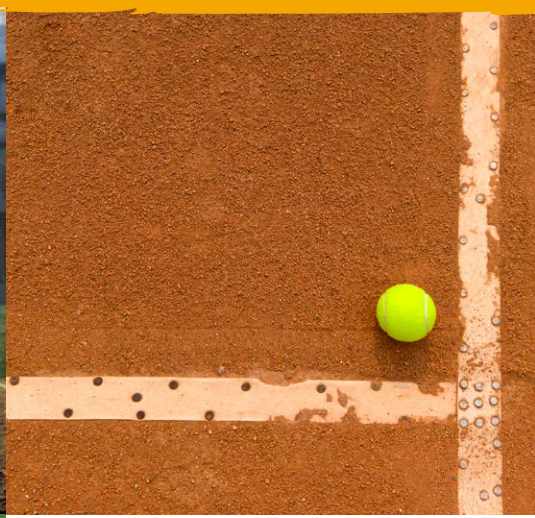
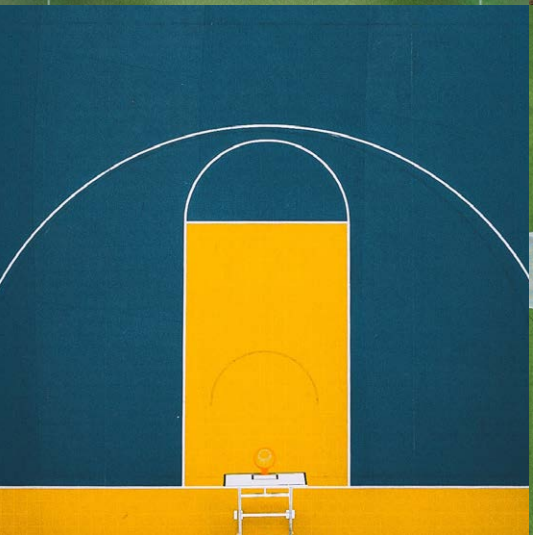
RACISM. IT STOPS WITH ME

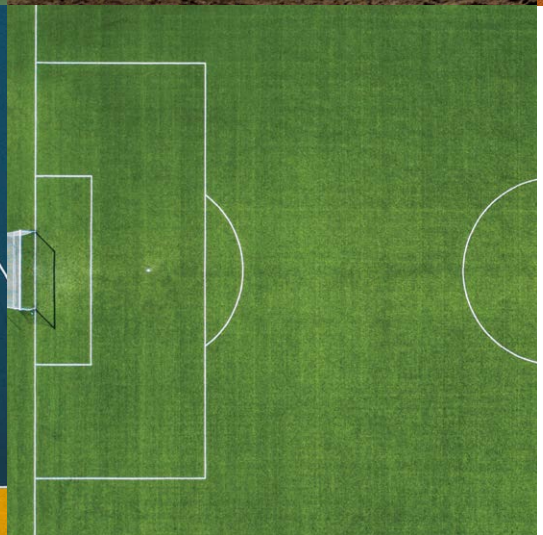
RACISM. NOBODY WINS.

GUIDELINES FOR WORKING WITH A TRAUMA-INFORMED APPROACH









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GUIDELINES FOR WORKING WITH A TRAUMA-INFORMED APPROACH

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Embed the five foundational trauma-informed principles at all levels of the organisation – safety, trustworthiness, choice, collaboration and empowerment 3

Promote language which is respectful and de-escalating at all times and be attuned to non-verbal communication 4

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Promote respect, diversity, and inclusion in trauma-informed approaches 5

Promote and implement an anti-racist approach and cater for specific needs of Indigenous communities and persons 6

Endnotes **6**

FOREWORD

These guidelines outline a best practice response to incorporating a trauma-informed approach across all levels of an organisation.

Trauma caused by racism and racial discrimination results from an event, series of events, or set of circumstances experienced by an individual who is the target of racial discrimination. Trauma has lasting and adverse effects on an individual's functioning and mental, physical, social, emotional, and spiritual well-being.[1] A trauma-informed approach recognises the intersectional impact of racism and racial discrimination and aims to centre the voice and experiences of the targets of racial discrimination.

Trauma-informed approaches;[2]

1. Realise the widespread impact of trauma.
2. Recognise the signs and symptoms of trauma, and the varied responses to trauma in both individuals and cultures.
3. Respond to trauma by integrating knowledge of trauma into all policies and practices.
4. Actively seek to resist re-traumatisation through organisational polices and environments.

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GUIDELINES FOR WORKING WITH A TRAUMA-INFORMED APPROACH

GUIDELINES FOR IMPLEMENTATION

The principles of a trauma-informed approach should underpin your organisation's response to racist incidents. It is also necessary that trauma-informed principles be reflected across all the organisation's operations, people and culture. By doing this, you will ensure that safety and wellbeing remains a core focus of the organisation.

The following guidelines have been adapted from the Blue Knot Foundation's Organisation Guidelines for Trauma-informed Service Delivery[3] and can be found at: https://blueknot.org.au/product/organisational-guidelines-for-trauma-informed-service-delivery-digital-download/

Embed the five foundational trauma-informed principles at all levels of your organisation – safety, trustworthiness, choice, collaboration and empowerment

- **Safety:** Interpersonal and environmental settings should promote a sense of physical, emotional and cultural safety.
- **Trustworthiness:** All organisational operations and decisions are conducted with transparency with the goal of building and maintaining trust.[4]
- **Choice:** Ensure that targets of racism are not obliged to solve issues within your organisation or provide education to perpetrators of racism or other staff members.
- **Collaboration:** Promote the reduction of power imbalances by shifting to 'collaborative' ways of working where the target of racism is part of decision-making processes that affect them.
- **Empowerment:** Centre the experiences of person/s experiencing racial discrimination in all aspects of the complaint handling processes. Decisions and actions taken by your organisation must be transparent and clear, and target/s of racism should be supported in shared decision making. Note that decision-making is distinct from the complaint handling or investigation process itself. The target's input should be sought throughout the decision-making process and should inform the way an independent complaint handling process takes place.

For example: *Start by informing yourself on what is a trauma-informed approach. There are many resources online, including Blue Knot Foundation's webinar series* https://professionals.blueknot.org.au/professional-development-training/

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GUIDELINES FOR WORKING WITH A TRAUMA-INFORMED APPROACH

Promote language that is respectful and de-escalating at all times, and be attuned to non-verbal communication

- Language should move away from a deficit-based approach that could victimise and place blame on a target of racism. For example, use language such as, 'what happened to you?' rather than 'what's wrong with you?'.
- Language should be respectful, non-judgemental, clear, strengths-based and carry a sense of commitment.[5]
- Understand that both verbal and non-verbal communication are central to trauma-informed interactions.
- Recognise that communication methods vary individually and cross-culturally, and that it is important to provide culturally appropriate and accessible forms of communication. This may include the use of interpreters.

The table below contains some dos and don'ts on how to use positive, strengths-based language to avoid using a deficit-based approach when communicating with those who have experienced trauma as targets of racism[6]. For further information, see the Recovery Oriented Language Guide at http://www.mhcc.org.au/wp-content/uploads/2019/08/Recovery-Oriented-Language-Guide_2019ed_v1_20190809-Web.pdf

DOS	DONT'S
Use language that is respectful Use statements like 'Thank you for sharing with me. I am here to listen.'	Use language that is negative or judgemental Don't use statements like 'Why didn't you tell me sooner?'
Validate a person's experience Use statements like 'It sounds like what happened to you was terrible.'	Minimise a person's experience of trauma Don't use statements like 'It was just a joke, I'm sure they didn't mean anything by it.'
Allow people the time to find the words and express what they want to say Listen attentively and minimise interruptions during pauses and silences.	Tell someone that certain information is irrelevant Don't suggest approaches like 'I don't think we need to include that person's details or how it happened?'
Ask whether the person feels they have been listened to Summarise what has been said and ask the person if you have the correct understanding.	Argue with a person's perception of events Don't question the target's experience with statements like 'Are you sure that happened? Maybe you're just overthinking it.'

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GUIDELINES FOR WORKING WITH A TRAUMA-INFORMED APPROACH

Incorporating a trauma-informed approach through all policies and procedures

- Revise all policies and procedures to align with trauma-informed principles.
- All policies and procedures should respect diversity of culture, gender, sexuality, ethnicity, religion, age, ability, socioeconomic position, and experience.
- Policies and procedures should employ co-design principles, working in collaboration with people with lived experiences of trauma caused by racism and racial discrimination.
- The diverse perspectives of people who have experienced trauma caused by racism and racial discrimination should be at the centre of all activities of the organisation, including policy making, leadership positions, training and service provision.
- Trauma-informed education should form part of the organisation's professional development policies to improve staff competency and enhance capacity when responding to incidents of racism.

For example, documents that outline an organisation's commitments and strategies about racism and anti-racism within the organisation should always centre the perspectives of people with lived experience. This might include inviting members of the organisation to review and provide input on codes of behaviours and/or Member Protection Policies, or it may involve the contracting of external consultants with such expertise and experience. Where possible, the knowledge and time of people with lived experience of racism should be appropriately remunerated.

Promote respect, diversity, and inclusion in trauma-informed approaches

- Trauma-informed resources and training should centre intersectionality of experiences and reflect the way that trauma impacts people from diverse backgrounds differently.
- Trauma-informed approaches should respect and adjust responses based on culture, ethnicity, gender, age, sexual orientation, ability, and socioeconomic status.
- Trauma-informed approaches should include educational tools on understanding internal racial biases that can impact responses to trauma.

For example: When holding trauma-informed education and training, seek providers that are led by people with lived experience of racism. Whenever a person is invited to speak about their lived experiences of racism and related trauma at events, webinars or meetings, it is important that those speaking have choice and control over how their stories are told, and how sessions are run. People with lived experiences of racism should always be remunerated for sharing their experience and insight. For more information about safe and meaningful engagements, see https://www.ourrace.com.au/

Promote and implement an anti-racist approach that recognises the unique experiences of First Nations peoples

- Ensure trauma-informed approaches are guided by the specific community needs in mind and are culturally safe and sensitive.
- Ensure the self-determination of First Nations peoples is respected and trauma-informed approaches, responses, and systems centre the experiences of First Nations communities.
- Trauma informed approaches should have ongoing evaluation to ensure they are current and appropriate for different scenarios.
- Trauma-informed approaches should be informed by anti-racism resources and guidelines.

For example: Seek out anti-racism resources informed by the perspectives of First Nations people and people with lived experience of racism. Use these as the basis for ongoing education for senior leadership, staff, officials, members and spectators. Anti-racism resources can be found at https://itstopswithme.humanrights.gov.au/

ENDNOTES

[1]Substance Abuse and Mental Health Services Administration, *SAMHSA's Concept of Trauma and Guidance for a Trauma-Informed Approach* (Report, 2014) https://ncsacw.samhsa.gov/userfiles/files/SAMHSA_Trauma.pdf

[2]Substance Abuse and Mental Health Services Administration, *SAMHSA's Concept of Trauma and Guidance for a Trauma-Informed Approach* (Report, 2014) 9 https://ncsacw.samhsa.gov/userfiles/files/SAMHSA_Trauma.pdf

[3]Blue Knot Foundation, *Organisation Guidelines for Trauma-informed Service Delivery* (Guidelines, 2020) 55-69 https://blueknot.org.au/product/practice-guidelines-for-treatment-of-complex-trauma-and-trauma-informed-care-and-service-delivery-digital-download/

[4]Substance Abuse and Mental Health Services Administration, *SAMHSA's Concept of Trauma and Guidance for a Trauma-Informed Approach* (Report, 2014) 11 https://ncsacw.samhsa.gov/userfiles/files/SAMHSA_Trauma.pdf

[5]Mental Health Coordinating Council, *Recovery Oriented Language Guide* (Guidelines, 2018) http://www.mhcc.org.au/wp-content/uploads/2019/08/Recovery-Oriented-Language-Guide_2019ed_v1_20190809-Web.pdf

[6]Mental Health Coordinating Council, *Recovery Oriented Language Guide* (Guidelines, 2018) 6-7 http://www.mhcc.org.au/wp-content/uploads/2019/08/Recovery-Oriented-Language-Guide_2019ed_v1_20190809-Web.pdf

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RACISM. IT STOPS WITH ME

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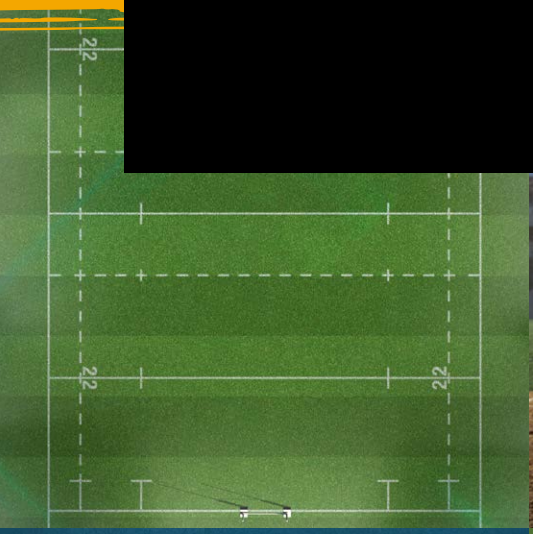
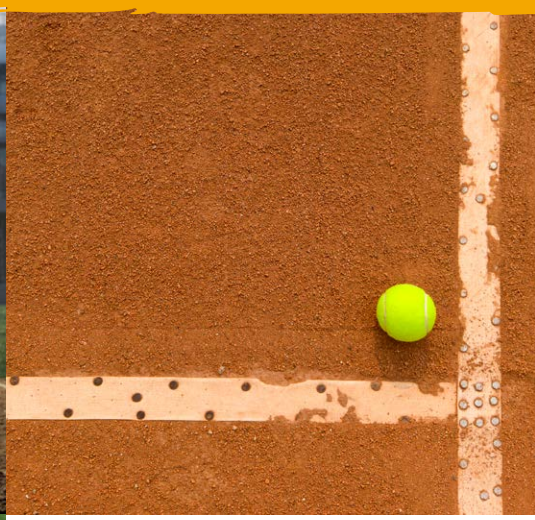
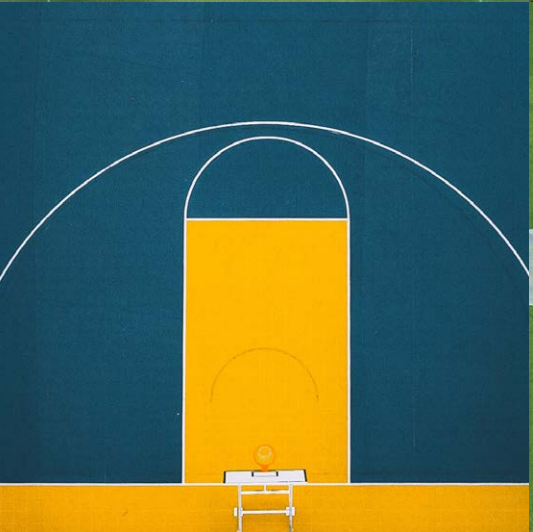
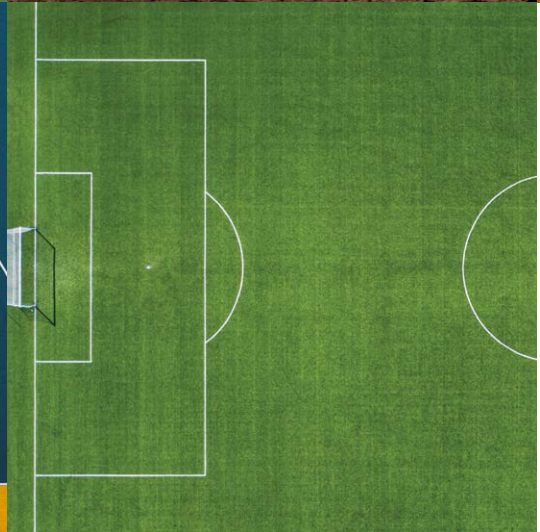
GUIDING PRINCIPLES FOR PROMOTING THE SPECTATOR RACISM GUIDELINES









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GUIDING PRINCIPLES FOR PROMOTING THE SPECTATOR RACISM GUIDELINES

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GUIDING PRINCIPLES

When communicating about the Spectator Racism Guidelines and other anti-racism messaging throughout your organisation and among players, spectators and other relevant stakeholders, it is important to:[1]

- ensure the inclusion of people and communities impacted by racial discrimination in decision-making processes
- centre the experiences of people and communities impacted by racial discrimination by engaging them in all stages of the creative concept
- identify possible counterarguments or backlash in advance and address these in the communications materials.

In planning the release of the Guidelines, and any campaigns or anti-racism messaging accompanying the Guidelines, it is important to:[2]

- ensure leaders in your organisation fully endorse and support the Guidelines and are committed to taking positive anti-racism action Organisational leaders should actively involve themselves in and take ownership of anti-racism initiatives, and their communication, within the organisation
- establish an advisory group for the campaign compromising of members of the affected group. Ensure that this group is involved in co-designing the campaign and remunerated for their expertise where possible
- provide up-front investment in the planning stages to enable:
  - researching of factors such as current media representations, existing research, demographic and geographic variations that may impact your campaign
  - mapping of the wider environment to identify contextual factors that may influence the campaign's success (e.g. local institutional discrimination or past incidents within your organisation that may resurface when the campaign gets underway) and consideration of how to address these openly and transparently
  - developing specific, tangible and measurable anti-racism objectives.

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GUIDING PRINCIPLES FOR PROMOTING THE SPECTATOR RACISM GUIDELINES

For more information on effective messaging for social change, you may wish to consider:

- "Passing the Message Stick" for guidance on communicating messages about First Nations self-determination and justice: https://passingthemessagestick.org/
- "'Race and Racism: doing good better": https://www.luminafoundation.org/wp-content/uploads/2020/12/race-and-racism-doing-good-better.pdf
- "Messaging this moment: A handbook for progressive communicators": https://communitychange.org/wp-content/uploads/2017/08/C3-Messaging-This-Moment-Handbook.pdf
- Tapping into existing campaign materials such as ***Racism: It Stops with Me*** and ***Racism Not Welcome***

ENDNOTES

[1]Paradies et al. *Building on our strengths: A framework to reduce race-based discrimination and support diversity in Victoria* (Full Report, 2009) 64 https://www.vichealth.vic.gov.au/-/media/ProgramsandProjects/Publications/Attachments/Building-on-our-strengths---full-report-v2.pdf?la=en&hash=26A61987C308D2D27F97FD227FC74F48879AA914

[2]Paradies et al. *Building on our strengths: A framework to reduce race-based discrimination and support diversity in Victoria* (Full Report, 2009) 64-65 https://www.vichealth.vic.gov.au/-/media/ProgramsandProjects/Publications/Attachments/Building-on-our-strengths---full-report-v2.pdf?la=en&hash=26A61987C308D2D27F97FD227FC74F48879AA914

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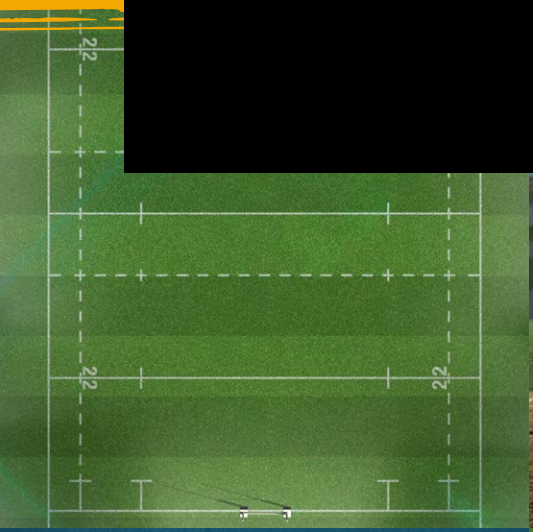
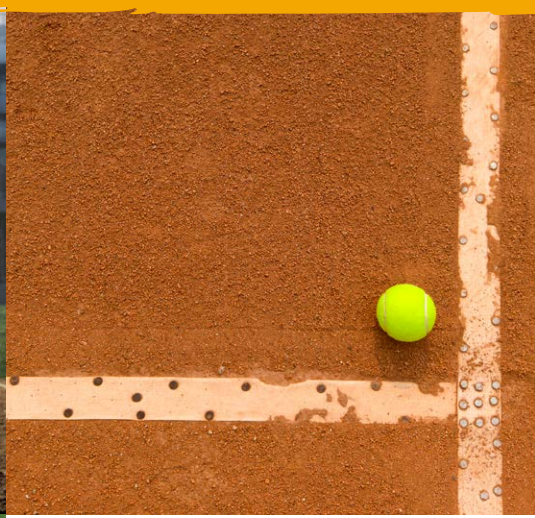
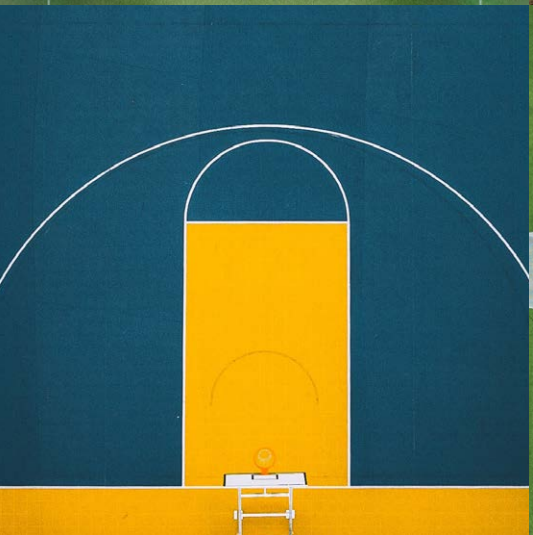
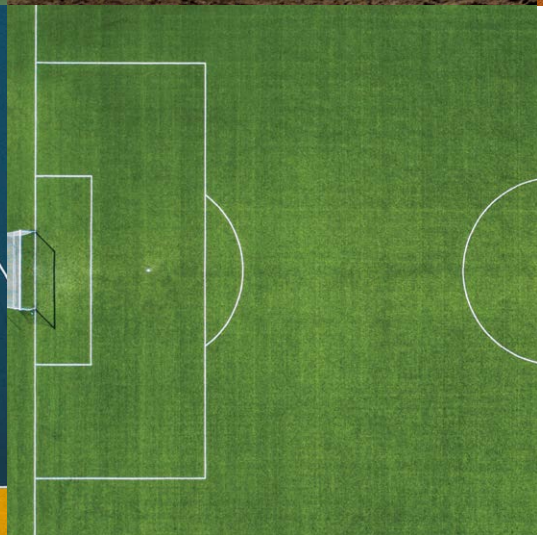
MATERIAL TO SUPPORT THE MEMBER PROTECTION POLICY









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MATERIAL TO SUPPORT THE MEMBER PROTECTION POLICY

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FOREWORD

This resource contains information about racial discrimination and anti-racism, to support member protection policies. Both Play by the Rules[1] and Sport Integrity Australia[2] have Member Protection Policy Templates, which aim to protect those involved in sport from discrimination, harassment, bullying and abuse. If you are using one of these templates, consider issuing an additional position statement that incorporates the below content about racial discrimination, inclusive practice and your commitment to anti-racism. If you are creating your own Member Protection Policy, also consider incorporating the below content.

The Play by the Rules Member Protection Policy Template is available at: https://www.playbytherules.net.au/resources/templates/member-protection-policy

In addition, Sport Integrity Australia has a Member Protection Policy Template as part of the National Integrity Framework, which is linked to an independent complaints process managed by Sport Integrity Australia. This is available at: https://www.sportintegrity.gov.au/sites/default/files/NIF%20Member%20Protection%20Policy.pdf

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MATERIAL TO SUPPORT THE MEMBER PROTECTION POLICY

RACIAL DISCRIMINATION

[Organisation] is committed to providing an environment that is free from racism and racial discrimination. We understand that racism has the potential to result in significant negative consequences for an individual's health and wellbeing and we regard racism in all forms as unacceptable at our organisation.

Racial discrimination occurs when a person is treated less favourably, or not given the same opportunities, as others in a similar situation, because of their race, the country where they were born, their ethnic origin or their skin colour.[3] Racial hatred involves behaviour such as saying something in public that is reasonably likely to offend, insult, humiliate or intimidate a person or group because of their race, colour, or national or ethnic origin.[4] Racial discrimination can include actions of an individual or group.

If any person believes they are being, or have been, discriminated against or harassed by another person or organisation bound by this policy, they may make a complaint via the organisation's complaint process.

INCLUSIVE PRACTICE

[Organisation] will support, respect and encourage people from First Nations and culturally diverse communities to participate in our club and where possible we will promote inclusive practice by:

- respecting and accommodating religious and cultural dates and commitments during the sporting season and events
- accommodating and providing culturally and religiously appropriate uniforms
- providing multifaith facilities (e.g. prayer rooms)
- regular assessment of potential barriers to membership and participation for people of culturally and linguistically diverse, or First Nations communities, and implementing measures to address these
- providing membership financial subsidies to promote diversity of participants.

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MATERIAL TO SUPPORT THE MEMBER PROTECTION POLICY

COMMITMENT TO ANTI-RACISM

[Organisation] takes a whole of organisation approach to anti-racism, and is committed to embedding these principles in all of its operations and dealings. **[Organisation]** commits to:

- employing an equity framework for the attraction, recruitment, and retention of employees
- regularly reviewing internal policies to reduce barriers to employment and access to senior leadership positions. This includes ensuring that organisational policies and procedures promote and support cultural diversity in senior leadership positions
- explicitly communicating our commitment to cultural diversity and anti-racism through our organisation's mission and important documents, such as our strategies, policies and job descriptions, including online and social media
- developing and periodically reviewing strategies and initiatives to promote cultural diversity and anti-racism in the workplace
- ensuring that these policies, strategies and initiatives are developed in direct consultation with First Nations and culturally diverse staff, or external consultants where necessary
- appropriately remunerating First Nations and culturally diverse staff for their contributions to the development of culturally safe strategies, policies and initiatives, or ensuring that these staff have their workloads appropriately adjusted.

ENDNOTES

[1]Play by the Rules, *Member Protection Policy* (Template, April 2016) https://www.playbytherules.net.au/resources/templates/member-protection-policy

[2]Sporting Integrity Australia, *National Integrity Framework: Member Protection Policy Template* (Template, 2021) https://www.sportintegrity.gov.au/sites/default/files/NIF%20Member%20Protection%20Policy.pdf

[3]Australian Human Rights Commission, *Racial Discrimination* (Report, November 2014) https://humanrights.gov.au/sites/default/files/GPGB_racial_discrimination.pdf

[4]Australian Human Rights Commission, *Racial Discrimination* (Report, November 2014) https://humanrights.gov.au/sites/default/files/GPGB_racial_discrimination.pdf

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