

Aboriginal and Torres Strait Islander identified positions

Generally it is unlawful discrimination to limit a work opportunity to a person of a particular race. However, the law recognises that there are some groups in our society who are affected by past or continuing disadvantage. Aboriginal and Torres Strait Islander peoples are one such group.

In this information sheet, we refer to Aboriginal and Torres Strait Islander peoples. By this we mean a person who:

- (a) identifies as an Aboriginal and/or Torres Strait Islander person; and
- (b) is of Aboriginal and/or Torres Strait Islander descent; and
- (c) is accepted as an Aboriginal and/or Torres Strait Islander person by the Aboriginal and/or Torres Strait Islander community in which he or she lives.

Under the *Anti-Discrimination Act 1991* (the Act), the attribute of 'race' includes Aboriginal and Torres Strait Islander peoples.

Exemptions

The *Anti-Discrimination Act 1991* sets out some circumstances, called 'exemptions' where discrimination on the basis of race can be lawful. An employer can argue that an exemption applies if a complaint of discrimination is made against them. The exemptions include:

Genuine occupational requirement exemption (section 25)

A person may impose genuine occupational requirements for a position.

Equal opportunity measure exemption (section 105)

A person may do an act to promote equal opportunity for a group of people with an attribute (such as race) if the purpose of the act is not inconsistent with this Act.

Welfare measure exemption (section 104)

A person may do an act to benefit the members of a group of people with an attribute (such as race) for whose welfare the act was designed if the purpose of the act is not inconsistent with this Act.

An example of a welfare measure would be the development of an employment and training program to increase and improve employment conditions for local Aboriginal persons, where statistics show high Aboriginal mortality, socio-economic disadvantage and long term high unemployment in that community.

Note: It is not necessary to apply to the Queensland Civil and Administrative Tribunal (QCAT) for an exemption from the Act in order for these exemptions to apply to a particular situation.

Identified positions for Aboriginal and Torres Strait Islander applicants

The term 'identified position' is not used in the Act. However, an employer may identify that a position is to be filled only by an Aboriginal or Torres Strait Islander applicant, if they consider that one of the exemptions outlined above applies.

Recruitment for the position would then seek only Aboriginal and Torres Strait Islander applicants and text of advertisements could state:

- To perform this role it is essential that the person who holds the position be an Aboriginal or Torres Strait Islander person. It is therefore a genuine occupational requirement under section 25 of the *Anti-Discrimination Act 1991* that applicants are Aboriginal or Torres Strait Islanders.
- This is a program to redress the under-representation of Aboriginal and Torres Strait Islander people in this [industry/campus/area...] and is an equal opportunity measure under section 105 of the *Anti-Discrimination Act 1991*. Applicants must be of Aboriginal or Torres Strait Islanders.

Identified positions in connection with welfare measures

A business or agency may offer a service or program specifically for the benefit of Aboriginal and Torres Strait Islander peoples. This is a welfare measure under section 104 of the *Anti-Discrimination Act 1991*.

If it is essential that the person delivering the service or program is an Aboriginal and Torres Strait Islander, this would be justification for creating an identified position on the basis of a genuine occupational requirement, and it could be advertised as such.

Exemptions granted by QCAT

A person or persons may apply to the Queensland Civil and Administrative Tribunal for an exemption. QCAT may grant an exemption under section 113 from the operation of a specified provision of the Act (such as race in recruiting for employment) for up to five years. An exemption may be renewed for further periods of up to five years on application by the person or people to whom, or in respect of whom, the exemption was granted.

This type of exemption applies to a specific set of circumstances for a specified length of time. If an exemption is granted by the Tribunal, a complaint of discrimination cannot be accepted by the Anti-Discrimination Commission Queensland against the person or business to whom the exemption has been granted.

The QCAT website states that the following circumstances are taken into account when considering an application for exemption:

- the appropriateness and reasonableness of the application;
- other non-discriminatory ways of achieving the objects or purposes for which the exemption is sought;
- other persons or bodies supporting the application;
- social, economic or other reasons;
- the promotion of equality of opportunity;
- the interests of the community;
- the effect of not granting the exemption;
- other possible improvement strategies;
- the principles of the *Anti-Discrimination Act 1991*.

An applicant must provide sufficient information about these issues if their application is to succeed.

The Queensland public sector

Queensland government departments, agencies and employees are bound by Public Service Commission (PSC) directives and guidelines. Relevant instruments in relation to identified positions for Aboriginal and Torres Strait Islander peoples are:

- *Recruitment and selection* Directive No 15/13
- *Evidence of attribute – Aboriginal and/or Torres Strait Islander identified roles* – PSC Guideline, 20 June 2013

More information

Anti-Discrimination Commission Queensland	http://www.adcq.qld.gov.au/	1300 130 670
Queensland Civil and Administrative Tribunal Queensland	http://www.qcat.qld.gov.au/	1300 753 228
Public Service Commission Queensland	http://www.psc.qld.gov.au/	1300 038 472