

# Human Resources

## Disability and Reasonable Adjustment in the Workplace



# DISABILITY AND REASONABLE ADJUSTMENT IN THE WORKPLACE

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## POLICY

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The Department of Education and Early Childhood Development is committed to:

1. Providing an inclusive, accessible and safe work environment free from discrimination, bullying and harassment.
2. Promoting and facilitating the progressive realisation of equality, as far as reasonably practicable.
3. Being proactive in the taking of reasonable and proportionate measures to eliminate discrimination as far as possible;
4. Complying with its positive duty to make reasonable adjustments for employees or prospective employees
5. Ensuring that all applicants and employees with disabilities are treated respectfully and equitably in all stages of the employment process including:
  - Recruitment and selection
  - professional development & training
  - performance management
  - promotion or transfer; and
  - termination
6. Acknowledging the significance of employment for people with disabilities, and making reasonable adjustments to provide equal opportunity for people with disabilities in DEECD workplaces.
7. Ensuring that all employees, managers and school leaders are aware of their rights and responsibilities with respect to legislation and this policy.

## RIGHTS AND RESPONSIBILITIES UNDER EQUAL OPPORTUNITY LEGISLATION

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Access to employment is a fundamental right that is protected under Victorian and Commonwealth legislation. The main pieces of legislation which make it unlawful to discriminate on the basis of disability are the:

- [Disability Discrimination Act 1992 \(Cwth\) \(DDA\)](#)
- [Equal Opportunity Act 2010\(Vic\) \(EOA\)](#)
- [Charter of Human Rights and Responsibilities Act 2006 \(Vic\).](#)

Importantly, the EOA and DDA both contain a positive duty which requires employers to make reasonable adjustments for employees or prospective employees with a disability (subject to exceptions relating to unjustifiable hardship and inherent requirements of the position outlined below).

## What is a Disability?

The definition of disability is broad and includes:

- total or partial loss of a bodily function, or part of the body
- the presence in the body of organisms that may cause disease, such as HIV or Hepatitis
- malfunction, malformation or disfigurement of a part of the body
- a mental or psychological disease or disorder, or other conditions that may result in a person learning more slowly
- past disability or impairment which may include childhood illnesses, having had a broken leg, or a period of psychiatric illness.

The legislation covers conditions which people:

- presently have
- had in the past (eg: a past episode of illness)
- may have in the future (eg: a family history of a disability which a person may also develop)
- are believed to have. (eg: if people think someone has AIDS).

## Who is protected by anti-discrimination Legislation in the workplace?

Anti-discrimination legislation covers full-time, part-time, casual, temporary (including contractors) and probationary employees. It also covers those working on commission and candidates applying for a job. Some aspects of the law also apply to volunteers and volunteer organisations.

It is unlawful for an employer to discriminate against **an applicant** for a position on the grounds of the person's disability in relation to:

- a) the arrangements made for the selection process; or
- b) selecting who should be offered employment; or
- c) the terms or conditions on which employment is offered.

Similarly, it is unlawful for an employer to discriminate against **an employee** on the ground of the employee's disability:

- a) in the terms or conditions of employment; or
- b) by denying the employee access, or limiting the employee's access, to opportunities for promotion, transfer or training, or to any other benefits associated with employment; or
- c) by dismissing the employee; or
- d) by subjecting the employee to any other detriment.

The legislation also protects friends, relatives or carers with some form of personal connection with a person with a disability if they are discriminated against because of that connection or relationship. For example, it is unlawful discrimination if:

- a parent is refused a job because the employer assumes he or she will need time off work to look after a child with a disability; or
- an employee is harassed about working with a person with a disability.

## Direct and Indirect Discrimination

Discrimination can be both direct and indirect. **Direct discrimination** occurs if a person treats, or proposes to treat, a person with an attribute unfavourably because of that attribute. **Indirect discrimination** occurs when a person imposes, or proposes to impose, a requirement, condition or practice—

- (a) that has, or is likely to have, the effect of disadvantaging persons with an attribute; and
- (b) that is not reasonable.

## Exceptions in the Anti-Discrimination Legislation

There are a limited number of circumstances where discrimination is allowed under the *Disability Discrimination Act* and *Equal Opportunity Act*. The two principal exceptions are:

- a) where unjustifiable hardship is caused by the provision of special services or facilities which are necessary for the person with the disability to do the work; and
- b) where the person, because of his or her disability, is unable to perform the inherent requirements of the job, even with the provision of reasonable adjustments by an employer.

It is not unlawful to provide people with a disability special services, facilities or opportunities to meet their special needs in employment.

There are also some general exceptions which include circumstances where the discrimination is necessary to protect the health or safety of another person or property, or where the discrimination is authorised by another piece of legislation.

## Vicarious Liability

If a complaint is made against an employee, the Department and, where appropriate, School Councils may be held liable for the discriminatory conduct of that employee. This is called vicarious liability. Vicarious liability can also extend to the discriminatory actions of *agents* of the Department such as recruitment firms and consultants.

Employers can reduce their liability if they can show that reasonable precautions were taken to prevent the conduct from occurring.

It is not enough to have good written policies on equal opportunity. The policies must be understood by all employees, including those responsible for hiring employees, such as external recruiting firms. See *School Equal Opportunity Tools* on the Department's [Equal Opportunity, Discrimination and Harassment](#) webpage for further information on how to be proactive in preventing discrimination and harassment in schools.

## Reasonable Adjustment

Creating a discrimination free workplace requires removing features in the workplace which are barriers to equal opportunity, equal participation or equal performance. Making changes to

ensure equal opportunity for people with a disability is commonly referred to as 'reasonable adjustment' or 'reasonable accommodation'.

As mentioned above, anti-discrimination legislation contains a positive duty which requires employers to make reasonable adjustments for employees or prospective employees with a disability (subject to the exceptions relating to unjustifiable hardship and inherent requirements of the position outlined above).

There is no list of the types of adjustments required to remove discrimination against people with a disability in employment – the particular circumstances relevant to each case need to be considered. Reasonable adjustments may be required to enable a person with a disability to:

- have equal opportunity to be considered for selection, appointment, promotion, transfer, training or other employment opportunity
- perform the requirements of the relevant job
- enjoy equal terms and conditions of employment with other employees in comparable circumstances
- participate in work related facilities, programs or benefits on equal terms with other employees.

Reasonable adjustments can be administrative, environmental, or procedural alterations required to enable a person with a disability to work effectively and may include:

- adjustments to work premises, equipment or facilities – including providing additional equipment or facilities
- adjustments to work related communications including making available information in an accessible form or format
- adjustments to work methods
- adjustments to work arrangements, including in relation to hours of work and use of leave entitlements
- adjustments to methods used for testing, assessment or selection
- adjustments to work related rules or other adjustments to enable a person to comply with rules as they exist
- access to training, transfer, trial or higher duties positions or other forms of opportunity to demonstrate or develop capacity in a position
- provision of interpreters, readers, attendants or other work related assistance
- permitting a person to use equipment or assistance provided by the person with a disability or by another person or group
- providing training to co-workers or supervisors.

Limitations on the obligation to provide reasonable adjustments include:

- adjustments which would impose an unjustifiable hardship on the employer
- changing the inherent requirements of the job (or maintaining a job which would otherwise be altered or abolished)
- assigning performance of some inherent requirements of the job to another employee or
- creating a new or different job
- promotion or transfer to a different job.

Guidelines for making reasonable adjustments in DEECD workplaces can be found below.

## Equal Opportunity Act 2010

[Section 20\(3\)](#) of the Equal Opportunity Act 2010 provides that in determining whether an adjustment is 'reasonable', the following factors must be considered:

- (a) the person's or employee's circumstances, including the nature of his or her impairment; and
- (b) the nature of the employee's role or the role that is being offered; and
- (c) the nature of the adjustment required to accommodate the person's or employee's impairment; and
- (d) the financial circumstances of the employer; and
- (e) the size and nature of the workplace and the employer's business; and
- (f) the effect on the workplace and the employer's business of making the adjustment including—
  - (i) the financial impact of doing so;
  - (ii) the number of persons who would benefit from or be disadvantaged by doing so;
  - (iii) the impact on efficiency and productivity and, if applicable, on customer service of doing so; and
- (g) the consequences for the employer of making the adjustment; and
- (h) the consequences for the person or employee of not making the adjustment; and
- (i) any relevant action plan made under Part 3 of the [Disability Discrimination Act 1992](#) of the Commonwealth; and
- (j) if the employer is a public sector body within the meaning of [section 38](#) of the [Disability Act 2006](#), any relevant Disability Action Plan made under that section; and
- (k) any relevant disability standards made under the [Disability Discrimination Act 1992](#) of the Commonwealth.

## OTHER LEGISLATION

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### The Victorian Charter of Human Rights and Responsibilities

The Victorian Charter of Human Rights and Responsibilities (the Charter) imposes a direct obligation on public authorities (including schools) to act compatibly with human rights.

## Section 8

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- (2) Every person has the right to enjoy his or her human rights without discrimination.
- (3) Every person is equal before the law and is entitled to the equal protection of the law without discrimination and has the right to equal and effective protection against discrimination.
- (4) Measures taken for the purpose of assisting or advancing persons or groups of persons disadvantaged because of discrimination do not constitute discrimination.

Acting in accordance with this policy will help to ensure compliance with the Charter of Human Rights and Responsibilities.

### **The Public Administration Act 2004 (Vic)**

The *Public Administration Act 2004* (Vic) provides a framework for good public service administration in Victoria by defining the values, principles and conduct of public sector employment. These principles apply to all employees of the Department.

The Act requires that:

- all employment decisions be based on merit;
- employees be treated fairly and reasonably; and
- equal opportunity be provided.

The [Public Sector Standards Commissioner](#) has issued standards and non-binding guidelines on:

- Equal Employment Opportunity
- Fair and Reasonable Treatment
- Merit in Employment
- Reasonable Avenue of Redress.

The Commissioner's directions allow people with a disability (as one of the groups declared disadvantaged for the purpose of employment) to be appointed to a position without advertisement. An [Exemption from Advertising](#) for this purpose must be obtained from the Secretary of the Department.

## **DISCLOSURE, CONFIDENTIALITY AND PRIVACY**

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### **Disclosure**

The Department is an equal opportunity employer with a commitment to workforce diversity. Employees with disabilities are therefore encouraged to inform their manager about their disabilities so that they can be given every reasonable opportunity to work to the best of their abilities. Every employee should be able to feel confident that their rights will be respected and that their privacy will be respected once they disclose information about their disability.

There is no legal obligation for a job seeker or employee to disclose a disability to an employer unless it is likely to affect their job performance or ability to work safely. <sup>1</sup>

Disclosure is inevitable where the disability is obvious, but in many cases people with disabilities may be unwilling to disclose due to a fear of being stigmatised or discriminated against. An example might be a person with a mental illness.

Job applicants and employees may choose not to disclose a disability because it does not affect their work, or does so only occasionally.

In some activities/industries, some disabilities would need to be disclosed. If employees are taking medication, they are obliged to tell you if it is likely that side effects will affect their work performance.

If an employee discloses a pre-existing disability or acquires a disability while an employee, an employer should seek to identify the issues regarding their position and the possible solutions available.

This requires clarification of the requirements of the job and what, if any, adjustment may be necessary to support the employee to get the job done. Conversations with the employee should be guided by principles of fairness and not be based on assumptions about his/her disability. All conversations and resolutions should be documented in the employee's personnel file.

### **Confidentiality and Privacy**

The privacy of personal and health information disclosed by a job applicant or support agency should be maintained in accordance with the *Information Privacy Act 2000* (Vic) and the *Health Records Act 2001* (Vic). Information regarding any disability, reduced function or impaired health status should be kept secure by the employer.

Failure to protect confidential personal information about a person's disability may leave an employer open to discrimination and/or privacy complaints. Disclosure is only permissible after obtaining the consent of the individual concerned, or as required by law.

For further information, go to the Department's [Privacy Policy](#) website.

## **RECRUITMENT AND SELECTION**

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People with disabilities can face unfair barriers when seeking employment. The principles of equal opportunity should be adhered to throughout the recruitment process. This means that it may be necessary to provide reasonable adjustments in recruitment and selection to ensure people with a disability are not disadvantaged.

### **The Disability Employment Advisory Service (DEAS)**

The Victorian Government has contracted Randstad to provide government departments (and Victorian Government schools) with a Disability Employment Advisory Service (DEAS). The aim of

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<sup>1</sup> "Disclosing Disability in Employment – Best Practice Guidelines for Employers and the Recruitment Industry" Victorian Equal Opportunity & Human Rights Commission, 2007.

the DEAS is to increase the opportunities for people with a disability to gain and retain employment in the Victorian public sector.

The DEAS can refer suitable applicants with a disability to advertised vacancies in either corporate or school locations. The referred applicants will have been carefully screened by the DEAS to ensure they are able to fulfil the inherent requirements of the role. Pre-screening includes ensuring candidate meets selection criteria and pre-application discussion with hiring manager. This can include the nature of the disabilities, requirements of the role and suitability for interview.

Suitable applicants referred by DEAS should be included on the interview shortlist.

For further information, see the [Disability Employment Advisory Service](#) information available on the Department's [Disability](#) webpage.

### **Selection Criteria**

All job applicants must be measured against the selection criteria. The selection criteria should include only the specific skills, knowledge and abilities regarded as essential for performing the functions of the job. Recruitment and selection criteria documents should include a commitment to equal opportunity principles and practices.

### **Selection Procedure Guidelines**

**The Selection Panel** - When choosing selection panel members, try to include someone with an awareness of disability issues in the workplace. There must also be at least one person with Merit Protection Board training on the panel. The selection committee should focus on the merit and abilities of the applicant rather than their disability.

**The Interview** - Prior to the interview, applicants should be asked if they require any reasonable adjustments in the way the interview will be conducted. For example, an applicant may request a rest break during the interview or that written materials be provided in an alternative format. Arrangements should be made to accommodate these requests. The DEAS will provide selection panels with all relevant information regarding applicants referred through that service.

In framing questions, interviewers should think about what they need to know. Questions or statements must be based on assessing the person's skill and ability to perform the inherent requirements of the job. Making assumptions regarding the capabilities of a person on the basis of a disability or medical condition is discriminatory.

### **Examples of appropriate questions**

- This job involves conducting research and report writing. Can you tell us how you would go about that?
- This job involves teaching a class of twenty-five 9 year old students. Can you tell us how you go about carrying out your teaching duties?
- If you were successful in getting this position, is there any equipment or reasonable adjustments to the workplace you may need?

### **Examples of inappropriate questions**

- How did you acquire your disability?
- How would your disability affect your ability to carry out the functions of this job?
- Do you think your disability means you would perform this role better or worse than a person without a disability?

### **Guiding principles**

- Treat the person with a disability as you would any other applicant.
- It is important not to make assumptions about people with disabilities. If you need information about how the applicant will perform the role, ask them.
- Inquire if the person needs any reasonable adjustments rather than automatically assuming there is a need. Provide any adjustments to enable the person to compete fairly (e.g. access to buildings, an interpreter at the interview).
- If selection tests are to be used, make them available in a form accessible to applicants with a disability.
- Be willing to repeat a question, or ask for clarification. Be patient.
- Do not avoid asking essential questions relating to the person's ability to undertake the duties of the position.
- Be open-minded. People with a disability are often able to perform at the same level as people without a disability.

Further information is provided on the Department's [Selection Panel](#) website.

## **INJURY AT WORK**

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The *Accident Compensation Act 1985* and *Occupational Health and Safety Act 2004* give employers responsibilities when employees are injured at work, including holding the injured worker's position open for 12 months and helping the worker return to work.

The procedures for managing employees who have suffered work related injuries or illnesses are detailed in the Department's [WorkSafe and Return to Work](#) webpage.

The Employee Health Unit can provide advice on the management of employees with work related injuries and can be contacted on 9637 2386.

## WORKPLACE REASONABLE ADJUSTMENTS

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The law requires that employers make reasonable adjustments to ensure candidates and employees with disabilities have equal opportunities in the workplace including (but not limited to) in recruitment, orientation, training, opportunities to act in higher roles, higher duties and access to work-related functions.

- It is the responsibility of applicants to inform the selection panel of any reasonable adjustments they may need when invited to do so.
- Where it is not otherwise clear, it is responsibility of employees to inform their manager or Principal if they need any reasonable adjustments to assist them to work at their full capacity.
- It is the responsibility of Managers and Principals to ensure that reasonable adjustments are made in each case. Managers and Principals should ensure that the adjustments are implemented in a timely and transparent manner.

In most cases reasonable adjustments are relatively simple and inexpensive. In other cases specialised assistance may be required. There are a range of support mechanisms available to assist with the implementation of reasonable adjustments.

### The Disability Employment Advisory Service (DEAS)

The Disability Employment Advisory Service (DEAS) can assist when new or current employees with disabilities require assistance to either commence work or continue in employment. Once contacted by a manager or Principal the DEAS will undertake the following steps:

**1. A Situational Brief** with the manager or Principal to determine the most appropriate individual assessment, recommendation and support measures. This meeting will include discussion of the background and challenges of the situation.

**2. A Needs Assessment** (if required) may include:

- Additional conference with the manager or Principal and employee to further discuss the background and challenges
- A workplace assessment with the employee to analyse capability against the current and/or previous Job Specifications and required tasks. This assessment will often be undertaken by an appropriate professional
- Recommendation and facilitation of any required or relevant testing

Assessment measures may include:

- Mediation
- Job Task Analysis
- Workplace/Work Station Assessment
- Vocational/Job Capability Assessment
- Fitness for Duties Examination
- Clinical Psych Assessment
- Activities of Daily Living Assessment
- Cognitive / Neuro-Psych Assessment
- Exercise Physiology/dietician assessment
- Functional Capacity Evaluation

**3. A Recommendation Plan** outlining DEAS advice and suggestions on what (if any) support is required.

The recommendations may include:

- Advice in regard to accessing appropriate workplace adjustments
- Advice as to how to work through the situation informally
- A Return to Full Work Capacity Plan
- Mediation
- Job re-design or workplace adjustments
- Training, coaching, mentoring or education for employees, managers and/or colleagues
- Ongoing contact and support for employees and/or managers

For information about the DEAS including contact details, see the [Disability](#) page on HRWeb.

### **Adjustments to a school's built environment – The Accessible Buildings Program**

A workplace assessment may recommend that adjustments be made to a school's built environment such as the installation of ramps, rails, accessible toilet facilities etc. For works of this nature, schools are able to make application to The Accessible Buildings Program.

The Accessible Buildings Program is coordinated centrally by DEECD through the nominated infrastructure Division coordinator, and supported by the DEECD Regional Facilities Managers.

For information about the Accessible Buildings Program, please speak to your Regional Facilities Manager.

### **The Employee Assistance Fund (EAF)**

The Commonwealth Government's Employee Assistance Fund (EAF) provides financial assistance for the costs involved in modifying the workplace or purchasing special or adaptive equipment. Assistance is available for people who are about to start a job or who are currently working, as well as those who require assistance to find and prepare for work.

In most situations the DEAS can assist managers and Principals with their applications to the Employee Assistance Fund.

The Fund may reimburse the cost of work related modifications and services including (but not limited to):

- the cost of modifications to the physical work environment
- modifications to work vehicles
- adaptive equipment for the workplace
- information and communication devices
- Auslan interpreting
- specialist services for employees with specific learning disorders and mental health conditions

- disability awareness training
- deafness awareness training, and
- mental health awareness training.

For further information about the Fund see:

[http://www.jobaccess.gov.au/Workplace\\_modifications/Pages/home.aspx](http://www.jobaccess.gov.au/Workplace_modifications/Pages/home.aspx).

### Other Resourcing Options

In some cases the Employee Assistance Fund may not provide financial assistance. In these circumstances the following guidelines apply:

1. Most modifications are simple to implement - often only a few hundred dollars. Inexpensive modifications should be funded out of local school and office budgets.
2. **Schools** seeking funding for significant reasonable adjustments (which cannot be met by the school's budget) should write to the Regional Director outlining a case for financial assistance. This request must be supported by appropriate documentation from the professional who performed the workplace assessment and any quotations.
3. **Corporate office** managers seeking funding for significant reasonable adjustments should seek assistance from their General Manager or Regional Director and if necessary the relevant Deputy Secretary. This request must be supported by appropriate documentation from the professional who performed the workplace assessment and any quotations.

### Adjustments to work arrangements - Access to Flexible Work

Adjustments to work arrangements may be appropriate for employees with a disability depending on their circumstances.

A wide range of flexible work and leave options can be accessed ranging from short term arrangements to meet medical appointments, to longer term options that may include reduced hours, flexible start and leave times or telecommuting arrangements.

Flexible work arrangements can also assist employees with family or carer responsibilities. Carer responsibilities may include caring for children, spouses or family members with a disability. For further information see the Department's [Flexible Work for Work-Life Balance](#) webpage.

## COMMONWEALTH WAGE SUPPORTS

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### The Supported wage system

The Supported Wage System is a process that allows employers to pay less than the minimum wage by matching a person's productivity with a fair wage. With the Supported Wage System, eligible people with disability can access a reliable process of productivity-based wage assessment to determine fair pay for fair work.

For further information see: [http://www.jobaccess.gov.au/Services/A-Z\\_list/pages/Supported\\_Wage\\_System.aspx](http://www.jobaccess.gov.au/Services/A-Z_list/pages/Supported_Wage_System.aspx)

## Wage Subsidies

Wage subsidies are payments made to the employer to assist with covering the cost of paying wages in the first few months of employment of a person with disability. They aim to increase the competitiveness of workers with disability.

For further information see [http://jobaccess.gov.au/Services/A-Z\\_list/Pages/Wage\\_subsidies.aspx](http://jobaccess.gov.au/Services/A-Z_list/Pages/Wage_subsidies.aspx)

## COMPLAINTS

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Employees who believe they have been treated unfairly or unreasonably in any matter related to their employment because of their disability can make a complaint using the Department's complaints processes contained in the Managing Complaints, Misconduct and Unsatisfactory Performance. For information see the Department's HR Web.

Complaints can also be lodged with external bodies such as the [Victorian Equal Opportunity and Human Rights Commission](#) (complaints based on Victorian legislation) and the [Australian Human Rights Commission](#) (Complaints based on Commonwealth Legislation).

## CONTACT HUMAN RESOURCES

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For advice or assistance on any matters related to disability and reasonable adjustment contact Schools HR Services on 1800 641 943.

Managers and staff in non-school locations can obtain advice, assistance or further information by contacting their [Corporate HR Services Consultant. \(Word - 285Kb\)](#).