

Human Resources

Disability and Reasonable Adjustment in the Workplace

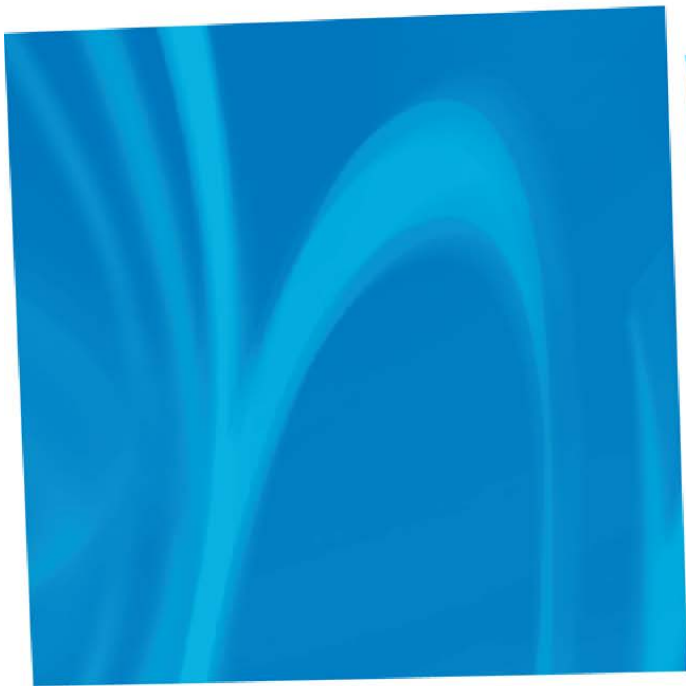


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INTRODUCTION

The purpose of this document is to outline the Department's policy and guidelines with respect to the employment of people with disability. It provides information on:

- The Department's expectations regarding the respect and equal opportunity to be afforded to employees and prospective employees with disability
- The legal context in which this policy has been developed including the definition of disability and the people and conditions covered by Victorian and Commonwealth legislation
- The points in the employment life-cycle at which disability and reasonable adjustment must be considered, and
- Steps for the implementation of reasonable adjustments and where support and funding can be obtained.

POLICY

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 equality
3. Being proactive in taking measures to eliminate discrimination
4. Ensuring that all applicants and employees with disability 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
 - departure
5. Acknowledging the significance of employment for people with disability, and making reasonable adjustments to provide equal opportunity for people with disability in DEECD workplaces.
6. Ensuring that all employees, managers and school leaders are aware of their rights and responsibilities with respect to legislation and this policy.

THE LEGAL CONTEXT

Access to employment 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) and the *Equal Opportunity Act 2010* (Vic) (EOA)

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 condition 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 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:

- the arrangements made for the selection process; or
- selecting who should be offered employment; or
- 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:

- in the terms or conditions of employment; or
- 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
- by dismissing the employee; or
- by subjecting the employee to any other detriment.

The legislation also protects friends, relatives or carers with a personal connection to a person with 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 disability; or
- an employee is harassed about working with a person with 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—

- that has, or is likely to have, the effect of disadvantaging persons with an attribute; and
- 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*. These are:

- 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
- 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; and
- 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.

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

Vicarious Liability

If a complaint is made against an employee, the Department and 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 for employers 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.

For further information on how to be proactive in preventing discrimination and harassment in schools see the *School Equal Opportunity Tools* on HRWeb.

Reasonable Adjustment

Creating a discrimination free workplace requires removing barriers to equal opportunity, equal participation or equal performance. Making changes to ensure equal opportunity is commonly referred to as 'reasonable adjustment' or 'reasonable accommodation'.

Anti-discrimination legislation contains a positive duty which requires employers to make reasonable adjustments for employees and prospective employees with disability (subject to the exceptions outlined above).

The particular circumstances of case need to be considered. Reasonable adjustments may be required to enable a person with disability to:

- have equal opportunity in 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
- participate in work related facilities, programs or benefits.

Reasonable adjustments can be administrative, environmental, or procedural 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 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.

Further information including practical steps for making reasonable adjustments in Department workplaces is included below.

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 and standards apply to all employees of the Department including employees located in schools.

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 also allow people with 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.

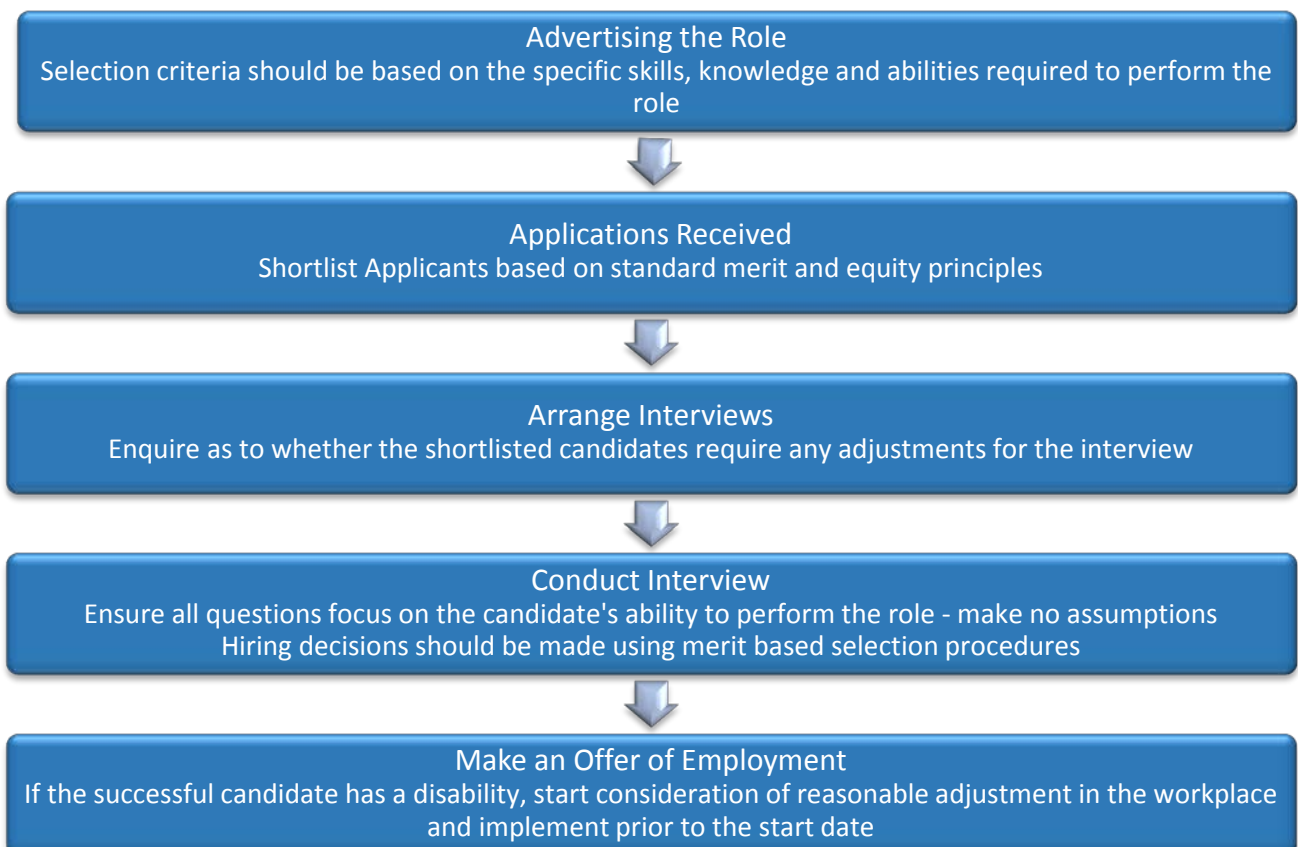
DISABILITY CONSIDERATIONS THROUGHOUT THE EMPLOYMENT CYCLE

There are times throughout the employment cycle when disability must be considered to ensure that applicants and employees who have disability are afforded equal opportunity. In all circumstances follow these guiding principles.

- Treat the person with disability as you would any other employee or applicant.
- Do not make assumptions about people with disability. If you need information about how the applicant will perform a role or task, ask them.
- Be open-minded. People with disability are often able to perform at the same level as people without disability.

Recruitment and Selection

The principles of equal opportunity must be followed throughout the recruitment process. Recruitment and selection criteria documents should include a statement reflecting the Department’s commitment to equal opportunity principles and practices.



Selection Criteria

All applicants must be measured against the selection criteria and assessed on their ability to meet the inherent requirements of the role. Inherent requirements are the genuine characteristics of a role which are essential to perform the job. The selection criteria should include only the specific skills, knowledge and abilities regarded as necessary for performing the functions of the job.

The Selection Panel

When panel members are being considered, try to include someone with an awareness of disability issues in the workplace. There must be at least one person on the panel with Merit Protection Board training.

The Interview

All applicants should be asked (prior to the interview) if they require any adjustment to the way the interview will be conducted. For example, applicants may need a rest break during the interview or the provision of written materials in an alternative format. Arrangements must be made to accommodate these requests if they are reasonable.

In framing questions, interviewers should think about what they need to know about the candidate and their ability to perform the inherent requirements of the role.

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?

Commencement

Once a person with disability has been offered employment, it may be necessary to seek a workplace assessment to determine whether any reasonable adjustments are required. More detailed information on these steps is included in the 'Practical Steps for Implementing Reasonable Adjustments' below.

Learning and Development

Employees with disability are entitled to access the same training and promotion opportunities in the workplace as other employees. Be sure to make any changes necessary to ensure employees with disability can access and fully participate in training and development opportunities.

Ongoing Support

Once a person with disability has been employed, ongoing support may be needed to ensure the employee is able to continue working and to meet the inherent requirements of the role. This could involve annual checks to ensure any previously implemented reasonable adjustments are still relevant to the needs of the employee.

Support for employees who acquire a disability

Current employees may also acquire a disability through illness or injury and may need support to continue to work to their full ability. Workplace assessments can be undertaken and reasonable adjustments made with funding support in the same way as for new employees who have disability. Information to assist with these steps is provided below.

PRACTICAL STEPS FOR IMPLEMENTING REASONABLE ADJUSTMENTS

It is the responsibility of managers to ensure that reasonable adjustments are in place to support their employees to perform their roles.



Step 1 - Seek advice

It is highly recommended that people managers contact their HR Services consultant as soon as they become aware that reasonable adjustments may be required to support a candidate or employee with a disability. HR Services consultants can provide support to both managers and employees with a disability on the implementation of this policy.

Step 2 - Have an initial discussion

It is often a good idea for the manager and employee to have an initial discussion about the employee's particular situation and the process that will be undertaken. The goal of this discussion is to ensure that everyone is comfortable with, and in agreement with the next steps in the process.

Step 3 - Arrange a workplace assessment through JobAccess

JobAccess is a Commonwealth Government organisation which provides information and advice to assist with the employment of people with disability. The service is free and can assist with all aspects of disability employment including workplace assessments to determine what changes need to be made, coordination of any work required and financial assistance.

JobAccess Advisors can be contacted on 1800 464 800 or online at www.jobaccess.gov.au.

A workplace assessment may include:

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

Step 4 - Implement the recommendations

The workplace assessment will usually result in the preparation of a report which may include one or more recommendations including:

- Installation or modification of information or communication devices
- Training, coaching, mentoring or education for employees, managers and/or colleagues
- Modifications to work vehicles
- Specialist services
- Modifications to the physical work environment
- Changes to working arrangements through flexible working
- Building works
- Auslan interpreting

JobAccess will work with managers to implement the recommendations and arrange for Commonwealth funding to reimburse the costs of the modifications in most cases. See additional funding information below.

Funding Reasonable Adjustments

Funding to undertake workplace assessments and implement reasonable adjustments is available through the Commonwealth Government's Employee Assistance Fund (EAF). This fund is administered by JobAccess who will assist with funding on a cost-recovery or reimbursement

basis. This funding 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.

For further information about the Fund see: <http://jobaccess.gov.au/content/workplace-modifications-and-adjustments>

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 Executive Director 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.

Modifications to Buildings

A workplace assessment may recommend that adjustments be made to the built environment such as the installation of ramps, rails, accessible toilet facilities etc.

The Accessible Buildings Program can assist schools to implement changes to the built environment. The program is coordinated by the Infrastructure Division, and supported by Regional Facilities Managers. For further information about the Accessible Building Program contact the coordinator on (03) 9637 3595.

Corporate Office building modifications should be arranged through the Shared Services Provider.

DISCLOSURE, CONFIDENTIALITY AND PRIVACY

Disclosure

The Department is an equal opportunity employer with a commitment to workforce diversity. Employees with disability are therefore encouraged to inform their manager about their disability 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 protected 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.

Disclosure is inevitable where the disability is obvious, but in many cases people with disability 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.

Confidentiality and Privacy

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

An organisation must not use or disclose health information about an individual for a purpose other than the primary purpose of collection without consent; unless the organisation reasonably believes that the use or disclosure is necessary for the following exceptions:

- required by law
- the individual is incapable of providing consent and the Department reasonably believes that it is necessary to provide further health services
- required for funding (de-identified)
- required for research or the compilation or analysis of statistics (de-identified)
- required to lessen or prevent a serious and imminent threat to an individual's life, health and safety.

Failure to protect confidential personal information may leave an employer open to discrimination and/or privacy complaints. For further information about privacy obligations contact the Department's Information & Knowledge Management Branch.

COMMONWEALTH WAGE SUPPORTS

The Commonwealth Government also supports schemes which aim to increase the employment of people with disabilities by reducing the costs associated with employment.

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://jobaccess.gov.au/content/supported-wage-system-1>

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/content/wage-subsidies>

INJURY AT WORK

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 on the Department's [WorkSafe and Return to Work](#) webpage.

The Employee Safety and Wellbeing Branch can provide advice on the management of employees with work related injuries and can be contacted on 9637 2460.

COMPLAINTS

Employees who believe they have been treated unfairly or unreasonably in any matter related to their employment because of their disability can lodge a grievance using the Department's complaints and grievances processes. For information about this process including the steps to be undertaken and avenues of appeal see the Department's HRWeb at <http://www.education.vic.gov.au/hrweb/employcond/Pages/griev.aspx>.

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).