

Employment Limitation Policy

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Overview

The Department of Education and Training (the Department) has an obligation to support the maintenance of proper standards of performance and conduct for employees of the Department, and to protect and provide for the welfare and safety of students and other employees. In this context from time to time persons are considered unsuitable for employment with the Department and may have an employment limitation imposed.

The process of imposing an employment limitation aims to balance fair and reasonable treatment of former employees and/or job applicants with the Department's fundamental responsibility to protect the welfare and safety of students and other employees and to comply with its legal obligations.

These guidelines set out the Department's policy on employment limitations. The guidelines explain what an employment limitation is, the legal basis to impose a limitation, circumstances when a limitation may be applied and review mechanisms where a person seeks to have a limitation removed.

In these guidelines a reference to the Department includes a reference to a school council established under Part 2.3 of the *Education and Training Reform Act 2006* (ETR Act) and a reference to an employee includes a reference to a person employed under Part 2.3 or Part 2.4 of the ETR Act or section 20 of the *Public Administration Act 2004* (the PA Act).

What is an employment limitation?

An employment limitation (also known as an employment restriction) is a limitation on a person's eligibility for employment with the Department or a school council. An employment limitation may be applied when a question arises about a person's suitability to be employed in a Victorian government school or in another Department workplace.

The imposition of an employment limitation is a process internal to the Department, and relates to a person's suitability to be an employee of the Department.

In practical terms, when an employment limitation is put in place, a notation is made on the person's Departmental Human Resources record. This alerts authorised users of the central payroll to the fact that there may be an issue with the person's employment or re-employment.

Once applied, the employment limitation has immediate effect.

An employment limitation may:

- preclude a person from any further employment with the Department; or
- limit the terms under which a person is to be employed (for example, a teacher may be restricted to fixed term periods of employment or to casual relief teaching).

Authority to impose Employment Limitations

The Secretary, as the employer of employees within the Department, has all the rights, powers, authorities and duties of any other employer and as such may decide who should be employed by the Department, subject to any relevant legal requirements and principles (for example, those contained in State or Federal anti-discrimination legislation). Similarly, a school council has a power to employ staff in accordance with section 2.3.8 of the ETR Act.

These general powers and duties are codified in the PA Act, the ETR Act and Orders made under that Act.

SCHOOL BASED STAFF

Employees of the Teaching Service (principal, teacher and education support class) are employed under section 2.4 of the ETR Act. School Councils are discrete entities, and can employ employees under Part 2.3 of the ETR Act. Typically school councils employ casual relief teachers, teacher aides, grounds maintenance staff, gardeners and cleaners.

The ETR Act enables the Minister for Education to make Ministerial Orders to give effect to the Act including any matters relating to employment in the teaching service or by school councils. [Ministerial Order 1038](#) contains the

current provisions dealing with employment in the Teaching Service and [Ministerial Order 1039](#) contains the current provisions dealing with employment by school councils.

Clauses 3.1.5 of both Orders provide that the Secretary may determine that a person's eligibility for employment is subject to an employment limitation. The clauses also provide for the Secretary to establish criteria and procedures for imposing an employment limitation on a person, including the grounds for a review of an employment limitation.

This policy constitutes the criteria and procedures for imposing an employment limitation on a person referred to in the relevant Order.

VICTORIAN PUBLIC SERVICE STAFF

VPS employees are employed under section 20 of the PA Act. They include employees within the Allied Health Adaptive structure of the VPS, school nurses (including in the Maternal and Child Health Information Line) and VPS employees in central and regional offices.

Pre-employment check

When considering employing a person it is critical that principals, managers and school councils check that person's record on the Department's central payroll to ensure that no employment limitation has been applied.

The central payroll should be checked even where the person is to be employed on the local payroll of a school.

This is to ensure that former employees who were dismissed for highly inappropriate behaviour, or who resigned during an investigation of serious allegations, are not re-employed in the Department or schools.

Employment Limitations and VIT Registration

The application of an employment limitation is a process internal to the Department, and relates to a person's suitability to be an *employee* of the Department.

The question of a teacher's *suitability to be registered to teach* in Victorian schools is legally a separate question. The Victorian Institute of Teaching (VIT), an independent statutory body established by Part 2.6 of the ETR Act is responsible for the registration of teachers in Government and non-Government schools in Victoria.

Under section 2.6.31 of the ETR Act, the Department (as an employer) is required to notify VIT if the employer has taken *any action* against a teacher that may be relevant to the teacher's fitness to teach. The Department therefore notifies VIT when an employment limitation is imposed.

VIT must investigate all notifications of action against a teacher. VIT may then elect to hold either a formal or an informal hearing into the allegations, or to take no further action.

Therefore, the fact that an employment limitation has been imposed by the Department does not necessarily mean that a teacher's registration to teach will be affected.

If VIT does not take further action following the notification of the application of an employment limitation, it does not mean the employment limitation is removed or is no longer applicable.

The Department reserves the right to maintain an employment limitation on a teacher who VIT has permitted to retain their teacher registration.

Employment Limitations and Working with Children Checks

A person who has passed a Working with Children Check (WWC) may nonetheless have an employment limitation applied, at the Department's discretion. Similarly, an employment limitation does not prevent a person from passing a WWC Check.

When will an Employment Limitation be applied?

Initial decisions regarding the application of employment limitations are made by the Manager of the Employee Conduct Branch, at his/her discretion. The terms of any employment limitation will be proportionate to the conduct which is the subject of the investigation.

A person may seek review of an employment limitation that is applied against them. See “Review of an Employment Limitation” section below.

Some situations in which an employment limitation may be applied are set out below.

1. FOLLOWING A MISCONDUCT OR UNSATISFACTORY PERFORMANCE DISCIPLINARY PROCESS

Where an investigation carried out in accordance with the relevant [Guidelines for Managing Complaints, Unsatisfactory Performance and Misconduct](#) has found a complaint or an allegation of misconduct or unsatisfactory performance to have been substantiated and/or the person’s employment has come to an end.

2. EXPIRY OF A PERIOD OF FIXED-TERM EMPLOYMENT OR PROBATIONARY PERIOD DURING THE COURSE OF AN INVESTIGATION

The Department’s legal power to investigate allegations of misconduct and unsatisfactory performance relates only to employees of the Department (Divisions 10 and 9A of the ETR Act and section 22 of the PA Act).

When a person’s period of fixed-term employment or probation expires during the course of a complaint process, or an investigation into alleged misconduct or unsatisfactory performance, the Department no longer has power to investigate, as the person is no longer an employee. However, as there remain unresolved issues with that person’s employment, an employment limitation may be applied

In making the decision as to whether an employment limitation will be applied or maintained in these circumstances, the following issues will be considered:

- the circumstances and context of the issue of concern;
- the response to the allegations provided by the former employee;
- the credibility of the evidence obtained or provided.

3. RESIGNATION DURING THE COURSE OF AN INVESTIGATION

If an employee resigns during the course of an investigation or complaint process, or where there are unresolved issues about his or her performance or conduct, an employment limitation may be applied.

This is to ensure that a person cannot circumvent a disciplinary, unsatisfactory performance or complaints process by resigning in order to avoid an adverse finding and being re-employed without proper consideration of the circumstances of the resignation.

In making the decision as to whether an employment limitation will be applied or maintained in these circumstances, the following issues will be considered:

- the circumstances and context of the issue of concern;
- the response to the allegations provided by the former employee;
- the credibility of the evidence obtained or provided.

4. CONDUCT DURING EMPLOYMENT WHICH, IF KNOWN, WOULD CONSTITUTE GROUNDS FOR EMPLOYMENT ACTION

An employment limitation may be applied if the Department becomes aware of an allegation that a former employee engaged in conduct during their employment which, had it been known during their employment, would have constituted grounds for an investigation (under Division 10 of ETR Act or section 22 of the PA Act), and:

- i. would constitute improper conduct (as defined in the Protected Disclosure Act 2012), or;

- ii. would constitute corrupt conduct (as defined in the Independent Broad-based Anti-corruption Commission Act 2011)

5. APPLICATION OF AN EMPLOYMENT LIMITATION ON MEDICAL GROUNDS

If an employee of the teaching service resigns or retires following a period of long term sick leave, or his/her employment is terminated due to physical or mental incapacity pursuant to Part 2.4 Division 8 of the ETR Act, an employment limitation may be applied.

This is not a disciplinary measure, but is to ensure that medical evidence is obtained to confirm that the person is fit for duty before he or she is re-employed.

In these circumstances, clauses 6.2.10 of [Ministerial Order 1038](#) and [Ministerial Order 1039](#) will apply, and the person seeking re-employment will not be permitted to return to duty unless and until a medical practitioner, approved by the Secretary, has certified that he or she is fit to resume work. The person seeking re-employment will be responsible for the cost of the medical examination.

Notification of an employment limitation

Once the decision has been made to apply an employment limitation, the person will be notified in writing. The letter will be sent to the person's last known address. The letter will:

- advise the person that an employment limitation has been applied;
- outline the terms and conditions of the employment limitation;
- advise the person of the basis upon which it has been decided to apply an employment limitation; and
- advise the person how to seek a review of the employment limitation.

Review of an Employment Limitation

INTERNAL REVIEW

Decisions regarding the removal or variation of an employment limitation are made by the Department's Executive Director, Human Resources.

A review may be initiated by an application from a person subject to an employment limitation, or may be initiated at the discretion of the Executive Director, Human Resources or the Manager, Employee Conduct Branch.

Persons seeking a review should make a request in writing, addressed to:

The Executive Director
People Division
Department of Education and Training
GPO Box 4367
Melbourne 3001

The request should be supported by the provision of the names and mailing addresses of at least three referees. If the applicant is seeking school-based employment, one of the referees should be a school principal if possible.

Referees may be employers in the non-government school sector, persons who have employed the applicant on a voluntary basis, or anyone who can comment on a position of responsibility held by the applicant.

Referees will be contacted in writing by the Department, and requested to provide a confidential reference in relation to the person's professional performance and conduct.

Copies of the confidential references will not be made available to the applicant. However, they may be released pursuant to a Freedom of Information request or court order.

The applicant may also submit a statement and/or written submissions on their own behalf. The applicant does not collect or provide professional references and the Department may not consider such references.

The fundamental issue that will be considered by the reviewer is whether the applicant can demonstrate that the conduct that led to the application of the employment limitation is no longer of concern or can now demonstrate competent performance, or is now medically fit for duty.

The reviewer will consider the nature and seriousness of the conduct that lead to the application of the employment limitation, the length of time since the conduct occurred and any other relevant issues.

Once the information has been reviewed and considered by the Department, the applicant will be notified of the outcome of the review. If the decision is not the outcome sought by the applicant, the applicant will be advised of the process for further review.

There are three possible outcomes of the internal review:

1. Removal of the employment limitation;
2. "Downgrading" of the employment limitation. For example, a teacher previously subject to a "do not employ" employment limitation, may be permitted to undertake casual relief teaching, or fixed term employment;
3. Continuing application of the employment limitation.

If the employment limitation is not removed, or is downgraded, the applicant may request a further internal review at a later date.

EXTERNAL REVIEW

External review procedures in Part 5 of [Ministerial Order 1038](#) (for teaching service) and [Ministerial Order 1039](#) (for school council employees) provide that an employee, other than a casual employee, may lodge an application for a personal grievance in writing with the Senior Chairperson of the Merit Protection Boards (MPB). External review procedures for Victorian Public Service (VPS) employees can be found on the [Grievances](#) page on HRWeb.

The only ground for review of an employment limitation internal review decision is that there was a significant deficiency in the process.

Further Assistance

Further information, advice or assistance on matters related to Employment Limitation is available by:

- Accessing the A-Z topic list on [HRWeb](#);
- Using the [related topics](#) list; or
- Contacting the Employee Conduct Branch on (03) 9637 2594.