Fact sheet

# Unjustifiable hardship and workplace adjustments

## Requesting and granting adjustments

All employees have a right to request workplace adjustments at any stage of their recruitment processes or at any time in their employment to enable their full participation in the workplace and to work safely. They may be a person with disability or have characteristics that impact their participation, such as a health condition or temporary injury requiring a temporary adjustment.

Employers must provide workplace adjustments unless doing so would cause the employer unjustifiable hardship[[1]](#endnote-1) or if the employee could not perform the inherent requirements of the role, even with a reasonable adjustment.

## What is the unjustifiable hardship exception?

Under anti-discrimination laws employers are required to make reasonable adjustments for employees with disabilities.[[2]](#endnote-2) However, there may be situations where certain adjustments would cause the employer major difficulties or unreasonable costs. In these cases, the law provides an exemption, called ‘unjustifiable hardship’, and an employer would not be required to make the adjustment.

Unjustifiable hardship is based on an assessment of what is fair and reasonable in the circumstances.[[3]](#endnote-3)

The burden of proving that something would impose unjustifiable hardship lies with the employer claiming unjustifiable hardship.

## Principles for determining unjustifiable hardship

The law states that all relevant circumstances of the particular case must be taken into consideration when determining an unjustifiable hardship claim.[[4]](#endnote-4)

Before deciding that unjustifiable hardship applies, an employer should consider how adjustments can be made and discuss issues directly with impacted parties. The anti-discrimination laws require that all relevant circumstances of the particular case be taken into account, including:

* the nature of benefit or detriment likely to accrue to, or to be suffered by, any person concerned
* the effect of the disability of a person concerned
* the financial circumstances, and the estimated amount of expenditure required to be made by the person claiming unjustifiable hardship.[[5]](#footnote-1)

For more information, visit your agency workplace adjustment policy and consult your internal HR, Legal or other specialist teams. Also see the [Australian Human Rights Commission’s guide on unjustifiable hardship](https://www.humanrights.gov.au/quick-guide/12105). Agencies are encouraged to consult and seek appropriate advice.

Where a manager believes that a requested workplace adjustment may constitute an unjustifiable hardship, they should seek internal advice from the relevant team in their agency before any decision to decline the request. This may be HR, Legal or another specialist team. Remember that personal and health information about an employee may be subject to privacy and health legislation and may not be able to be shared without their consent unless authorised by law.

1. [*Disability Discrimination Act 1992 (Cth)*, s 11](https://www.legislation.gov.au/C2004A04426/latest/text). [↑](#endnote-ref-1)
2. [*Disability Discrimination Act 1992 (Cth)*](https://www.legislation.gov.au/C2004A04426/latest/text), [*Anti-Discrimination Act 1977 (NSW)*](https://legislation.nsw.gov.au/view/html/inforce/current/act-1977-048) [↑](#endnote-ref-2)
3. [Unjustifiable Hardship - Australian Human Rights Commission Factsheet](https://humanrights.gov.au/quick-guide/12105) [↑](#endnote-ref-3)
4. [*Disability Discrimination Act 1992 (Cth), s 11*](https://www.legislation.gov.au/C2004A04426/latest/text).

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   # Moving between roles and workplace adjustments

   ## Aligning our approach across the sector

   The *Government Sector Employment Act 2013* and *Government Sector Employment (General) Rules 2014* provide various mobility provisions to support movement between roles and agencies, including by way of assignment, secondment and transfer.

   When employees move to a new role, existing workplace adjustments should be reviewed and updated.

   The Commissioner’s Direction and Model Policy for Workplace Adjustments are designed to support government agencies to develop their own workplace adjustment policies and facilitate a consistent and effective approach for workplace adjustments across the sector. In many cases, adjustments should be transferred if they are reasonable and practicable for the new role.

   ## When would workplace adjustments need a review?

   When an employee moves to another role, and the employee shares their adjustment needs with their new manager/agency, the new manager will need to review existing adjustments and consider what adjustments are required for the new role.

   The adjustment review should consider all relevant circumstances. In addition to the requirements for considering a workplace adjustment, this may include:

   * How practical and cost-effective it is to transfer an adjustment from their previous role. For example, consider if it is more practical and/or economical to re-purchase or re-utilise equipment at the new location for large items like an ergonomic chair or sit/stand desk or whether it is more efficient to ship the items from the employee’s previous workplace.
   * The nature of the role. An adjustment may be in place in one role but create an unjustifiable hardship for the employer in another. For example, hybrid working may be suitable for an office-based policy role where face-to-face contact is not an inherent requirement but may not be suitable for an operational service role where face-to-face contact at the workplace or worksite is an inherent requirement.
   * Checking to see if the employee’s adjustment needs have changed due to the new role or a change in the employee’s circumstances. For example, the location may mean a longer commute, a different office set up, or the employee’s residential location may have changed.
   * Identifying whether any agency specific policies or policy changes since the previous adjustment may impact the adjustment.

   ## A fair review process

   If an employee is unsatisfied with the workplace adjustment process or decision, they should refer to the relevant escalation process within their new agency.

   If an employee wishes to make an informal or formal complaint, it is important the process is fair, transparent, confidential and timely. This could look like:

   * having a manager or HR/third party review the decision
   * the Director or HR Advisory facilitating or mediating an open and respectful conversation between the parties
   * clearly explaining the process and possible outcomes to the employee from the outset and keeping those involved informed of the progress
   * keeping the complaint and all personal or health information confidential and ensuring the complaint information only goes to those who need to know about it
   * having mechanisms in place to protect the employee from being victimised as a result of making the complaint
   * ensuring the resolution process is accessible to the employee making the complaint
   * conducting the escalation process in an efficient manner and providing an outcome or resolution in a timely fashion.

   The employee should be supported throughout this process. This could include allowing the employee to bring a support person to meetings, providing advice and support services to the employee and holding regular check-ins with the employee. The Model Policy for Workplace Adjustments provides a list of advice and support services for employees who wish to make an informal or formal complaint.

   The Australian Human Rights Commission provides [good practice guidelines for internal complaint processes](https://humanrights.gov.au/our-work/employers/good-practice-guidelines-internal-complaint-processes) on their website.

   Where a manager has questions or concerns regarding workplace adjustments where an employee is moving between roles, they should seek advice from the relevant team in their agency. This may be HR, Legal or another specialist team. Remember that personal and health information about an employee may be subject to privacy and health legislation and may not be able to be shared without their consent unless authorised by law.

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   # Injury management and workplace adjustments

   ## Supporting injured or ill employees with a workplace adjustment policy

   Employees who are injured or ill may have a temporary disability that impacts their ability to work. This means that a workplace adjustment may help facilitate their participation in the workplace.

   Under the [*Disability Discrimination Act 1992 (Cth)*](https://www.legislation.gov.au/C2004A04426/latest/text)and the [*Anti-Discrimination Act 1977 (NSW)*](https://legislation.nsw.gov.au/view/html/inforce/current/act-1977-048)agencies should provide workplace adjustments to all employees with disabilities to facilitate them to perform their role, regardless of whether the injury or illness is work-related or not, unless the adjustment would cause the employer unjustifiable hardship.

   People managers should ask all employees, including those returning after an injury or illness, if they require any workplace adjustments. Managers should ensure they refer to their agency’s workplace adjustment policy and related procedures in discussions with employees when they are returning to work after an illness or injury.

   ## What is injury management?

   Injury management covers the activities and procedures taken to help workers with a work-related injury or illness safely return to work or recover while at work. This includes the employer’s obligations under the *Workers Compensation Act 1987 (NSW)* or the *Workplace Injury Management and Workers Compensation Act 1998 (NSW).*

   Your agency’s workplace adjustment policy may not address these obligations specifically. People managers are encouraged to seek clarification from their agency’s work health and safety team, on their obligations and to advise on the correct policy and/or process to follow.

   ## How does the workplace adjustment policy impact injury management policies?

   The workplace adjustment policy does not replace other injury management policies or procedures.

   A workplace adjustment may be managed differently to a return-to-work program or workers compensation claim. While there can be similarities and some cross-over, they are managed under separate legislation and systems with additional and different obligations applying in relation to employees who have a work-related injury or illness.

   Agencies may need to take additional steps to discharge their duties in relation to the matters not addressed under their workplace adjustment policy, including in relation to any obligations which may arise under workers compensation legislation.

   Where a manager has questions or concerns regarding injury management and workplace adjustments they should seek advice from the relevant team in their agency. This may be HR, Legal or another specialist team. Remember that personal and health information about an employee may be subject to privacy and health legislation and may not be able to be shared without their consent unless authorised by law. [↑](#endnote-ref-4)
5. *Anti-Discrimination Act 1977* s 49C. See also *Disability Discrimination Act 1992 (Cth)* s 11 which requires some additional factors to be taken into account. [↑](#footnote-ref-1)