

## Practitioner Toolkit

# Disclosure

### Contact

| [toolkit@nesa.com.au](mailto:toolkit@nesa.com.au) | [nesa.com.au](http://nesa.com.au)

**#weR4jobs** *weR4everyone*



# Practitioner Toolkit

*Damien Opolski has over 30 years experience in the employment services sector, including many years as an employment consultant in regional and metropolitan areas. This paper is based on his experiences, thoughts and research...*

## Disclosure

### Introduction

Many people are comfortable talking about themselves. It's the one subject that most of us are expert in. It may be that our job seeker has a disability – it could be something they were born with or something they acquired. They may have a temporary or permanent health issue. Many of your job seekers will be used to discussing their circumstances – maybe at school, with family and friends, or through education, training and other employment.

You'll also know that some disabilities are less obvious than others. For example, epilepsy or a mental health condition might not be as obvious as a wheelchair, prosthetic or guide dog. It might be that people with more 'visible' disabilities are more used to talking about themselves, their skills, abilities and aspirations and, when appropriate, their disability. Most of us would agree that in the past many people have been reluctant to identify as having a mental health condition, and these things would often not be disclosed. You might also agree that times seem to be changing, and more people seem to be comfortable in talking about mental health.

Job seekers who are *volunteering* for assistance have most likely done some research before coming to you, so they will have an understanding of the services you provide and know that in order to best assist them you will be keen on learning as much about them as you can. Job seekers who are *required* to participate in employment services may be more reticent.

### Asking Very Personal Questions

Think about times when organisations have asked you for information about *your* circumstances. How do *you* feel about that?

When a medical professional asks us questions about our health we usually understand the *context* and *relevance* of the request and are comfortable in responding, but if a financial institution were to ask us the same questions we'd probably be a bit more reticent.

You might be reluctant to share sensitive information about yourself if you don't know *why* you are being asked, *what* the information is being used for and *who* it might be shared with. If you understand the *context* in which the information is being sought then you might be more comfortable in disclosing information. Maybe your job seeker feels the same.

We looked before at the importance of doing your best to develop a professional relationship with your job seeker – a relationship built on mutual respect and trust. Job seekers may feel more comfortable in disclosing information about themselves when they feel the information is relevant and in 'good hands'. At the same time, having more information assists you in working with the job seeker to develop a plan of action. We need to remember that information about health and personal circumstances can be very personal, and it can be difficult for a job seeker to disclose some things or to agree for you to request information about them from health or service professionals.



## Practitioner Toolkit

We need to respect this. A couple of things to think about:

- If a job seeker understands *why* sharing information with you can help you to help them, they may be more comfortable in sharing information with you.
- If the job seeker knows *what* you will do with the information – that you have a legal obligation to protect their privacy, and that you must have their consent to disclose information to an employer – and that the only situation in which you can share information with an employer is when there's a legal requirement or it relates to the job seeker's ability to perform the *essential* (or 'inherent') requirements of the job, then the job seeker may be more comfortable in disclosing information to you. But remember that it may take some time.
- Job seekers don't have to disclose information to you, and you'll know that JSCI questions around whether a person is Aboriginal/Torres Strait Islander/South Sea Islander, the nature of their entry into Australia (in the case of refugee and humanitarian visas), health and criminal record is classified by the Department of Employment as 'voluntary disclosure'. Before asking these questions you might explain to the job seeker that you are about to ask some very personal questions and that disclosure is voluntary, while also explaining how the information can help you to work with the job seeker to develop a good plan.

That's where the relationship you're building with your job seeker becomes so important.

### Understanding Discrimination and Privacy

It's very important that you understand the legal framework that underpins employment services – especially around discrimination and privacy.

You'll see we've got more information on discrimination and privacy in the Toolkit. We'd recommend you have a look at some of the very interesting material and case studies we've got for you in those sections.

As an employment consultant you are subject to privacy law and the Australian Privacy Principles which govern the '*how, what, why, where and when*' of information gathering and its use – including its disclosure. Make sure you're familiar with the principles – and keeping a copy on your desk can send a good message!

The Department of Employment's Privacy Guideline is also available to you here in the Toolkit and on the Provider Portal.

### 'Inherent' Requirements of the Job

There is only a requirement for information about health or disability to be disclosed to an employer if it relates to your job seeker's ability to perform the *essential* or 'inherent' requirements of the job.

If the information is not relevant to the inherent requirements then it should not be requested by an employer and does not need to be volunteered by the job seeker or employment consultant.

The inherent requirements of the job need to be identified before recruitment commences. In some cases, it will be an inherent requirement that an applicant possess a specific licence, ticket or



## Practitioner Toolkit

registration. These are called ‘regulated’ occupations, and include jobs that involve working with ‘vulnerable’ people such as children, older people and people with disability. It’s also an inherent requirement that you have the appropriate accreditation to drive a truck, crane or forklift, work as a scaffolder, or be registered as a nurse or lawyer.

Inherent requirements can also include the requirement that the job be done in a safe work environment, and may also include attributes such as honesty and trustworthiness – for example for jobs that involve handling money or working with limited supervision.

So perhaps the first question is: “Can my job seeker perform the inherent requirements of the job?”

If the job seeker’s circumstances (including a disability) will impact on their ability to perform the inherent requirements of the job, then the job seeker (or, with the jobseeker’s permission, the employment consultant) should discuss the circumstances with the employer.

It may be that your job seeker could meet the inherent requirements with the help of an assistive technology, or some minor job redesign – perhaps around the hours of work or way that the job is done.

Programs such as the Employment Assistance Fund, Supported Wage System and wage subsidy schemes are there to help employers when employing people with disability.

[Here are a couple of case studies that look at disability and the ‘inherent requirements’ of a job](#)

### Brad and the building company

Brad wishes to apply for a reception position with a building company. The job involves greeting clients, providing some basic details about services, recording details in the computer system, and booking the client in to see the most suitable consultant.

Brad has a bright personality and good computer skills. He had an accident five years ago and his right leg was amputated below the knee. He has a prosthetic.

Can Brad fulfil the inherent requirements of the job?

The first question is “What are the inherent requirements of the job?” The inherent requirements of this job could be that:

- You are able to greet clients
- You are able to use computers
- You can contribute to a safe working environment

Based on our limited information we might decide that Brad can fulfil the inherent requirements of the job. The fact that Brad has a prosthetic does not impact at all on his ability to do this job. The job advertisement should not require that an applicant not wear a prosthetic, and unless there are significant access issues, there is no requirement for Brad (or the employment consultant) to mention this.



## Practitioner Toolkit

Disclosure need not be a consideration – there’s no ‘close and tight’ relationship between the inherent requirements and Brad’s disability, so the job shouldn’t ask and Brad doesn’t need to volunteer the information.

### Denise’s desk

Denise wishes to apply for a job in a call centre. The call centre has 20 desks, and each consultant sits at a desk to answer and process calls. Denise has an ongoing back problem which means that she can’t sit for longer than 15 minutes before standing for 10 minutes.

Even though Denise can’t sit for long periods, she has the required skills and attributes and could do the job if she had a ‘standing desk’.

Denise has given her consent for her employment consultant to discuss her back problem with employers where a job would normally require sitting for long periods. If the employer offered both sitting and standing desks – and staff had the option of sitting or standing – then Denise’s back injury might be irrelevant and there may be no reason for Denise (or her employment consultant with Denise’s permission) to discuss Denise’s injury with the employer. Denise and her consultant will have a strategy around disclosure - and in this case Denise might discuss it with the employer at her interview, and perhaps discuss how the Employment Assistant Fund could provide the standing desk that Denise needs so that her back injury won’t impact on her ability to do the job.

### Ashley’s asthma

Ashley has chronic asthma. He has needed hospitalisation in the past. It means that he can’t work with many grasses and seeds or in dusty environments. He manages his condition in part by avoiding these places.

Ashley wishes to apply for a hospitality position. The café has an outdoor area but is located in a built up region – there is no exposure to dust, grasses or seeds. Ashley has been to the venue before so he knows its fine for him.

The inherent requirements of the job may be that you need to:

- Be a good barista
- Have a personality and communication skills that suit public contact
- Have a ‘Responsible Service of Alcohol’ ticket

Ashley’s employment consultant feels that Ashley meets these requirements.

You might say there is no need for Ashley or his provider to advise the employer of his asthma as it is irrelevant to this particular job – there is no ‘close and tight’ relationship between Ashley’s asthma and the inherent requirements of the job.

### Kailey’s chemicals

Kailey is allergic to an industrial chemical – BBB – so she can’t work in environments where BBB is present. Kailey wishes to apply for a clerical position in an office at a warehouse. Kailey and her employment consultant discuss the job and contact the employer to see if BBB is used in the warehouse, and if so, if the job involves spending time in the warehouse. The employer tells them



## Practitioner Toolkit

that the job may involve some time in the warehouse but that BBB is never used. The job requires good communication and computer skills.

If BBB was present in the warehouse then you could say that it is an inherent requirement of the job that a person be able to work in an environment with BBB, and that unless the position could be modified such that Kailey didn't ever need to go to the warehouse, or unless Kailey could wear some protective clothing, that Kailey's allergy prevented her from meeting the inherent requirements of the job, and that therefore the job wasn't a good fit for Kailey or the employer.

BUT...

In this case BBB isn't present, so it's not a requirement of the job that a person be able to work in a BBB environment. As Kailey has good communication and computer skills, her consultant assesses that she meets the essential requirements of the job. Her allergy is irrelevant to her ability to perform the inherent requirements of the job, so you might say there is no need to volunteer the information.

### Trev's truck

Ten years ago Trev hurt his back playing footy. He had an operation and for 12 months he was quite limited in his movement and was unable to lift more than 10 kilograms.

Trev undertook an extensive rehabilitation program and within 12 months had no restrictions and was able to resume playing football. He's had no problems since.

He has a truck licence and wishes to apply for a truck driving job. It's a requirement of the job to be able to tie loads and load/unload the truck as well as do the basic mechanicals.

The question is: Does Trev's old back injury impact on his ability to perform the inherent requirements of the job, and should Trev or his employment consultant volunteer the information to the employer? In this case Trev and his consultant agree that he can meet all the essential requirements of the job so you might say there is no need to volunteer the information about his previous injury.

### *Requests for information*

There's a difference between *volunteering* information and responding to a *request* for information from an employer. In the last example we felt that because Trev can meet the essential requirements of the job there was no need for Trev (or Trev's provider with Trev's permission) to volunteer information about his old back injury.

But what if the employer asked Trev: *"Have you ever had a back injury that required an operation?"*

There's a couple of issues here:

1. Should the employer ask this? Maybe it's not the right question – it could leave the employer open to claims of discrimination. An applicant may have had an operation but it doesn't impact on their ability to do the job now. Maybe the question should be: "Do you have an injury or health condition that might impact on your ability to do this job?"

The Disability Discrimination Act 1992 and the Australian Human Rights Commission Act

(1986) are designed to protect people from discrimination.

It's important that employers understand the legal framework around discrimination and what they should and shouldn't do. There's plenty of information available to employers to help them develop good recruitment practices. The Job Access web site has a section just for employers!

### 2. What should Trev's response be (or your response if the employer asks you)?

We've already said that employers need to know about their rights and responsibilities when employing staff, and this includes the wording of job advertisements and the types of questions they (or you as an employment consultant), ask potential employees. So that's the first thing. Let's say that you have a chat to the employer and they change the question to:

*"Do you have an injury or health condition that might impact on your ability to do this job?"*

Trev can now honestly answer the question.

The second issue is around honesty.

Let's say that Trev still has back problems and knows that he may aggravate his condition while loading and unloading the truck. He has recently been assessed by a health professional who concluded that he should not do any lifting. Trev answers 'no' to a question on the application form that says: *"Do you have any health issues that may impact on your ability to do the job?"*

Let's say that sometime later the employer finds out that Trev's answer was incorrect and he had been advised not to lift. The employer dismisses Trev and Trev lodges a complaint with the AHRC saying that he has been discriminated against on the grounds that he has a disability. He hasn't had any problems doing the job. The employer may argue that Trev was dismissed *not* because of his disability but because he dishonestly answered a question on his application form. It is possible that Trev's claim of discrimination could be dismissed on the grounds of honesty – that he knowingly provided incorrect information on his application form.

By the way, employing a person with disability will not affect an employer's compensation premiums unless an employee is injured at work. When calculating workers' compensation premiums, insurance companies do not consider whether or not an organisation employs people with disability.

### Sam's substance abuse

Let's say that Sam is one of your job seekers. Sam had a significant substance abuse issue around 12 months ago. You worked closely with Sam and assisted her to find a place in a residential rehabilitation program. The program included follow up counselling sessions. Sam completed the program and is now in a much better space. You've seen her a couple of times lately she appears fit and healthy. Her communication skills are excellent. When you first saw her – 12 months ago – her manner was very reserved and she struggled to maintain eye contact. That's not the case now and she's given you copies of a recent assessment that supports your assessment that Sam is very work ready.

Sam wishes to apply for a position as an assembly worker. The job requires good dexterity and attention to detail. You believe that Sam meets the inherent requirements of the job so you might

say there is no requirement to volunteer information about Sam's previous substance abuse or treatment.

But one thing that you need to consider in Sam's case is that there may be a gap in her employment history which the employer asks about. How will Sam respond to that? We talk about a job seeker being a 'good fit' for a job. Maybe we also need to think about an employer being a 'good fit' for a job seeker. If you were the employer what would you think about Sam's efforts to rehabilitate? You and Sam might come up with a good way to respond to an employer who asks about a gap in employment history. We would hope that employers will be supportive of Sam's situation and acknowledge her achievement – the fact that she has worked her way through rehabilitation says a lot about her character and her personal qualities. Sam might say to you:

*"I'm happy to tell them – if they don't employ me because of that they probably aren't the sort of people I want to work for".*

Once again, every situation is different and you'll work through these things on a case-by-case basis.

So there are a couple of things for you to consider in the area of disclosure of information. You may find that you and your job seekers understand the legal framework very well, but some of your employers may not. Remember – there is lots of information and training available to employers as well.

### Duty of care?

On the one hand you have a commitment to the job seeker, and a duty of care to only refer them to suitable jobs. On the other hand you may have a duty of care to the employer when it comes to disclosure of sensitive information. When you refer a job seeker who clearly meets the inherent requirements of the job you are comfortably meeting your obligations to both parties. If you feel that the job seeker's disability might impact on their ability to satisfy the inherent requirements then you may have a 'duty of care' to the employer for that information to be made available. Remember that you can only disclose information with the job seeker's permission, and only disclose information that is relevant to the particular circumstance.

An example might be that Jane, who is vision impaired, is looking for clerical work. She's highly skilled using a computer when the computer has screen reader and voice activation software. Jane may be extremely comfortable in discussing her skills and qualities with employers, and also very comfortable in explaining how assistive technology will allow her to do the job. She might have her own assistive technology which can simply be installed on the work computer. It might be that Jane has a guide dog and she's very comfortable in talking to people about how her dog adjusts to different environments.

You might be contacting some potential employers for Jane. How will you 'market' Jane? Well, it sounds like Jane has a pretty good self-awareness so she can help you with your 'pitch'.

I bet that when you apply for a job, or when you discuss job seekers with employers, you focus on the skills, abilities and qualities that will make you/them a good fit for the job. It's the same with Jane – you will have decided that Jane is a good fit for this employer, so the focus will be on emphasising Jane's skills, abilities and qualities – that's what the employer will be most interested in. If Jane requires some assistive technology and has a guide dog – such that some workplace



adjustment will be required – then that’s relevant information for the employer, but perhaps it’s secondary to Jane’s skills, abilities and qualities.

### When might the information be disclosed?

Once again, it’s a case-by-case situation. Remember that we’re only talking about situations where a job seeker’s disability might have an impact on their ability to meet the essential requirements of the job. A tip is to disclose when it becomes relevant, which is often when the job seeker has been selected for interview or attends the interview. If you are canvassing potential employers on behalf of the job seeker then you and your job seeker may, as part of your strategy, agree when relevant information might be disclosed.

In Jane’s case, the employer may get a ‘hint’ that Jane is vision impaired from her application and resume – her resume may have references to some of the assistive technology she uses or some of the organisations she’s been involved in. Additionally:

- If access to the interview location is an issue, or if the employer wants applicants to demonstrate their computer skills, then Jane (or you with her permission) may contact the employer before the interview to discuss access or to arrange to have some specific assistive software installed.
- If Phuong, another job seeker you are helping, uses a wheelchair, she may contact the employer before the interview to discuss access arrangements.
- If there are ‘at work’ considerations, Jane may choose to address these at the interview. Perhaps Jane has her own assistive software packages and during the interview she explains that that they can easily be installed on the work computers. Jane may have a guide dog who sits quietly under Jane’s desk – so Jane may discuss this at the interview.
- A job seeker with epilepsy may choose to discuss their condition and how it can be managed in the work environment at the interview.

### What’s the Catch?

Every situation is unique – so once again focus on the person and not the disability. It’s important not to make assumptions based on the disability.

If you are disclosing information then think about what you say and how you say it. If someone says to us...

- *“Jane will be very suitable for this job BUT...”*
- *“Now, there’s SOMETHING ELSE I NEED TO TELL YOU about Jane...”, or*
- *“There is an ISSUE with Jane...”, or*
- *“I WILL GIVE YOU a wage subsidy IF YOU employ Jane...”*

...then we might be setting off an ‘alarm bell’, and our first reaction may be to think “OK... what’s the catch”.



## Practitioner Toolkit

So, don't make a big deal out of things that aren't a big deal. You've already decided that your job seeker's skills, attitudes and attributes make them a good fit for the job –and maybe you'll need to look at job design or assistive technology. But if you didn't think the job seeker and employer might be a good fit you wouldn't be looking to bring them together. If it's not a big deal to you don't make it a big deal for the employer.

### Try to be matter-of-fact

You might say:

*“That’s great. Phuong will be there for her appointment at 10.00am on Monday. Phuong has a wheelchair so what’s the best way for her to access the building?”*

*“Sammy has an acquired brain injury which means he can work at around 80% capacity. Now we offer some financial assistance and can also help Sammy to get started on ‘day one’. We also have our post placement support service...”*

*“Toni has epilepsy which she controls through medication. If she should have a seizure there are steps that you can take to assist her. I can help you with this.”*

### Disclosure and Criminal Records

I'd absolutely recommend that you read the 'Off the Record' article here in the Toolkit. It will really help you to understand when you have a duty of care for information about a job seeker's criminal record to be disclosed to an employer – either by the job seeker or by you (with the job seeker's permission.)

Briefly, the disclosure principles are the same. The question is, can my job seeker perform the inherent requirements of the job? If the answer is 'yes', then you have made an assessment that there is no 'close and tight' relationship between the inherent requirements of the job and the job seeker's criminal record (which is broadly interpreted to include the *circumstances* of the offence). If you feel that there is a 'close and tight' link between the criminal record and the inherent requirements of the job, then you may decide that you have a duty of care to the employer for the information to be disclosed.

It's also important to remember that 'criminal record' is a broad term, and if disclosing information, it's important to only disclose information that you have assessed as being relevant to the particular position – it may be a breach of privacy to disclose other aspects of the record that are not directly related to the position.

### Inherent requirements of the job and criminal records

The inherent requirements of a job are made up of two categories: 'tasks' and the 'other requirements'. The tasks are the things we do, such as operating machinery or making coffee. The other requirements are the other things that doing a job involves, such as contributing to a safe workplace, or working by yourself, or working in an isolated location, or being of good character.

Sometimes it's quite easy to determine if a person can do the *tasks* part of a job, but it's harder to assess if they can meet the *other requirements*.

Here's just one example:

*You are Helen's case manager. You are looking after a vacancy for a job at a bottle shop. Helen is 30 years old. When she was 15 she was found guilty of stealing two bottles of alcohol.*

*Would you refer her to this job?*

*Helen may have the skills to do the tasks, but do you think she can meet the other requirements, which may require the person be able to work by themselves on occasions, and be 'honest and trustworthy'? Do you think there is a 'close and tight' connection between the inherent requirements of the job and Helen's offence? Do you think a duty of care exists for Helen's offence to be disclosed to the employer?*

The key to this scenario is whether you assess there to be a 'close and tight' relationship between Helen's offence and the inherent requirements of the job. When considering criminal record it's important to look at the circumstances around the offence.

Here's what we know:

Helen was 15 years of age. Let's say that since then she has had no criminal activity, and she has excellent recent references. You might therefore form the view that, given the passing of time and Helen's immaturity when the offence occurred, and given that she has good character references, there is no 'close and tight' relationship between her offence and the inherent requirements of the job, and therefore there is no requirement to volunteer this information to the employer.

But what if the circumstances were different?

What if Helen had findings of guilt for similar offences in the last 12 months? You might decide that there is a 'close and tight' relationship between the offence and Helen's ability to perform the inherent requirements of the job. You may decide that this is a not a suitable position for Helen, or, if you decide to refer Helen, you may decide that there is a duty of care for information about relevant, recent offences to be disclosed to the employer.

Sometimes there will be a legal requirement for information to be disclosed – for example certain offences need to be disclosed if a job seeker is looking to work with vulnerable people, for example as a careworker with children, aged people or people with disability. In most cases though, these jobs are regulated so a police check is done when the person applies for the appropriate licence/clearance. The agency issuing the ticket will take this information into account and may decline to issue the card if they assess that there is a 'close and tight' relationship between the offence and type of work.

That's why I want you to read 'On the Record' – it talks about all of these things and has a number of very interesting court case studies!

### Summary - some things to think about

- There's no blanket rule around volunteering information to employers. If a job seeker's disability or criminal record impacts on their ability to perform the essential requirements of the job then you need to think about your duty of care to the employer and the job seeker. In terms of disability, it might be that with a bit of extra assistance (job design, assistive technology, clothing and equipment, workplace modification) the job will be a good fit.
- If there is no 'close and tight' relationship between the job seeker's disability /criminal record and the inherent requirements of the job then there is no requirement to volunteer information.
- A consultant is unable to disclose information unless the job seeker has agreed to the disclosure.
- It is the employer's responsibility to determine the 'inherent requirements' of the job – but with your skills and knowledge you can assist them.
- There is no definition of 'inherent requirements', but they should focus on the 'what' (i.e. the outcomes) rather than the 'how'.
- There's no 'one size fit's all' – every case will be different and you need to look at the specific circumstances.
- Remember there's a difference between volunteering information and responding to a request for information. Consider the implications of providing knowingly incorrect information to the employer.
- Work with your job seeker to develop a marketing strategy. Agree on what sensitive information can be disclosed and the circumstances in which it can be disclosed. Put yourself in the employer's shoes – if you were an employer what might your concerns be? As part of your strategy come up with responses to possible concerns.
- Have a strategy for addressing gaps in employment and questions such as "why weren't you working then...?"