

# Retailers' guide: Face masks and discrimination

**Ensuring your approach to masks  
and vaccines is lawful under  
discrimination law in Victoria**



Private and public retailers, like all providers of goods and services, have a legal responsibility to ensure that their customers and clients are treated fairly and with respect. During the pandemic, many retailers have revised their entry and service policies to accommodate public health directions, such as the requirement to wear a face mask. This resource helps service providers comply with their obligations under discrimination law in Victoria during COVID-19.

## Masks

Since the start of the COVID-19 pandemic the Commission has received hundreds of complaints about the way service providers have treated people who cannot wear a mask because of a protected attribute under discrimination law, such as a disability. People have been refused service for not wearing a mask despite having a lawful exception under the public health directions and the protections provided by discrimination law.

The Commission recognises that this is a complex issue, and service providers are grappling with their legal obligation to protect their staff and customers, alongside their obligations under discrimination law. **However, applying a blanket rule to always refuse service to anyone not wearing a mask is likely to be unlawful.**

## Vaccinations

In the months ahead, another emerging issue will be service providers considering whether to require proof of vaccination from customers and clients.

Retailers must consider a similar range of issues to determine their approach for both vaccinations and masks.

# Four steps to ensure your approach to masks and vaccinations is lawful under discrimination law

**Step 1. Understand your obligations under discrimination law**

**Step 2. Develop non-discriminatory policies around masks and vaccinations**

**Step 3. Train your staff to understand your obligations under discrimination law**

**Step 4. Regularly update your policy and practice including in response to complaints**

## Step 1.

### Understand your obligations as a retailer under discrimination law

Under Victorian law, private and public services have two key duties under discrimination law:

- a duty not to discriminate on the basis of a range of personal attributes, such as disability, pregnancy, religious belief or activity, and physical features
- a duty to take reasonable and proportionate measures to prevent discrimination as far as possible.

### Consider whether a requirement to wear masks or be vaccinated is discriminatory in your circumstances

#### Would a requirement to wear a mask be reasonable?

If you require customers to wear a mask or be vaccinated, even if they are unable to because of a protected attribute, you could be discriminating against them.

It is against the law to unreasonably require customers and clients to wear a mask or prove they have been vaccinated. This means you must make reasonable exceptions for people who cannot do those things because of their disability, pregnancy or other protected attribute.

→ [Find out more about what whether a requirement is reasonable](#)

Even when public health directions require masks to be worn in all retail settings, the Victorian Government's COVID-Safe advice on face masks explains that businesses should not refuse service to patrons who may have a valid lawful reason for not wearing a mask. While the public health directions around masks change frequently, they have consistently made clear that a physical or mental illness or condition that prevented a customer from wearing a mask was a lawful reason for them not to do so.

Ensuring you and your staff are informed about the lawful reasons not to wear a mask is a helpful and easy way to ensure your business does not discriminate against customers and clients. It is important to remember that the requirement to wear a mask applies to individuals – retailers are not obliged under the public health directions to enforce any requirement on individuals to wear a mask.

**If you cannot reasonably allow a person not to wear a mask, can you adjust your service to provide it safely?**

A key obligation under discrimination law is the requirement to make reasonable adjustments for people with a disability. This means that service providers must take positive steps to meet the needs of customers and clients with a disability where reasonable.

→ **What is reasonable will depend on all the circumstances, including the considerations listed below.**

**If you fail to make reasonable adjustments, your actions could be discriminatory unless an exception applies.**

**Does an exception apply?**

Where an exception applies, discrimination may be lawful. The law allows service providers to discriminate in limited circumstances where a policy or practice is reasonably necessary to:

- 1.** protect the health and safety of staff or other customers, or
- 2.** where it is authorised by law.

For example, it is likely lawful under discrimination law for a hospital to apply a blanket rule requiring face masks to be worn if you are visiting a patient who has been diagnosed with COVID-19.

→ **Find out more about exceptions**

As a service provider, if you are relying on an exception, it is your responsibility to prove that it applies.

### Determining whether your approach to face masks and vaccination is reasonable

To determine whether a policy or practice requiring people to wear face masks or prove vaccination is reasonable and therefore lawful, you will need to consider a range of factors:

- how long people generally stay inside the building when receiving the goods or services
- whether it is possible to stay 1.5 metres away from each other inside the building
- the type of people who use the goods and services and whether there is a heightened risk they will suffer severe symptoms if they contract COVID-19 (for example, people over 60 or people with respiratory conditions)
- the consequences of refusing access to the goods and services
- whether the business could put alternative measures in place to protect staff and customers
- advice from work health and safety bodies, such as WorkSafe Victoria, at the time the service is refused
- what the public health directions and advice from the Department of Health is at the time the service is refused
- the rate of community transmission at the time service is refused.

### **Two important things to note**

- **Public health directions have always had exceptions for people with medical conditions and disabilities.** At times where masks are required the public health directions have stated that people do not have to wear a mask if an exception applies, including if they cannot wear a mask due to a disability. There is currently no legal requirement to be vaccinated and no indication that the Victorian or Australian Governments will make this mandatory in a retail setting.
- **WorkSafe has relevant guidance on face masks and vaccines.** WorkSafe has recognised the lawful exceptions under the CHO directions and indicated that, where someone has a lawful reason not to wear a mask, other risk control measures should be implemented where reasonably practicable. WorkSafe has also outlined that vaccinations are only one control measure available to employers and that other control measures should be considered to slow the spread of COVID-19. Employers should note they also have responsibilities to ensure that other people, such as customers, are not exposed to risks to their health or safety as a result of the employer's conduct. Requiring a customer to wear a mask when it is not safe for them to do so due to their disability or other protected attribute may create a risk to their health and safety.

## Step 2.

### Develop non-discriminatory policies around masks and vaccinations

A retailer imposing a blanket requirement that all customers and clients must wear a mask or prove they have been vaccinated is unlikely to be lawful. It is useful for you to develop a policy or practice around masks and vaccinations which creates exceptions for people who are protected by discrimination law, such as people with a disability or people who are pregnant. Ensure all employees in your business are aware of the policy and apply it consistently. Consider displaying the policy clearly for customers and clients.

#### How retailers can develop and implement non-discriminatory policies

1. Ensure your entry policy recognises and makes adjustments for people with a disability with a lawful reason to not wear a face mask.
2. Change the wording on any posters at the entry to your store. Instead of 'No mask, no entry', consider 'No mask, no entry – unless you have a lawful exemption'.
3. Provide training on your entry policy so that all staff treat people with respect and know how to manage people who are not wearing a mask.

It is also unlikely that retailers can require customers or clients to provide proof that they have a disability or other attribute protected under discrimination law. **It is important to note that there is no requirement under the public health directions for a person with a lawful exception to provide proof of that exception, including people with disabilities.** Make sure your policy or practice is clear that proof isn't required. Only in very limited circumstances would it be lawful under discrimination law for a retailer to require proof of a disability in order to access their service without a mask. For such a requirement to be lawful the retailer would need to prove that their unusual circumstances warrant a departure from the requirements of the public health directions (which are informed by the latest public health data and modelling regarding risk). In the rare circumstances where a retailer might lawfully be allowed to ask for proof this should be as limited as possible – for example a letter from a GP confirming the person cannot wear a mask should be sufficient; it should not be necessary to know exactly what disability the person has which prevents them from wearing a mask.

**In the rare circumstance where a blanket requirement to wear masks or prove vaccination is required, consider alternate ways you can provide a service to the person you are excluding from your premises. For example, if you are a chemist can you take the prescription from the person over the phone or the internet and arrange for pick up or delivery?**

## How retailers can make reasonable adjustments for people who cannot wear a face mask

1. As outlined above, requiring all customers and clients to wear a mask without exception is unlikely to be lawful. In most circumstances it should be possible to make exceptions for people with a disability or other protected attribute and allow them not to wear a mask and access your services as normal.
2. If this is not possible, think about alternative ways to offer your services. Are there services you could provide online? Could you provide click-and-collect, home delivery or telephone-assisted shopping for people who cannot wear a face mask?
3. Can you serve the person outside of your business? If you arrange to serve people who cannot wear a mask outside your business, make sure there is adequate shelter and consider providing a seat so any customers with disability are comfortable as they wait.
4. Can you accommodate that person at particular times? Consider designating particular times of day when people who cannot wear a face mask could shop or visit by prior arrangement. For example, a retail store might nominate a quiet time like 8.30 to 9.30am on weekdays as a time when people without face masks can shop.

### Step 3. Train your staff to understand your obligations under discrimination law

Your business can be held responsible for the way your staff treat customers and clients.

Think about who is most likely to be implementing your policies and practices around masks and vaccinations and make sure you provide them with thorough training. This may include security staff at entrances, front line staff, and managers. It is important that they understand your obligations under discrimination law and the policies and practices you've put in place.

**Remember that many disabilities are not visible. Some of the common reasons why people cannot wear a mask due to a disability include conditions affecting their lungs and mental health conditions. Make sure that staff understand this and don't make judgements about whether a person's reason not to wear a mask or be vaccinated is valid.**



## **Step 4.**

### **Regularly update your policy and practice including in response to complaints**

Whether your policy or practice is lawful under discrimination law is likely to change over time as the rate of community transmission and restrictions in Victoria change. Make sure you regularly update your policies and practices as conditions change.

Treat complaints as an opportunity to learn and tailor your policies and practices to cover the kinds of scenarios your staff are faced with to ensure you are providing a respectful and lawful service to the community.

#### **Case study:**

#### **Business refuses entry to a customer with a medical exception**

Peter visited his local garden centre and was not wearing a mask as he had a medical exception. When he entered the centre, he was approached by the business owner who asked why he was not wearing a mask. Peter told the business owner he had a medical exception. The business owner asked him for a copy of a medical report, but Peter responded that he did not have to provide a copy as it was confidential. The business owner told him to leave the premises.

Peter contacted the Commission to make a complaint of disability discrimination against the business owner. The Commission contacted the business owner, but she was initially hesitant to engage in the dispute resolution process. The Commission's conciliator explained to the owner that there appeared to be no requirement for businesses to require proof of a person's medical exception or reasonably refuse entry to a premises. They also explained that the business may be in breach of discrimination law for refusing a service and not providing reasonable adjustments for people with a disability to access the garden centre.

Once the business owner understood more about her obligations under Victorian discrimination law, she agreed to provide an apology to Peter, stating that she regretted refusing him access to the centre because she was misinformed about businesses' obligations regarding medical exceptions and the requirement to wear a mask. The business owner also implemented new store policies for staff to follow and welcomed Peter back to the business.