

Guideline:

Disability and

Employment Practices

Complying with the Equal Opportunity Act 1984



Government of South Australia

Office of the Commissioner for
Equal Opportunity

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Legal disclaimer

This practice guideline does not constitute legal advice. It is intended as a guide only. The content of this guideline may be updated in subsequent versions. To ensure you are accessing the most up-to-date version see: www.equalopportunity.sa.gov.au.

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Contents

About this guideline 3

Part 1 – Understanding disability and inclusion 4

Part 2 – What the law says 6

Part 3 – How to be fair when recruiting 8

Part 4 – How to be fair and inclusive in the workplace 10

Part 5 – Checklist for employers 13

Part 6 – Other resources..... 14

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About this guideline

This guideline provides information about anti-discrimination law in South Australia, with a focus on employees with disability.

It has been produced for South Australian employers to encourage and assist them to employ people with disability, and to understand anti-discrimination laws.

The guideline does not constitute legal advice, or cover every aspect of disability discrimination in employment.

How will it help?

Employers, like everyone else, must not discriminate against people with disability. It is unlawful to do so.

Working-age (aged 15–64) people with disability are more likely to be unemployed than those without disability. According to the Australian Institute of Health and Welfare the unemployment rate of working-age people with disability is twice that of those without disability and it has increased in recent years.

Discrimination is damaging to the health and wellbeing of people with disability, but it can also be a cost to business if complaints are made, which can also damage a business's reputation.

Businesses that are inclusive and create equal opportunities for people with disability benefit in many ways.

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Part 1 – Understanding disability and inclusion

About one in five South Australians live with disability.

Across Australia, most people with a disability identify a physical impairment as their main condition. Almost a quarter of people with disability identify a mental or behaviour disorder as their main condition.

How disability is defined

Disability is broadly defined in the Equal Opportunity Act, and includes disability that:

- > presently exists
- > previously existed but no longer exists
- > may exist in the future, or
- > is imputed to a person.

And:

- > physical disability
- > intellectual disability
- > psychiatric disability
- > sensory disability
- > neurological disability
- > learning disability
- > physical disfigurement, and
- > the presence in the body of disease-causing organisms.

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What people with disability experience

Misconceptions and negative attitudes towards people with disability can affect their employment. People with disability are underrepresented in the workforce.

South Australia's equal opportunity laws were created to give 'each and every person a basis on which they can live their life in dignity and in equality and with the respect that is due to every single person in the community'.

For most people, including those with disability, employment is important in shaping identity, improving mental health and self-esteem, creating purpose and supporting independence. Employment builds connections with others and helps protect against violence, abuse, neglect and exploitation.

People with disability deserve to have access to the same opportunities as every other South Australian but are often excluded.

Benefits of diversity and inclusion at work

Research shows people with disability have better attendance, higher rates of retention, and have fewer occupational health and safety incidents than those without a disability.

Having a diverse and inclusive workforce can also boost:

- > creativity and innovation
- > staff loyalty, morale, and retention
- > productivity
- > brand reputation
- > marketing opportunities and profit.

Employers can also broaden their customer base and be seen as an employer of choice. Inclusive workplace practices need to be in place to achieve this.

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Part 2 – What the law says

It is unlawful for an employer to discriminate against a person on the basis of their disability when:

- > recruiting and offering employment
- > deciding on the terms or conditions for the work
- > denying or limiting opportunities such as promotion, transfer or training
- > dismissing the employee, or
- > subjecting the employee to other detriment (including humiliation or denigration).

Employment could be full-time, part-time, casual or unpaid work.

Types of disability discrimination

There are different types of discrimination. Direct discrimination is where someone is treated unfairly because of their disability, while indirect discrimination can happen if they are disadvantaged by a policy, system or requirement.

Indirect discrimination is only against the law when it is unreasonable.

Unlawful discrimination occurs where, for instance, assumptions are made that someone with disability cannot do aspects or all of a job and they are treated unfavourably as a result of that assumption; or where there is a failure to provide the safe access, special equipment or reasonable support they need (see more in part 4).

Discrimination may not be unlawful if the person with disability is unable to: ¹

- > perform the work without putting themselves or others in danger
- > respond adequately to emergencies that may be likely with the employment or position.

It is important to note that a discrimination complaint can be made on one or multiple grounds covered by the Act, not just disability.

¹ Section 71 of the Equal Opportunity Act.

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Other factors to consider**Assistance animals**

It is unlawful to treat someone unfavourably because they are accompanied by an assistance animal, or to separate a person from their assistance animal.² A maximum penalty of \$2,500 may apply.

Under the Equal Opportunity Act, assistance animals are dogs that have been accredited by the Dog and Cat Management Board of South Australia and they help alleviate the effects of a person's disability. They help with a range of disabilities and conditions.

Victimisation

It is also unlawful under the Act to treat someone unfavourably because they have, in good faith, made a claim of unlawful discrimination, or supported a claim.

Federal law

The Federal *Disability Discrimination Act 1992* (Cth) (DDA) also operates in South Australia.

The DDA makes it unlawful to harass employees on the basis of their disability. Harassment might include humiliating or insulting comments or overbearing or abusive behaviours towards people with intellectual disability.

Alleged breaches of the DDA may result in a complaint to the Australian Human Rights Commission.

² Sections 66(e) and 88 of the Equal Opportunity Act.

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Part 3 – How to be fair when recruiting

It is unlawful for employers to discriminate against people with disability from the beginning of the employment process.

A recruitment process cannot be unreasonably unfavourable to an applicant, or potential applicant, with disability.

Employers should take reasonable steps to be fair and inclusive when recruiting and not make decisions based on assumptions about people with disability.

Advertising and shortlisting

- > Make sure the position description and selection criteria match what is needed for the job.
- > Focus on what is to be achieved, rather than how.
- > Create job ads and documents that are accessible and alternative formats, where possible.
- > Appoint someone with disability inclusion training as the contact person.
- > Encourage people with disability to apply.
- > For applicants with disability, don't make assumptions about their ability to do the job. Do not exclude them because of their disability.

Employers wanting to expand their pool of applicants with disability may also want to consider working with Disability Employment Services (DES) providers or relevant disability specific organisations to target people with disability looking for work.

Interviewing

- > Ask if any assistance or reasonable adjustments can be made for the interview.
Eg:
 - arrangements for an assistance animal
 - having the interview later in the day
 - providing information in different ways (verbal and written)
 - additional time for interview questions or questions provided ahead of time
 - wheelchair or step-free access,
 - hearing loop, or Auslan or other interpreters.

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Asking ahead of time about any adjustments needed for an interview also means you are less likely to have someone unexpectedly show up for an interview that has not disclosed their disability, out of concern for being excluded.

Tell reception staff and the interview panel about the arrangements and needs.

- > Ask questions suitable for all candidates, where possible. For example, 'what supports would you need to be effective in your role?'
- > Don't ask about the origins or specific nature of a person's disability. If you need to ask about the disability for the purposes of the job, explain why. Eg: 'We are a committed equal opportunity employer. We are also committed to the wellbeing and safety of our staff and work health and safety laws. Are you able to safely perform all of the inherent requirements of the position?'
- > Avoid language that implies negative attitudes or assumptions. Eg: 'does your disability mean you cannot do xx?'
- > Ask the candidate about what adjustments they would need, if any, to do the job.
- > If the candidate is successful, detailed consideration must be given to the adjustments suggested and whether these are reasonable (see below). Only if they are not reasonable can an employer lawfully decline them.
- > Provide feedback to unsuccessful candidates, where possible, with a focus on skills and experience. This will help show that the process was fair.

Pre-employment tests and declarations

Only use medical and aptitude tests for essential job requirements.

Keep pre-employment declarations confidential and make sure information is only used for the reason it was collected.

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Part 4 – How to be fair and inclusive in the workplace

An inclusive workplace is one in which people with differences and disability feel welcome and valued and have opportunities.

Employers may need to make reasonable adjustments and respond to any issues.

As a minimum, employers should have a diversity and inclusion policy that integrates with other relevant workplace policies. Information on best practice policies can be found on the [JobAccess website](https://www.jobaccess.gov.au/employers/employer-toolkit) (<https://www.jobaccess.gov.au/employers/employer-toolkit>).

Disability inclusion training for staff and leadership accountability for diversity and inclusion will also help.

What the law says about ‘reasonable adjustments’

Reasonable adjustments are changes that remove barriers for a person with disability. These changes might be to premises, facilities, equipment, work and/or recruitment practices, work schedules or training.

By law, employers need to provide people with disability with ‘special assistance or equipment’ (adjustments) where this is reasonable and won’t cause ‘unjustifiable hardship’.

People with disability are usually the best authority on what is needed. The Federal Government’s [JobAccess site](http://www.jobaccess.gov.au) (www.jobaccess.gov.au) also provides a useful guide.

Often, adjustments and accommodations are easier to provide than anticipated.

What is reasonable?

Every scenario will be different.

Employers need to consider a range of factors, such as:

- > the person’s disability and the particular employment context
- > the likely benefits, both to the person and the workplace
- > the potential cost or difficulty (financial or other)
- > the likely effect on the person with disability if not implemented.

Adjustments can be lawfully denied if they are unreasonably expensive, difficult, time consuming or cause some other hardship.

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Financial help for adjustments

Funding may be available through the Commonwealth Government's Employment Assistance Fund.

JobAccess administers the fund, which may help to reimburse the cost of:

- > modifications to the physical work environment
- > modifications to work vehicles
- > adaptive equipment for the workplace
- > information and communication devices
- > Auslan interpreting
- > specialist services for employees with specific learning disorders and mental health conditions
- > disability awareness training
- > deafness awareness training
- > mental health awareness training.

For more information see: <https://www.jobaccess.gov.au/employment-assistance-fund-eaf>.

Work health and safety laws

It is important to understand that work health and safety laws co-exist with anti-discrimination laws.

If reasonable adjustments can be made to work practices or roles that allow someone with disability to perform that role safely, it may be against the law not to hire someone or to terminate them on the assumption they are at increased risk.

Meetings, training and promotion

It is unlawful to unreasonably deny or limit access to opportunities or benefits, including promotion, transfer or training, to an employee based on their disability.

Employers should consider how to make meetings and training available to all eg providing information in an alternative format, arranging an interpreter, holding meetings on different days to include part-time employees.

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Evacuation plans

People with disability should be consulted when creating or adapting organisational evacuation plans. Reasonable adjustments may be required, and fire wardens should be made aware of particular requirements for employees with disability.

If a complaint is made

You may receive a complaint alleging that a staff member has been subjected to any form of unlawful conduct. If so, do not ignore it.

Most businesses will have a complaint procedure for dealing with these issues, which are likely to have numerous options available to suit the particular circumstances of each individual situation.

If a complaint is made, the issue should be addressed directly with the person concerned. This conversation should identify the offensive behaviour, explain why it is unwelcome and offensive, and ask that the behaviour stop or request an apology. It may be that the person was not aware that their behaviour was unwelcomed or caused offence.

This conversation could be led by the complainant if they feel confident to do so, or by a manager, a representative from HR, or a complaints manager. If the matter is of a more serious nature and warrants a formal process rather than an informal process this is generally when an investigation will be led by a third party. Any disciplinary action is a confidential matter between the affected workplace participant and the organisation. If a matter cannot be resolved to everyone's satisfaction, an employee may make a complaint to the Commissioner for Equal Opportunity.

Complaints to the Commissioner for Equal Opportunity

If a discrimination complaint is made about you as an employer, the Commissioner will first decide if there are sufficient grounds for the complaint under the Act.

If the Commissioner accepts the complaint, conciliation is considered. This is a meeting between the people involved and someone from the Commissioner's office, to talk about the complaint and look for ways to resolve it.

An outcome may be compensation for the person who has made the complaint.

If the complaint is not resolved by conciliation it may be referred by the Commissioner to the South Australian Civil and Administrative Tribunal for determination.

For some years, disability has been the most commonly reported ground of discrimination to the Office of the Commissioner for Equal Opportunity.

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Part 5 – Checklist for employers

- ✓ **Challenge your bias.** Don't make assumptions about people with disability. Consider training in unconscious bias and/or disability inclusion training.
- ✓ **Consider the accessibility of your recruitment process.** Encourage people with disability to apply, and consider making job adverts and documents available in accessible and alternative formats.
- ✓ **Focus on what needs to be delivered in a job,** not how you think it should be achieved.
- ✓ **Have a process in place** for job applicants and employees to request reasonable adjustments for their interview or employment.
- ✓ **Consider any requests for 'reasonable adjustments'** properly and document your decisions and reasons. Is there any external funding available?
- ✓ Keep information about a person's disability confidential.
- ✓ Don't make unfavourable decisions about hiring, advancing or terminating someone based on their disability.
- ✓ **Make hiring decisions based on skills and experience.** Document your decisions and provide feedback.
- ✓ Take steps to **create a work environment that is inclusive of diversity,** including disability. Consider workplace policies, training and leadership accountability for workplace diversity.
- ✓ **Make training, promotions, and transfer opportunities available to all.**
- ✓ **Seek legal advice** whenever you are not sure about how to comply with anti-discrimination law.

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Part 6 – Other resources

This guideline is available on the Office of the Commissioner for Equal Opportunity website <http://www.equalopportunity.sa.gov.au>

The law

The Equal Opportunity Act can be accessed at www.legislation.sa.gov.au. More information is on the Office of the Commissioner's website (<https://www.equalopportunity.sa.gov.au/discrimination/types-of-discrimination>) and the Legal Services Commission of South Australia's online Law Handbook (<https://lawhandbook.sa.gov.au/ch17s01s02s02.php>).

The Disability Discrimination Act can be accessed on the online Federal Register of Legislation (www.legislation.gov.au). For an overview of disability discrimination under this Federal legislation, see the Disability discrimination fact sheet available on the Australian Human Rights Commission's website (<https://humanrights.gov.au/our-work/employers/disability-discrimination>).

For more information on assistance animals, see Assistance Dogs: Access and the Law in South Australia produced by the Dog and Cat Management Board and the Office of the Commissioner, accessible online at <https://dogandcatboard.com.au/dogs/assistance-dogs>.

Employer toolkits

The South Australian Government's Office of the Commissioner for Public Sector Employment (OCPSE) has a detailed Disability Employment Toolkit that is publicly available (<https://www.publicsector.sa.gov.au/Resources-and-Publications/frameworks-and-toolkits>).

JobAccess is a federally funded hub for disability workplace and employment information. JobAccess has an Employer Toolkit which covers disability employment basics, fundamentals for organisations, recruiting people with disability, getting your workplace ready and managing your team.

(<https://www.jobaccess.gov.au/employers/employer-toolkit>).

Information and ideas about reasonable adjustments

For information on adjustments for particular symptoms of different disabilities, see JobAccess' Disability and Adjustment page (<https://www.jobaccess.gov.au/disability-adjustment>).

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The Australian Network on Disability has information and ideas on reasonable adjustments available on its website (<https://www.and.org.au/pages/workplace-adjustments.html>).

Resources to support good practice

South Australia's JFA Purple Orange offers disability inclusion training run by people with lived experience of disability. For more information:

<https://www.purpleorange.org.au/what-we-do/disability-inclusion-training>

The Australian Network on Disability has training and resources on increasing disability confidence. For more information see <https://www.and.org.au/pages/training.html>.

For guidance on best practice policies and procedures regarding disability:

<https://www.jobaccess.gov.au/node/77721>.

For information on inclusive language, see the Australian Network on Disability's webpage: <https://www.and.org.au/pages/inclusive-language.html>.

For a first-hand account of job seeking for a person with disability, listen to JFA Purple Orange's podcast episode 'The Elephant in the Interview':

<https://www.purpleorange.org.au/stories/elephant-interview>.