

Submission by the Australian Nursing and Midwifery Federation

Review of the Disability Discrimination Act 1992 (Cth)

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**Australian
Nursing &
Midwifery
Federation**



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Introduction

1. The Australian Nursing and Midwifery Federation (ANMF) is Australia's largest national union and professional nursing and midwifery organisation. In collaboration with the ANMF's eight state and territory branches, we represent the professional, industrial and political interests of more than 345,000 nurses, midwives and care-workers across the country.
2. Our members work in the public and private health, aged care and disability sectors across a wide variety of urban, rural and remote locations. We work with them to improve their ability to deliver safe and best practice care in each and every one of these settings, fulfil their professional goals and achieve a healthy work/life balance.
3. Our strong and growing membership and integrated role as both a trade union and professional organisation provides us with a complete understanding of all aspects of the nursing and midwifery professions and see us uniquely placed to defend and advance our professions.
4. Through our work with members, we aim to strengthen the contribution of nursing and midwifery to improving Australia's health and aged care systems, and the health of our national and global communities.
5. Our members work with vulnerable populations, including people with a disability, whether the disability be due to illness, injury, age, or a congenital disability.

Impact of Illness and Injury and Disability on ANMF members

6. Our members are affected not only by compensable injury and illness claims, but also non-work-related illness, injury and disability.
7. This is not unique to our industry, but the nature of work for nurses and carers as physically, emotionally and mentally demanding that in most cases must be done on-site,



can make it challenging for our members to return to work after illness and injury. Some workers with illness or injuries, work-related or otherwise, are unable to return to full duties long term. For those with compensable work-related injuries, this may be beyond the period of “suitable duties” provided for under workers’ compensation concludes, and even after weekly payment periods cease, for those with compensable injuries.

8. This makes the provision of “reasonable adjustments” important for our members, along with its intersection with the inherent requirements of a role.

Overview

9. In its final report, the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability (Disability Royal Commission) made 222 Recommendations to Government.
10. On 31 July 2024, the Commonwealth Attorney General’s Department released its response. This included in-principle agreement to the 15 recommendations relating the *Disability Discrimination Act 1992 (Cth)* **(the Act)**.
11. This includes a review and modernisation of the Act, to be led by the Attorney General’s Department.
12. The ANMF thanks the Department for the opportunity to make a submission to the Review.
13. This submission will deal with several of the consultation questions posed in the Issues Paper, in the context of issues that arise for those living with disability who are in employment and seeking employment. The questions we will deal with are questions 5, 6, 7, 8, 10, 12, 18, 20, 21 and 22.

Question 5: Changes to the definitions of Direct Discrimination

- What test should be used to ensure that the definition of direct discrimination is easy to understand and implement for both duty holders and people with a disability and why?



- *How could the definition of indirect discrimination be amended to ensure that it is easy to understand and implement for people with disability and duty holders?*

14. Direct discrimination is currently defined under the Act as less favourable treatment than a person without disability in similar circumstances (the comparator test) and the treatment they experienced was because of the disability (causation).
15. The ANMF supports a change to the parameters of the definition of both direct and indirect discrimination to align with the application of the law under the *Fair Work Act 2009 (Cth)* (**the FW Act**) so that a comparator is not required, and the focus is on whether the conduct has been detrimental, as proposed by Recommendation 4.25 and 4.26 of the Review's Issues Paper.
16. This acknowledges the difficulty of applying the comparator test under the current legislative provisions.

Question 6: Burden of Proof

- *How should the burden of proof be addressed in the Disability Discrimination Act?*
17. The ANMF would support changes to the burden of proof in discrimination cases to the model existing under the FW Act, under which the applicant merely has to prove that they have a disability, and that the harmful action occurred, while the respondent has to prove that the action was not taken for a discriminatory reason.

Questions 6, 7 and 8: Changes in the definition of Direct and Indirect Discrimination

- *How could the definition of indirect discrimination be amended to ensure that it is easy to understand and implement for people with disability and duty holders?*
- *Should the reasonableness element in indirect discrimination law be removed, reformed and supplemented with a list of factors to consider, replaced with a legitimate and proportionate test, or other reform?*



18. The current definition of indirect discrimination in the Act has 4 elements:
 - a requirement to comply with a condition, requirement or practice
 - the condition, requirement or practice disadvantages people with a disability
 - the person does not or would not comply, or is not able or would not be able to comply, because of their disability
 - the condition, requirement or practice is not indirect discrimination if it is a reasonable requirement, condition or practice (reasonableness element).
19. ANMF acknowledges that, in cases of indirect discrimination, that the comparator test does not recognise the intersectionality of disability and disadvantage; for example, people living with disability may live with multiple disabilities, while physical and mental disability can lead to financial, social and further health disadvantage, all of which are relevant to the both comparator test under the current definition of direct discrimination, and the reasonableness test under the current provisions for indirect discrimination.
20. The Issues Paper recommends the removal of the “reasonableness” element from the current test for indirect discrimination, with the alternatives of replacing it with a “legitimate and proportionate” test, or the provision of further guidance on the reasonableness test.
21. The ANMF supports these recommendations in full.
22. We also support the removal of the word “reasonable” from the term “reasonable adjustments, creating a provision that adjustments must be made to accommodate a prospective employee or employee’s disability.



Question 10: Interaction with the UN Convention on the Rights of Persons with Disabilities (CRPD)

- *Should the Disabilities Convention be included in the Objects provision of the Disability Discrimination Act?*

23. The ANMF would support adopting the social model of disability from the UN Convention on the Rights of Persons with Disabilities (CRPD). This model recognises that disability results from barriers in environments and attitudes rather than the person's condition. It aligns with the approach now being taken across aged care reforms. In community aged care, for example, many older people live in environments not designed for accessibility — such as multi-storey properties or homes in hard-to-reach locations — which can create significant barriers to independence by creating barriers to accessibility.

Question 12: Positive Duty

- *If there was a positive duty in the Disability Discrimination Act, who should it apply to?*

24. The ANMF would also be supportive of the introduction of the positive duty to prevent discrimination as far as reasonably practicable, as per Recommendation 4.27 and 4.28 of the Review's Issues Paper.
25. Organisations — including aged care providers and health services — should take active steps to prevent discrimination. This includes accessibility reviews, inclusive recruitment practices, staff training in supported decision-making, and fostering cultures that celebrate diversity through appreciation events and cultural recognition activities.
26. The ANMF notes that this would echo s.10 of the *Equal Opportunity Act 2010 (Vic)*, the *Anti-Discrimination Act 1992 (NT)* which provides that discrimination must be eliminated “to the greatest extent possible.” and the *Anti-Discrimination Act 1991 (ACT)*, which imposes a duty of “reasonable and proportionate” measures. A positive duty can also be found in the *Sex Discrimination Act 1984 (Cth)*.



How could the positive duty be carried out?

27. The revised Act, or additional Regulations developed as part of the Review, could offer practical guidance — templates, checklists, and examples — to help organisations meet their obligations. These could be developed by government, research centres, or providers already known for best practice in inclusive and disability-friendly services.
28. A positive duty should provide for an environment of systemic monitoring, reporting and action, with a focus on more than updating policies and procedures.
29. The ANMF believes the resourcing of the Australian Human Rights Commission should be extended, with considerable wait times currently existing. Introduction of new positive duty will be meaningless if it cannot be enforced and upheld. Matters need to be heard in a more timely manner, particularly in employment relationship where discrimination is live and experienced every day. Delay is an impediment to bringing claims.
30. Greater resourcing would also foster an environment of greater communication with employers, employees and unions, to support and facilitate the positive duty.
31. Any guidelines and regulations should include mandatory education across health services, employers and management on learning disability and autism, under a similar framework to the Oliver McGowan Code of Practice on Statutory Learning Disability and autism training, as provided for under the *Health and Care Act 2022*, and applying to Care Quality Commission (CQC)-registered health and social care providers and their staff.¹
32. Olivier McGowan died following a severe reaction to antipsychotic medication. He was 18 years old, and lived with autism. An independent review concluded that Oliver's death was

¹ Health and Care Act 2022 s. 181 at <https://www.legislation.gov.uk/ukpga/2022/31/section/181> accessed October 24, 2025



preventable due to a "general lack of understanding and acknowledgement of Oliver's autism" and that simple adjustments could have been made to his care.

33. Training would not only be beneficial in-patient treatment, but also in supporting health and social care workers living with autism and learning disabilities themselves.
34. The ANMF is open to the consideration that such a requirement be extended to other disabilities and education for workers in other industries.

Questions 18 and 20: Reasonable Adjustments

- *Would removing the word "reasonable" from the term "reasonable adjustments" to align the language with the legal effect have any unintended consequences?*
 - *What are your views on amending the Disability Discrimination Act to consider the nature and extent of any adjustments made and encourage consultation between prospective and current employers and prospective and current employees before employment decisions?*
35. S.4 of the Act defines a "reasonable *adjustment*": an adjustment is a *reasonable adjustment* unless making the adjustment would impose an unjustifiable hardship on the person.
 36. S.5(2) of the Act makes it unlawful to discriminate against a person on the grounds of disability if the person does not make or proposes not to make reasonable adjustments for the person.
 37. S.11(a) provides that all relevant circumstances of the particular case must be taken into account in determining if the adjustment would cause unjustifiable hardship and sets out the criteria for assessing unjustifiable hardship.
 38. The section also makes plain that the burden of proving that something would impose unjustifiable hardship lies on the person claiming unjustifiable hardship.



39. The ANMF would support the proposal to remove the requirement that the adjustment be reasonable, in alignment with Recommendation 4.25 and 4.26 of the Review's Discussion Paper. A claimant would therefore be required to satisfy a less complex test regarding the provision of adjustments.
40. Alternatively, "legitimate and proportionate" test could be introduced, or further guidance provided such as a definition of "reasonable adjustments", and some examples, as in the *Equal Opportunity Act 2010* (Vic).
41. A further option for reform would be to provide access to the Fair Work Commission for reasonable adjustments complaints. The Commission would provide initial conciliation, with options to progress to hearing, stop orders, compensation and reinstatement. This could be highly valuable in improving accessibility to an independent disputes process.

Questions 21 and 22: Inherent Requirements

- *Are there other amendments to the Disability Discrimination Act that could support engagement between prospective or current employers and current and prospective and current employees to better understand the inherent requirements of a job?*
 - *Should any other amendments be made to the definition of inherent requirements, including factors that should be considered when deciding whether a person could carry out the inherent requirements of a job?*
42. The Issues Paper refers to the difficulties both employers and employees have in navigating S.21A of the Act. This provision states that it is not unlawful for the employer to discriminate against another person in relation to particular work if because of the disability, the worker is unable to fulfil the inherent requirements of the particular work (or transfer to a particular work) due to the lack of guidance in applying this legislation.
 43. The ANMF agrees with this observation.



44. Section 21A(2) sets out three criteria for assessing whether a person can fulfil the inherent requirements of the role.
- (a) the aggrieved person's past training, qualifications and experience relevant to the particular work;
 - (b) if the aggrieved person already works for the discriminator--the aggrieved person's performance in working for the discriminator;
 - (c) any other factor that it is reasonable to take into account
45. Whether it be following the required period of "suitable duties" for compensable cases, or due to non-work related illness or injury, ill or injured members have been advised that they are unable to return to work because they cannot fulfil the inherent requirements of their substantive role, and are therefore not entitled to reasonable adjustments.
46. The caselaw doesn't define the inherent requirements of a role with much detail. In *Qantas Airlines v Christie*, Guadron J the inherent requirements of a particular position are held to be "something that is essential to the position."² adding that "certainly, an employer cannot create an inherent requirement.....by stipulating for something that is not essential or, even, by stipulating for qualifications or skills which are disproportionately high when related to the work to be done"³ In *X v Commonwealth*, McHugh J defined inherent requirements as something "essential element of that particular employment."⁴ *Chivers v State of Queensland (Queensland Health)*⁵ also emphasised the importance of looking at contractual terms, but not in isolation. A contract of employment, position description and Letter of Offer/Acceptance may tell some of the story. The caselaw refers to rostering/scheduling systems, including the use of night shifts as important element to be considered.

² [1998] HCA 18 at [33]

³ Ibid at [34]

⁴ [1999] HCA 63 at [31]

⁵ [2014] QCA 141



47. Reasonably, therefore, the inherent requirements of a role are determined on a case-by-case basis.
48. The ANMF notes that the Disability Royal Commission recommended the addition of two additional factors to specify that the “nature and extent of any adjustments made” and “the extent of consultation of any person with the disability concerned” be inserted as criteria to be considered when assessing whether a worker can perform the inherent requirements of the specific job.
49. The ANMF observes that s.21A(2)(c) should cover the field and agrees that these additional provisions may provide a clearer guideline for employers and employees in negotiating these concepts.
50. The ANMF suggests that it may also be useful to add other specific factors into the considerations listed in s.21A(2) to broaden the scope of the criteria. Additional criteria added to 21A(2) could include
 - Whether the worker had been performing substantively the same role before the onset of the disability
 - In the case of a temporary disability, the length of time before the worker is able to perform the inherent requirements of the role again.
 - Any changes in the inherent requirements of the role since the employee’s commencement in that role.
51. The ANMF believes that this further guidance is especially necessary in the case of acquired injury and illness where these are not work-related or otherwise non-compensable, or after periods of “suitable duties” mandated by workers’ compensation legislation have concluded in the case of compensable injuries.
52. Case studies involving non-work-related injuries and illness can illustrate the complexity of establishing and negotiating fulfilment of the inherent duties of particular work.



53. Member A was working as a clinical nurse, but began to perform substantial non-clinical duties over a period of time before developing a medical condition. She was unable to undertake clinical work. Her employer argued she should be stood down without pay as being unable to fulfil the inherent requirements of her job while she waited for her condition to stabilise and to undergo treatment, after which recovery would be swift. The ANMF argued that she could fulfil the inherent requirements of her job.
54. In another case, the ANMF attempted to argue that Member B fulfilled the inherent requirements of her role as an Enrolled Nurse (EN).. A small number of elements position description had been changed since Member B began employment and there were still a small number of tasks on the daily task list for an EN she could not fulfill.. This complicated negotiations, and the negotiation process was ongoing, and delayed her return to work, with related financial loss, indicating a need for a simplification/clarification of the criteria for inherent requirements to come under discussion.
55. These cases illustrate issues presented by the heavy reliance on position descriptions in establishing inherent requirements. These must be used not just to provide the basis of an argument that each and every task is an inherent requirement, but to guide what adjustments can be made.
56. The ANMF is of the view that guidelines on inherent requirements should include consultation about what these actually are, with the person living with a disability at the centre of these consultations, as recommended by the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability.

Support Persons



57. The ANMF further notes the importance of support persons such as Union representatives, in negotiating inherent requirements, and is of the view that the role of the support person should be clarified in any guidelines regarding negotiations around inherent requirements, reasonable adjustments and return to work.

Interaction with a Human Rights Act

58. The ANMF supports the introduction of a Commonwealth Human Rights Act, mirroring the Human Rights Acts in Queensland and the Australian Capital Territory, and the Human Rights Charter in Victoria. The rights provided for under such an Act would provide a framework for the operation and implementation of Discrimination Acts, by comprising rights such as equality under the law, and rights to privacy and dignified treatment. This would assist in determining whether a person has been discriminated against. Conversely, Discrimination Acts would enable everyone to be covered by a Human Rights Act without discrimination.

Conclusion

59. It is hoped that the outcome of the Review of the *Disability Discrimination Act 1992 (Cth)* will assist and benefit both people living with disabilities, and the people working with them.