



New South Wales

Disability Discrimination Legislation Amendment Act 1998 No 34

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New South Wales

Disability Discrimination Legislation Amendment Act 1998 No 34

Act No 34, 1998

An Act to amend certain Acts to provide for consistency with the *Disability Discrimination Act 1992* of the Commonwealth; and for other purposes.
[Assented to 15 June 1998]

The Legislature of New South Wales enacts:

1 Name of Act

This Act is the *Disability Discrimination Legislation Amendment Act 1998*.

2 Commencement

This Act commences on a day or days to be appointed by proclamation.

3 Amendments

Each Act specified in Schedule 1 is amended as set out in that Schedule.

4 Explanatory notes

The matter appearing under the heading "Explanatory note" in Schedule 1 does not form part of this Act.

Schedule 1 Amendments

(Section 3)

1.1 Community Land Development Act 1989 No 201

[1] Schedule 3 Community management statement and precinct management statement

Omit clause 5 (a) and (b). Insert instead:

- (a) affects the keeping on a lot of an animal that is used as an assistance animal by a person with a disability who is a proprietor or occupier of a lot, or
- (b) affects the use on a lot, or on association property, of an assistance animal by a person with a disability, or

[2] Schedule 3, clause 5 (2)

Insert at the end of clause 5:

- (2) In this clause:

assistance animal means an animal referred to in section 9 of the *Disability Discrimination Act 1992* of the Commonwealth.

disability has the same meaning as in the *Disability Discrimination Act 1992* of the Commonwealth.

[3] Schedule 4 Neighbourhood management statement

Omit clause 5 (a) and (b). Insert instead:

- (a) affects the keeping on a lot of an animal that is used as an assistance animal by a person with a disability who is a proprietor or occupier of a lot, or
- (b) affects the use on a lot, or on neighbourhood property, of an assistance animal by a person with a disability, or

[4] Schedule 4, clause 5 (2)

Insert at the end of clause 5:

(2) In this clause:

assistance animal means an animal referred to in section 9 of the *Disability Discrimination Act 1992* of the Commonwealth.

disability has the same meaning as in the *Disability Discrimination Act 1992* of the Commonwealth.

Explanatory note

The *Community Land Development Act 1989* prevents a community management statement (a statement of the by-laws and other particulars governing participation in a community scheme) from containing any prohibition or restriction that affects the keeping on a lot of a dog that is used as a guide by a completely or partially blind person who is a proprietor or occupier of a lot or that affects the use of a dog as a guide on a lot or on association property by a person who is completely or partially blind. Similar restrictions apply in relation to a neighbourhood management statement (a statement of the by-laws and other particulars governing participation in a neighbourhood scheme). The amendments provide that a community management statement or neighbourhood management statement cannot prohibit or restrict the keeping or use of a dog that is used as a guide dog by a person with a visual disability ("disability" having the same meaning as in the Commonwealth Act) or a dog that is used as a hearing dog by a person with a hearing disability.

1.2 Conveyancers Licensing Act 1995 No 57

Section 13 Suspension and cancellation of licences

Insert after section 13 (1):

(1A) For the purposes of subsection (1) (k), a licensee is unfit to carry out conveyancing work only if the licensee, because of his or her physical or mental illness or infirmity, would be unable to carry out the inherent requirements of conveyancing work.

- (1B) The following are to be taken into account in determining whether a licensee would be unable to carry out the inherent requirements of conveyancing work:
- (a) the licensee's past training, qualifications and experience relevant to such work,
 - (b) if the licensee is already carrying out such work, the licensee's performance in carrying out such work,
 - (c) all other relevant factors that it is reasonable to take into account.

Explanatory note

Section 13 of the *Conveyancers Licensing Act 1995* allows the Director-General of the Department of Fair Trading to suspend or cancel a licence to carry out conveyancing work if the licensee is (because of physical or mental illness or infirmity) unfit to carry out conveyancing work and it is in the public interest that the licence be suspended or cancelled. The amendment makes it clear that a person is to be considered unfit to carry out conveyancing work because of a disability, only if the person, because of that disability, would be unable to carry out the inherent requirements of conveyancing work.

1.3 Driving Instructors Act 1992 No 3

[1] Section 16 Medical certificates

Omit "is of the opinion, having regard to the safety of the public, that" from section 16 (1).

Insert instead "stating the medical practitioner's opinion as to whether, having regard to the inherent requirements of the occupation of driving instructor (including the safety of the public),".

[2] Section 18 Grounds for refusal of application

Insert after section 18 (2):

- (3) If an applicant is a person with a disability (within the meaning of the *Disability Discrimination Act 1992* of the Commonwealth), the Authority must not refuse an application on the ground that the person is, because of

that disability, not a fit and proper person to act as a driving instructor, unless the applicant because of that disability would be unable to carry out the inherent requirements of the occupation of driving instructor.

- (4) The following are to be taken into account in determining whether an applicant would be unable to carry out the inherent requirements of the occupation of driving instructor (as referred to in subsection (3)):
- (a) the applicant's past training, qualifications and experience relevant to the occupation of driving instructor,
 - (b) if the applicant is already acting as a driving instructor, the applicant's performance in that occupation,
 - (c) all other relevant factors that it is reasonable to take into account.

[3] Section 26 Grounds for suspension or cancellation of licence

Insert after section 26 (2):

- (3) If the holder of a licence is a person with a disability (within the meaning of the *Disability Discrimination Act 1992* of the Commonwealth), the Authority must not cancel a licence on the ground that the holder is, because of that disability, not a fit and proper person to act as a driving instructor, unless the holder because of that disability would be unable to carry out the inherent requirements of the occupation of driving instructor.
- (4) The following are to be taken into account in determining whether a holder of a licence would be unable to carry out the inherent requirements of the occupation of driving instructor (as referred to in subsection (3)):
- (a) the holder's past training, qualifications and experience relevant to that occupation,
 - (b) if the holder is already acting as a driving instructor, the holder's performance in that occupation,

- (c) all other relevant factors that it is reasonable to take into account.

Explanatory note

The *Driving Instructors Act 1992* provides for the licensing of driving instructors. Sections 18 and 26 give the Roads and Traffic Authority power to refuse an application for a driving instructor's licence, or to suspend or cancel a licence in certain circumstances, including that the person is not a fit and proper person to act as a driving instructor. Items [2] and [3] amend those sections to provide that a person is not to be considered unfit to act as a driving instructor because of a disability, unless the person, because of that disability, would be unable to carry out the inherent requirements of the occupation. Item [1] requires a medical practitioner, when issuing a medical certificate relating to the fitness of a person to act as a driving instructor, to have regard to the inherent requirements of the occupation.

1.4 Legal Profession Act 1987 No 109

Section 38A Refusal, suspension or cancellation of practising certificate—infirmary

Insert after section 38A (1):

- (1A) For the purposes of this section, an applicant or holder is unfit to practise as a barrister or solicitor and barrister only if the applicant or holder, because of his or her infirmity, injury or mental or physical illness, would be unable to carry out the inherent requirements of practice as a barrister or solicitor and barrister.
- (1B) The following are to be taken into account in determining whether an applicant or holder would be unable to carry out the inherent requirements of practice as a barrister or solicitor and barrister:
- (a) the applicant's or holder's past training, qualifications and experience relevant to such practice,
 - (b) if the applicant or holder is already practising as a barrister or solicitor and barrister, the applicant's or holder's performance in such practice,

- (c) all other relevant factors that it is reasonable to take into account.

Explanatory note

The *Legal Profession Act 1987* allows the Bar Council or Law Society Council to refuse to issue, or cancel or suspend, a practising certificate if the Council is satisfied that the applicant or holder is, because of infirmity, injury or mental or physical illness, unfit to practise as a barrister or solicitor and barrister and that it is in the public interest or the interest of the clients of the person concerned that the practising certificate should be cancelled or suspended. The amendment makes it clear that a person is to be considered unfit to practise as a barrister or solicitor and barrister because of a disability only if the person, because of that disability, would be unable to carry out the inherent requirements of practice as a barrister or solicitor and barrister.

1.5 Local Government Act 1993 No 30

[1] Section 336 Filling of vacancy in position of general manager

Omit section 336 (2) (d). Insert instead:

- (d) becomes a mentally incapacitated person and is removed from the position by the council because of that mental incapacity, or

[2] Section 336 (3)

Insert after section 336 (2):

- (3) A person may be removed from office under subsection (2) (d) only if, taking into account the person's past training, qualifications and experience relevant to employment as a general manager, the person's performance as an employee, and all other relevant factors that it is reasonable to take into account, the person because of his or her mental incapacity:
- (a) would be unable to carry out the inherent requirements of the position of general manager, or

- (b) would, in order to carry out those requirements, require services or facilities that are not required by persons who are not mentally incapacitated persons and the provision of which would impose an unjustifiable hardship (within the meaning of the *Disability Discrimination Act 1992* of the Commonwealth) on the council.

[3] Section 344 Objects

Omit "physical impairment" from section 344 (a).
Insert instead "disability".

[4] Section 344 (b)

Omit "physically handicapped persons".
Insert instead "persons with disabilities".

[5] Section 344 (2)

Insert at the end of section 344:

- (2) In this section, *disability* has the same meaning as in the *Disability Discrimination Act 1992* of the Commonwealth.

Note. The *Disability Discrimination Act 1992* of the Commonwealth defines disability to include such things as loss of bodily or mental function, loss of a part of the body, malfunction, malformation or disfigurement of a part of the body and certain other conditions, disorders, illnesses and diseases. That Act makes it unlawful for an employer to discriminate against a person on the ground of the other person's disability in certain contexts. These include in determining who should be offered employment (section 15 of that Act). Such discrimination is unlawful unless the person, because of his or her disability, would be unable to carry out the inherent requirements of the particular employment or would, in order to carry out those requirements, require services or facilities that are not required by persons without the disability and the provision of which would impose an unjustifiable hardship on the employer.

[6] Section 349 Appointments to be on merit

Insert after section 349 (2):

- (3) In determining the merit of a person eligible for appointment to a position, regard is to be had to the objects of Part 4 of this Chapter (see section 344).

Explanatory note

Vacancy in position of general manager

Section 336 of the *Local Government Act 1993* provides that a vacancy occurs in the position of general manager of a council if the person becomes a mentally incapacitated person. This expression is defined in the *Interpretation Act 1987* to mean a person who is a temporary patient, a continued treatment patient or a forensic patient within the meaning of the *Mental Health Act 1990*, or a protected person within the meaning of the *Protected Estates Act 1983*. Item [1] replaces this provision with a provision that enables the council to remove the general manager from office if he or she becomes a mentally incapacitated person. Item [2] further provides that the council must not remove the general manager for that reason unless the general manager, because of that mental incapacity, would be unable to carry out the inherent requirements of the position of general manager or the provision of services or facilities that would enable the general manager to carry out those requirements would impose an unjustifiable hardship on the council.

Equal employment opportunity

The *Local Government Act 1993* contains provisions aimed at eliminating discrimination in employment by councils on the grounds of race, sex, marital status and physical impairment and promoting equal employment opportunity. Items [3]–[5] replace the references to “physical impairment” and “physical handicap” in order to make it clear that the provisions extend to all forms of disability covered by the Commonwealth Act, not just physical impairments. Item [4] also inserts a note referring to provisions of the Commonwealth Act.

Section 349 of the *Local Government Act 1993* provides that appointments to council positions are to be made on merit, including by reference to the abilities of the applicant for the position. Item [6] provides that regard is also to be had to the desire to eliminate employment discrimination (including on grounds of disability) and to promote equal employment opportunity.

1.6 Mines Inspection Act 1901 No 75

[1] Section 7 Grant of certificates of competency

Insert after section 7 (1):

- (1A) If the applicant is a person with a disability (within the meaning of the *Disability Discrimination Act 1992* of the Commonwealth), the Minister must not refuse to grant a certificate of competency as manager to the applicant on the ground of the applicant's disability unless the applicant, because of that disability, would be unable to carry out the inherent requirements of the occupation of manager.
- (1B) The following are to be taken into account in determining whether an applicant would be unable to carry out the inherent requirements of the occupation of manager:
 - (a) the applicant's past training, qualifications and experience relevant to that occupation,
 - (b) if the applicant is already acting as a manager, the applicant's performance in that occupation,
 - (c) all other relevant factors that it is reasonable to take into account.

[2] Section 12 Penalty on unqualified person taking charge of machinery

Omit "unable to discharge the person's duties efficiently" from section 12 (1) (b).

Insert instead "unable to carry out the inherent requirements of the person's duties".

[3] Section 12 (1)

Insert "(referred to in this section as *the employer*)" after "any other person".

[4] Section 12 (4), (5), (6)

Insert after section 12 (3):

- (4) The following are to be taken into account in determining whether a person is unable to carry out the inherent requirements of his or her duties (as referred to in subsection (1) (b)):
 - (a) the person's past training, qualifications and experience relevant to employment in those duties,
 - (b) if the person is already employed in such duties, the person's performance as an employee,
 - (c) all other factors that it is reasonable to take into account.
- (5) A person who is unable to carry out the inherent requirements of his or her duties does not commit an offence under subsection (1) if the person would have been able to carry out those inherent requirements had the employer provided services or facilities that would not have imposed an unjustifiable hardship (within the meaning of the *Disability Discrimination Act 1992* of the Commonwealth) on the employer.
- (6) Subsection (5) does not affect the liability of the employer under this section.

[5] Section 14 Grant of certificates to applicants on passing examination

Insert after section 14 (1):

- (1A) If the applicant is a person with a disability (within the meaning of the *Disability Discrimination Act 1992* of the Commonwealth), the Minister must not refuse to grant a certificate of competency as engine-driver to the applicant on the ground of the person's disability unless the applicant, because of that disability, would be unable to carry out the inherent requirements of the occupation of engine-driver.

- (1B) The following are to be taken into account in determining whether an applicant would be unable to carry out the inherent requirements of the occupation of engine-driver:
- (a) the applicant's past training, qualifications and experience relevant to that occupation,
 - (b) if the applicant is already acting as an engine-driver, the applicant's performance in that occupation,
 - (c) all other relevant factors that it is reasonable to take into account.

[6] Section 14 (2)

Omit "such certificate". Insert instead "certificate of competency granted".

[7] Section 16 Certificates granted outside of New South Wales

Insert after section 16 (1):

- (1A) If the holder is a person with a disability (within the meaning of the *Disability Discrimination Act 1992* of the Commonwealth), the board of examiners must not refuse to approve any such certificate of competency of service on the ground of the holder's disability unless the holder, because of that disability, would be unable to carry out the inherent requirements of the occupation of engine-driver.
- (1B) The following are to be taken into account in determining whether a holder would be unable to carry out the inherent requirements of the occupation of engine-driver:
- (a) the holder's past training, qualifications and experience relevant to that occupation,
 - (b) if the holder is already acting as an engine-driver, the holder's performance in that occupation,
 - (c) all other relevant factors that it is reasonable to take into account.

[8] Section 18A Medical examination of holders of certificates

Omit section 18A (5) (b). Insert instead:

- (b) the Chief Inspector certifies to the Minister that the Chief Inspector is of the opinion that, having regard to safety requirements, the person, by reason of the matters contained in the medical certificate, would be unable to carry out the inherent requirements of his or her duties,

[9] Section 18A (8) (c)

Omit section 18A (8) (c). Insert instead:

- (c) the Chief Inspector certifies to the Minister that the Chief Inspector is of the opinion that, having regard to safety requirements, the person whose engine-driver's certificate has been cancelled or suspended would be able to carry out the inherent requirements of his or her duties,

[10] Section 18A (10)

Insert after section 18A (9):

- (10) For the purposes of this section, in determining whether a person would be able or unable to carry out the inherent requirements of his or her duties, the Chief Inspector is to take into account the following:
 - (a) the person's past training, qualifications and experience relevant to those duties,
 - (b) if the person is already carrying out those duties, the person's performance in carrying out those duties,
 - (c) all other relevant factors that it is reasonable to take into account.

Explanatory Note**Managers**

Section 7 of the *Mines Inspection Act 1901* requires the Minister to grant a certificate of competency as manager to every applicant who has, among other things, provided satisfactory evidence of the applicant's ability to be a manager. The amendment in item [1] provides that the Minister is not to refuse to grant a certificate of competency to a person on the ground of the person's disability, unless the person, because of that disability, would be unable to carry out the inherent requirements of the occupation.

Engine-drivers

Section 12 of the *Mines Inspection Act 1901* makes it an offence in certain circumstances for a person with a particular disability to take charge of certain machinery and for a person to employ such a person in such duties. Items [2] and [4] make it clear that the offence does not apply in respect of a person with a disability who is able to carry out the inherent requirements of those duties. Item [4] also exempts a person with a disability from the offence if the person would have been able to carry out the inherent requirements of his or her duties had some reasonable adjustment been made by the employer. In such a case, however, the employer is still liable for the offence. Item [3] is a consequential amendment.

Section 14 requires the Minister to grant a certificate of competency as engine-driver to every applicant who has, among other things, provided satisfactory evidence of physical fitness and that the applicant's sight, hearing and other faculties are unimpaired. The amendment in item [5] provides that the Minister is not to refuse to grant the certificate of competency to a person on the ground of the person's disability, unless the person, because of that disability, would be unable to carry out the inherent requirements of the occupation. Item [6] is a consequential amendment. Section 16 is amended to apply the same requirements to the board of examiners when it determines whether to approve a certificate of competency as an engine-driver granted outside New South Wales (see item [7]).

Section 18A requires the holders of certain types of engine-driver's certificates to obtain medical certificates before taking charge of or operating certain prescribed machinery. The Minister is required to cancel or suspend such a certificate if the medical certificate discloses that the holder has a particular type of disability and the Chief Inspector is of the opinion that the disability makes the person unable to perform his or her duties safely. This section is amended by items [8]–[10], so that the certificate can be cancelled or suspended on grounds of disability only if the Chief Inspector is of the opinion that, having regard to safety requirements, the person would be unable to carry out the inherent requirements of his or her duties.

1.7 Superannuation Act 1916 No 28

[1] Section 21C Commuting of pension emerging after Superannuation (Amendment) Act 1985

Omit section 21C (2) (b). Insert instead:

- (b) in the case of a pension payable under section 29, before attaining the maturity age.

[2] Section 21C (4) (b)

Omit the paragraph. Insert instead:

- (b) in the case of a pension payable under section 29:
 - (i) if the person's maturity age is 55 years, at any time after attaining the age of 54 years and 6 months, or
 - (ii) if the person's maturity age is 60 years, at any time after attaining the age of 59 years and 6 months.

[3] Section 21D Limitations on elections under section 21C

Omit "the age of 60 years" wherever occurring from section 21D (1) (b) (i) and (2) (b) (i).

Insert instead "the maturity age".

[4] Schedule 25 Savings and transitional provisions

Insert at the end of clause 1 (1):

*Disability Discrimination Legislation Amendment Act
1998*

[5] Schedule 25, Part 5

Insert after Part 4:

**Part 5 Disability Discrimination Legislation
Amendment Act 1998**

8 Definitions

In this Part:

amending Act means the *Disability Discrimination Legislation Amendment Act 1998*.

appointed day means the day on which Schedule 1.7 to the amending Act commences.

**9 Amendments to section 21D—no application to persons
of or over 60 years of age**

The amendments made to section 21D by the amending Act do not apply in respect of any person who attains the age of 60 years on or before the appointed day.

**10 Amendments to section 21D—application to certain
persons between 55 and 60 years of age**

- (1) This clause applies in respect of a person who:
 - (a) is entitled to a pension payable under section 29, and
 - (b) has a maturity age of 55 years, and
 - (c) on the appointed day, has not attained the age of 60 years but has attained the age of 55 years.
- (2) Section 21D, as amended by the amending Act, applies in respect of such a person as if the person had attained the maturity age of 55 years on the appointed day. For example, section 21D (1) (b), as amended by the amending Act, applies so that such a person may make an election under section 21C relating to a pension payable under section 29 at any time within the period of 6 months after the appointed day.

- (3) Accordingly, the reference in section 21D (3) to the time prescribed by section 21D (1) and (2) is a reference to the time prescribed by those subsections, as modified by this clause.

Explanatory Note

Section 21C of the *Superannuation Act 1916* provides that a person who becomes entitled to a pension may not commute the whole or part of that pension before attaining the age of 55 years. At present a woman who contributed for a pension payable on reaching the age of 55 years is entitled to a full pension on retirement at or after age 55. However, section 21C provides that if a person becomes entitled to a pension because the person is retired on the ground of invalidity or physical or mental incapacity to perform his or her duties, the person may not commute the whole or part of the pension before attaining the age of 60 years. Section 21C is amended by items [1] and [2] to allow any woman who contributed at the rate prescribed for retirement at age 55 years and who is retired because of a disability to commute the whole or part of her pension on attaining the age of 55 years, in the same way as she could have done had she not been retired due to disability. Items [3]–[5] provide for consequential and transitional provisions.

1.8 Veterinary Surgeons Act 1986 No 55

Section 26 Complaints against veterinary surgeons

Insert after section 26 (8):

- (9) For the purposes of subsection (1) (f), a registered veterinary surgeon is unfit to practise veterinary science only if the veterinary surgeon, because of his or her infirmity, injury or illness, would be unable to carry out the inherent requirements of the practice of veterinary science.
- (10) The following are to be taken into account in determining whether a registered veterinary surgeon would be unable to carry out the inherent requirements of the practice of veterinary science:
- (a) the veterinary surgeon's past training, qualifications and experience relevant to such practice,

- (b) if the veterinary surgeon is already practising as a veterinary surgeon, the veterinary surgeon's performance in such practice,
- (c) all other relevant factors that it is reasonable to take into account.

Explanatory Note

The *Veterinary Surgeons Act 1986* allows a complaint to be made to the Veterinary Surgeons Investigating Committee that a registered veterinary surgeon is, by reason of infirmity, injury or illness, whether mental or physical, unfit to practise veterinary science. If the Investigating Committee is satisfied of the truth of the complaint, it may take action on the complaint, including by imposing conditions on the registration of the veterinary surgeon. It may also refer the matter to the Veterinary Surgeons Disciplinary Tribunal. This amendment makes it clear that a person is to be considered unfit to practise veterinary science because of a disability only if the person, because of that disability, would be unable to carry out the inherent requirements of the practice of veterinary science.

[Minister's second reading speech made in—
Legislative Council on 6 May 1998
Legislative Assembly on 2 June 1998]