Review of the Disability Discrimination Act

Submission of the United Workers Union

14 November 2025

UNITED
WORKERS UNION

Contents

Acknowledgement to Country

The United Workers' Union is a national trade union. We acknowledge and respect the continuing spirit, culture and contribution of Traditional Custodians on the lands where we work, and pay respects to Elders – past, present and emerging. We extend our respects to Traditional Custodians of all the places that United Workers' Union members live and work around the country.

About the United Workers' Union

United Workers Union ('**UWU**') is a powerful new union with 150,000 workers across the country from more than 45 industries and all walks of life, standing together to make a difference. Our work reaches millions of people every single day of their lives. We feed you, educate you, provide care for you, keep your communities safe and get you the goods you need. Without us, everything stops. We are proud of the work we do– our early childhood educators are shaping the future of the nation one child at a time; supermarket logistics members pack food for your local supermarket and farms workers put food on Australian dinner tables; hospitality members serve you a drink on your night off; aged care members provide quality care for our elderly and cleaning and security members ensure the spaces you work, travel and educate yourself in are safe and clean.

Introduction

UWU welcomes the opportunity to provide a submission to the Attorney-General's Department on the Disability Discrimination Act ('**DD Act'**) Review ('**The Review**'). UWU broadly supports the reforms and amendments proposed in the Issues Paper, particularly in view of the Department's intention to modernise, clarify, and strengthen the DD Act, to better protect people with disability. UWU recognises the importance of progressing the rights and improving the experiences of people with disability, particularly within the employment context, in order to prevent exploitation, exclusion, unacceptable treatment in the workplace and remove barriers to entry into the workforce. We support the Review's stated purpose to incorporate the 15 recommendations of the Disability Royal Commission ('**DRC**') to the DD Act.

UWU represents a diverse range of members including cleaners, farm and agricultural workers, security guards, logistics and warehouse workers, food and beverage manufacturing workers, aged care workers, hospitality and casino workers, disability support workers and early childhood educators. UWU members have experienced exclusion and expulsion from the workplace due to their disabilities, including injuries, illnesses and degenerative conditions. Employers sometimes reject adjustments by citing 'unjustifiable hardship', even when there is

little evidence to support this claim. UWU has also represented members who were dismissed after their employer concluded they could not meet the 'inherent requirements' of their role, again, often without sufficient evidence. As a result, workplaces are losing committed and experienced staff.

UWU members with a disability may require adjustments from an employer, which could feasibly be provided. However, the obligation in the DD Act to provide reasonable adjustments or modified duties is inadequate and too easily discharged. Common examples of adjustments requests include lifting restrictions, reduced hours or not being required to perform a discrete task. Even these common adjustments are often fiercely contested and/or refused.

UWU strongly supports the removal of the 'reasonableness' element from 'reasonable adjustments' in the definition of indirect disability discrimination in s 6 of the DD Act. The courts have recognised that that the term 'reasonable adjustments' means all adjustments up until the point of unjustifiable hardship[1], and removing the 'reasonableness' element would provide clarity to both workers and employers about the scope of the obligation. In addition, a stand-alone duty to provide adjustments is warranted in order to strengthen this provision and improve inclusivity and accessibility.

Currently, the DD Act does not define what constitutes the inherent requirements of a job. As a result, in practice, employers have significant discretion to determine what constitutes the inherent requirements of a job. UWU recommends that the DD Act explicitly include a list of factors for determining the inherent requirements of a role, with input from employees. This would better ensure that the inherent requirements are realistic and fairly determined.

In addition, UWU strongly supports the introduction of a positive duty for employers and other duty holders to better protect people with disability from discrimination. Shifting to a positive duty will fundamentally reform the DD Act away from a reactive, complaints-based model, where persons with disability constantly have to be individual drivers of equality and must litigate to achieve equal treatment. This has been unjust, unfair and inhibiting. It is integral that a more proactive and comprehensive approach is introduced, in order to require employers (and other duty holders) to actively engage in removing structural barriers to workplace participation. A positive duty requires a shift to prevention and pre-emptive consideration rather than mitigation once discrimination occurs, which is important.

However, it is necessary that the Federal Government increase funding and resources to the Australian Human Rights Commission ('**AHRC**') in order for it to adjudicate and enforce matters pertaining to the new positive duty in a timely manner. We also recommend - notwithstanding that it is beyond the scope of this Review - that corresponding amendments

also be made to the *Fair Work Act 2009* (Cth) ('**FW Act'**), to mirror and buttress any reforms to the DD Act. That way the Fair Work Commission ('**FWC**') may also adjudicate and enforce discrimination matters expediently within the general protections framework.

To reform the DD Act in line with the DRC recommendations, barriers to accessibility and inclusion in employment must be eliminated wherever possible to facilitate more widespread participation. This has the benefit of challenging and addressing systemic and everyday ableism as experienced by people with disability, whilst fundamentally improving access and inclusion for all Australian workers in our workplaces.

Consultation Question 1- *How should disability be defined in the Disability Discrimination Act?*

UWU broadly supports measures designed to modernise and update the current definition of disability, which is inherently outdated, negatively framed and underscored by ableism. Under the current definition the onus is on the person to establish that they fall into a prescriptive category as defined by the DD Act, rather than focussing on whether the person is prevented from participating in society or accessing supports at work. We recognise the importance of shifting away from a deficit-based definition of disability and/or a prescriptive medical model towards a more inclusive social and human rights-based definition.

Specifically, current wording needs to be changed from 'disorder', 'malfunction', 'malformation', 'disturbed' and 'disfigurement', which are fundamentally demeaning, to more neutral and inclusive language, such as 'health or medical status' and/or 'functional limitation or impairment'. The definition of disability in the Act's *Disability Inclusion Act 2024* (Act) is a good example:

disability—

> *(a) means any impairment or functional limitation that, in interaction with a barrier to accessibility, hinders the full and equal participation of a person with disability in society; and*
>
> *(b) includes an impairment or functional limitation—*
>
> > *(i) that is permanent, temporary or episodic in nature; and*
> >
> > *(ii) whether or not it can be noticed by others.*[2]

This wording broadens the language surrounding disability by removing prescriptive, rigid categories.

Consultation Question 2- ***What factors should be considered in developing a new definition of disability?***

It is important to consider that at the time the DD Act was drafted, the definition of disability was informed by medical language. Whilst medical language may be useful in health and diagnostic spaces it is not as relevant or useful in legal or human rights-based frameworks.

Instead, the focus should be on how a person accesses services, participates in society and/or in the workplace to remove structural barriers.

An important factor to consider in developing a new definition is the objects of the DD Act in s 3, including the object to eliminate discrimination as far as possible, to ensure that persons with disabilities have the same rights to equality before the law as the rest of community, and promote recognition and acceptance within the community that persons with disabilities have the same fundamental rights as others.

Additional objects should also be added and considered, including:

- an object to foster a community where ableism is challenged and addressed; and
- where barriers to accessibility and inclusion are identified and removed.

These examples currently appear in the objects of the *Disability Inclusion Act 2024* (Act)[3] and should be reflected in the DD Act's definition of disability.

Consultation Question 3- ***Would the Disability Discrimination Act be strengthened by expressly allowing claims to be brought for multiple or combined protected attributes?***

Currently, the DD Act is similar to the general protections provisions in the FW Act with respect to the 'multiple reasons' issue. As a result, if there are multiple reasons for the discriminatory action and one of those reasons is disability discrimination, then it is done for a purpose contrary to the DD Act. It does not need be the substantial or dominant reason (noting, in the FW Act, s 360 requires that the prohibited reason must be operative reason). The DD Act should remain unchanged in this regard.

However, UWU proposes adding an express provision, to clearly recognise circumstances where a person may face multiple layers of discrimination. The Act must clearly reflect that a

person may be affected by multiple disabilities or experience compounding forms of discrimination pertaining to race, sex, gender identity, sexual orientation, religion, age etc.

The inclusion of a definition of intersectionality in the DD Act must recognise that discrimination can include combined or compounding protected attributes, including multiple disabilities. Accordingly, the definition could be modelled on the following from the *Disability Inclusion Act 2024* (Act):

> *'**Intersectionality** means the interconnected nature of attributes, including protected attributes, of a person that create overlapping and interdependent systems of disadvantage or discrimination*[4].

Or drawn from the example in Tasmania's *Disability Rights, Inclusion and Safeguarding Act 2024* (Tas):

> *'**Intersectionality** means the multi-layered experiences of people with disability in relation to the personal attributes of a person or group of persons that create interconnected and interdependent systems of disadvantage or discrimination.'*[5]

Both effectively highlight the compounding factors which can detrimentally affect persons with disability.

Consultation Question 4- ***Could any other changes be made to the Disability Discrimination Act to recognise and provide protection for people with disability who have intersecting identities, or addressing compounding discrimination?***

The current comparator test in the DD Act is complicated, even when a person does not have intersecting identities. It effectively requires the applicant to successfully demonstrate that a hypothetical worker, in theoretically similar circumstances, without a disability, would be treated more favourably. As a result, it is and will be extremely difficult to demonstrate a comparator situation when a person does have intersecting identities or is facing multiple forms of discrimination. This has been and continues to be a significant barrier to progressing claims. For these reasons UWU strongly advocates for the removal of the comparator test.

In most cases, the comparator test is difficult to apply because it is hard to identify an appropriate hypothetical comparator. For example, in a situation with a single mother who has a disability, it is unclear whether the correct comparison is a single parent, parents generally or parents specifically with disability.

The situation becomes more complex where there is intersectionality in terms of other forms of discrimination or multiple disabilities. For example, some UWU members experience age

discrimination in conjunction with other health conditions such as arthritis or diabetes. This makes it very difficult to find appropriate comparators without oversimplifying the compounding features.

Consultation Question 5- ***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 disability, and why?***

UWU supports the DRC's recommendation to replace the comparator test with a detriment (unfavourable treatment) test. The detriment test provides a clearer and more practical standard, because it focuses directly on the harm experienced by people with disability. The comparison test creates an additional and unnecessary hurdle for applicants and should be removed.

Consultation Question 6- ***How should the burden of proof be addressed in the Disability Discrimination Act?***

UWU supports the DRC's proposed changes to shift the burden of proof. However, UWU's experience under the reverse onus in the FW Act shows that respondents are often able to discharge this burden too easily through decision-makers' evidence, even in strong cases for the applicant.[6] This occurs frequently in general protections matters.

In general protections matters, the applicant still bears the onus of establishing the key elements of the claim with evidence. The applicant must demonstrate which right or entitlement was exercised, the fact that adverse action was then taken and the connection between that right or entitlement exercised to the adverse action. Where an employer takes action for a number of reasons, only one of which is a prohibited reason, that can still result in a contravention. This would appear to make the respondent's case more onerous, but in practice it is surprisingly easy for employers to discharge their onus.

This is largely because the reverse onus is tempered by the requirement that the applicant must also respond to the respondent's negative case, by demonstrating that a prohibited reason was an operative or immediate reason for the action, or a substantial and operative factor in taking the action. This can be difficult to prove without considerable evidence. As a result, the reverse onus is effectively quite cursory, in practice, compared to the evidentiary burden placed on the applicant. The applicant must still establish the bulk of the case including successfully rebutting the respondent's defence.

As a result, UWU recommends that the language defining the reverse onus be strengthened and clarified, to limit the higher evidentiary burden on applicant's imposed by case law. This could be achieved by an express provision in the DD Act stating that a prohibited reason does not have to be 'an operative or immediate reason for the action or a substantial and operative factor', to remove the additional threshold requirement for applicants. This is also intended to make the respondent's onus more substantive than it currently is in the FW Act.

Consultation Question 7- ***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?***

UWU is broadly in favour of amendments which simplify the four-part test. The DRC recommended removing the 'reasonableness' element from the definition of indirect discrimination. UWU supports this amendment. Furthermore, the DRC also recommended removing the 'inability to comply' requirement, which we also support.

However, in the alternative, if the 'inability to comply' test is to remain in the DD Act then it must be amended to better reflect current case law. That is, the courts have determined that the question is not just whether a person can comply with a condition but whether compliance would lead the person to suffer a serious disadvantage.

Additionally, in *Travers v New South Wales* it was held that in the circumstances 'is not able to comply' should be construed liberally.[7] To codify this would better ensure that the requirement is interpreted broadly and practicably to avoid more literal interpretations by employers. However, UWU's preference remains that the 'inability to comply' element be removed entirely.

Consultation Question 8- ***Should the reasonableness element in the definition of indirect discrimination be*****:**

a. ***removed***
b. ***retained and supplemented with a list of factors to consider***
c. ***replaced by a legitimate and proportionate test***
d. ***other?***

Please expand on your response.

UWU agrees with option (a) that this element should be completely removed from the definition of indirect discrimination. Removing the word 'reasonable' should reduce ambiguity and make an employer's obligations clearer. The courts have determined that the term 'reasonable adjustments' means all adjustments up until the point of unjustifiable hardship, and that there is no scope to assess the 'reasonableness' of an adjustment outside the context of unjustifiable hardship.[8] However, the current wording creates considerable confusion for workers and employers regarding the scope of the reasonableness assessment.

Consultation Question 9- *Should the language of 'does not or would not comply or is not able or would not be able to comply' be removed from the definition of indirect discrimination?*

Yes, UWU supports removing the language of 'does not or would not comply or is not able or would not be able to comply' because despite courts construing the test liberally, (making it broader than the literal words would suggest) it still leads to confusion in practice.

However, if the wording is to be retained, then there must be an express provision to reflect the case law: stipulating that it is not just whether a person can comply with a condition, but whether compliance would lead the person to suffer a serious disadvantage.

Ultimately, UWU recommends that the wording be removed entirely because the test is unnecessary. Particularly given that there is already a limb of the indirect discrimination test that captures whether the person is disadvantaged by the requirement.

Consultation Question 10- *Should the Disability Convention be included in the object provision of the Disability Discrimination Act?*

UWU supports the DRC's recommendation that the DD Act should expressly include the Convention on the Rights of Persons with Disabilities ('**Disabilities Convention'**) in its objects. The Act is a primary vehicle for fulfilling Australia's obligations under the Disabilities Convention, and making this link explicit would provide clearer interpretive guidance, strengthen the connection between domestic law and international obligations, and signal Parliament's intent to advance the rights of people with disability.

Consultation Question 11- ***Should the Disability Discrimination Act be expressly required to be interpreted in a way that is beneficial to people with disability, in line with human rights treaties?***

UWU supports this proposal. Although courts can already consider human rights principles through the common law and the *Acts Interpretation Act 1901* (Cth), an express requirement would provide certainty and consistency. It would align the Act with other legislation, such as the *Disability Services and Inclusion Act 2023* (Cth) s 3, and ensure courts adopt interpretations that advance rather than narrow the rights of people with disability.

Consultation Question 12- ***If there was a positive duty in the Disability Discrimination Act, who should it apply to?***

UWU strongly supports the introduction of a positive duty in the DD Act for employers. It must apply broadly to all employers, including small businesses. UWU also recommends that the Review consider extending the duty beyond employment to other duty holders in the DD Act, as recommended by the DRC. Otherwise, the rights of persons with disability could be unfairly constrained or diminished in certain sectors, such as in education or government service provision.

However, it is concerning that the AHRC is the sole adjudicator and enforcer for the positive duty under both the SDA and potentially also under the DD Act. Workers and trade unions should be able to bring complaints regarding non-compliance with the positive duty as well. This would undoubtedly increase and improve compliance of the positive duty to better ensure that it is robustly tested and upheld.

Furthermore, if the amendments to the DD Act were mirrored in the FW Act, then the FWC could also adjudicate and enforce discrimination matters within the general protections framework. This could also potentially include adjudicating non-compliance of the positive duty within employment through the FWC, to facilitate broader enforcement and drive systemic change.

Consultation Question 13- ***Are there lessons from the operation of the positive duty in the Sex Discrimination Act that could be incorporated into a positive duty in the Disability Discrimination Act?***

Firstly, because some employers had difficulty transitioning to the new SDA framework, it is vital that the AHRC or Attorney-General's Department make training and education available for duty holders. In particular, using case examples from the SDA's positive duty to provide guidance and contrast would be beneficial. Otherwise, employers may have trouble understanding the scope of their new duty, such as the need to implement necessary policies and conduct staff training, to bring practices in line with the new obligation.

Crucially, additional funding and resources must be given to the AHRC in anticipation of a new positive duty, for three key reasons:

- in order to facilitate the adjudication and enforcement of these new duties. Otherwise, the new duties will not provide sufficient protection for persons with disability if they cannot be widely tested and upheld; and
- to facilitate greater expediency of matters at the AHRC and avoid unnecessary delay.
- to facilitate training, education and resources for duty holders, including guides or explanatory materials.

The reality is that many applicants and unions generally prefer to use the current framework in the FW Act and Fair Work Commission ('**FWC**') to adjudicate discrimination matters because the jurisdiction is far more expedient and time sensitive. Whereas, according to the AHRC's recent statistical data, about 1 in 5 complaints was not resolved in 12 months.[9] Furthermore in AHRC's Annual Report 2024-2025, a lack of funding was identified as a major barrier to addressing complaint backlogs, which reportedly have built up after a 30% increase in complaints following the pandemic.[10]

This confirms UWU's experience that wait times for AHRC matters are considerable and subject to significant delays. Such time delays are completely unworkable and impractical for applicants, particularly in the context of an ongoing employment relationship where discrimination is live, persisting and in many cases intolerable for an employee. Accordingly, the AHRC needs to have the capacity to deal with a higher volume of matters in a timely manner if the jurisdiction is to be a practical and realistic option for applicants.

Lastly, the SDA and the FW Act were both amended in the Respect@Work reform, so that definitions and duties were mirrored and certain provisions were corresponding across both acts. This should be the preferred model for legislative reform in disability. There are inherent limitations in conducting consultation with respect to the DD Act only. It would be useful to consider how the FW Act may also be amended to buttress and reflect any legislative updates in the DD Act. This would also address concerns pertaining to the timing and resourcing of the AHRC, by enabling the FWC to be a disability discrimination adjudicator and enforcer as well.

Consultation Question 14- ***What costs, benefits and other impacts would duty holders experience in meeting a positive duty under the Disability Discrimination Act?***
(If you are an existing duty holder under the Disability Discrimination Act, please specify how you think meeting a positive duty would impact you?)

The significant benefit of a positive duty is moving from a reactive, complaint-based system to one that requires proactive steps from employers (and other duty holders) to actively engage with facilitating accessibility and participation. This necessitates more consideration, better understanding, increased engagement and possibly increased empathy from employers towards those with disability. The positive duty framework encourages the duty holder to engage with how its spaces, policies and programs can be made accessible.

Costs may be incurred through physical changes to workspaces or may be incurred through work necessary to implement the positive duty. Employers will need to review, and in some circumstances create policies, complaint processes and other internal mechanisms to discharge their duty. This will require work and time to complete. Employers may also need to incur costs to meet their obligations, such as installing ramps, hearing loops or Braille blocks. However, these costs are undoubtedly beneficial and ultimately necessary in the long run because they facilitate increased workforce participation and inclusion.

In the context of the SDA, s 47C(6) provides a useful list of additional matters that are taken into consideration when determining whether a duty holder has complied with their positive duty. This includes the size, nature and circumstances of the business, the duty holders' resources, including financial or otherwise (which would also include human resources capabilities). It then outlines a consideration of the practicability and 'cost of measures' element (to assess whether the measure will be effective with the cost and difficulty of

implementing it). There is also a catch-all provision for 'any other relevant matter'. This provides a useful guide on the scope of matters to consider.

However, to this list of factors UWU also recommends adding the following:

- the benefits of implementing the measures;
- the consequences and risks of failing to implement measures; and
- the extent to which the duty holder has complied with any relevant guidelines published by the AHRC.

Furthermore, employers would undoubtedly benefit from more guidance and training about what is reasonable and proportionate, similar to the *Guidelines for Complying with the Positive Duty under the Sex Discrimination Act*, from the AHRC.[11]

Consultation Question 15- *Should there be exceptions or limits to the application of a positive duty?*

UWU does not recommend any exceptions within the context of employment.

Consultation Question 16- *Would the creation of a stand-alone duty to provide adjustments better assist people with disability and duty holders to understand their rights and obligations?*

UWU supports the DRC's recommendation to establish a stand-alone duty to provide adjustments. As previously outlined in answer to Question 8, UWU also advocates for removing the 'reasonableness' element from the requirement to provide adjustments, in order to provide greater clarity.

By introducing a stand-alone duty, the focus would shift to the proper question: whether providing the adjustment would impose unjustifiable hardship. This would make the law clearer for duty holders. A stand-alone duty would also correct the narrowing effect of *Sklavos v Australasian College of Dermatologists,*[12] which has limited the operation of the current provisions.

Consultation Question 18- ***Would removing the word 'reasonable' from the term 'reasonable adjustment' to align the language with the legal effect created any unintended consequences?***

UWU supports the DRC's recommendation to replace "reasonable adjustments" with "adjustments" for the reasons discussed above in response to Question 8.

Case Study 1- Bar & Gaming Attendant, (full time)

UWU represented a bar and gaming attendant who had worked for 20 years at an RSL club. Two years ago she incurred a back injury in an accident which was not work related. As a result, she had to access her paid entitlements whilst in recovery and then accessed income protection under her superannuation policy as her injury became protracted.

Once her condition stabilised, she attended an independent medical examination which determined that she could return to normal duties without risk of aggravating symptoms, provided that she was able to take short breaks after standing or sitting for long periods.

Nevertheless, the employer unilaterally determined that no suitable and safe accommodations or alternative roles were available that would enable her continued employment. UWU was aware of other injured employees on site with hip injuries being redeployed to seated, administration or office-based duties. The case is ongoing.

This example highlights that employers are often reluctant to find solutions or compromise in relation to reasonable adjustments at the outset.

Case Study 2- Store Person (Food Manufacturing), (full time)

UWU represented a member who began working with their employer, a large food manufacturer in early 2022. He was employed as a store person which involved moving stock, primarily through operating and driving a forklift.

In early 2023 he experienced a number of seizures and later received a formal diagnosis of epilepsy. This meant that he could not drive or operate a vehicle, including a car, forklift or otherwise move heavy plant equipment. However, he was otherwise cleared to be on the shop floor, be around forklifts and trucks (just not drive them), and could do manual labour and/or heavy lifting.

The employer claimed that using the forklift was an inherent requirement of the store person position and amounted to 90% of the role requirement. Despite being a large employer, the business claimed that retraining and redeployment to other areas of the warehouse, such as in inventory, was not possible. The parties reached an impasse.

The matter was later resolved.

Case Study 3- Security Guard, (full time)

Our member suffered from chronic migraines since childhood and occasionally required time off work to manage his condition. After working for the same employer for 2 years, that employer lost the security contract at the site. Our member was then offered a role with the new employer who took over the contract at the site, which he accepted.

However, within a few months of taking over the site, the new employer raised an issue with the amount of unpaid leave our member was taking for his medical condition. The employer threatened to terminate his employment. Our member provided additional evidence from his treating doctor and explained that his old employer had accommodated his disability for 2 years without any issues.

Nevertheless, the new employer ignored this and did not consider whether accommodating our member's disability would cause unjustifiable hardship before moving to terminate him. As a result, this member's case is now the subject to a general protections application at the FWC, on grounds of disability discrimination. The case is ongoing.

Consultation Question 19- ***What is your preferred approach to achieving greater fairness and transparency in claims of unjustifiable hardship:***

a. the Disability Royal Commission amendment as proposed

b. a new definition of unjustifiable hardship

c. other?

Please expand on your response.

UWU supports option (a), the DRC's recommendation. We consider the DRC's approach strikes the right balance between enhancing accountability and ensuring decisions are informed by the perspectives of people with disability.

While we acknowledge that documentation and consultation obligations may create additional administrative steps, we do not consider these disproportionate. They are minimal safeguards compared to the significant impact that denial of adjustments has on people with disability. Option (a) also allows flexibility for smaller duty holders, as the scope of consultation and record-keeping can be proportionate to the circumstances.

By contrast, option (b), a new definition of unjustifiable hardship, risks narrowing the protection by reducing the test to a cost/benefit balancing exercise. Courts may give disproportionate weight to financial costs.

For these reasons, UWU supports the DRC amendment (option a) as the most effective way to improve fairness and transparency in the application of the unjustifiable hardship defence.

Case Study 4- Home Care Workers

UWU aged care members who work in home care undertake vital work in keeping elderly clients in their homes longer. However they are particularly susceptible to disability discrimination due to a variety of converging factors, including the persistent physical nature of their work which can result in repetitive strain injuries particularly towards the end of their career.

Firstly, the work involves a lot of manual handling when providing domestic assistance, (such as cleaning, mopping, sweeping, vacuuming and dusting their client's homes) or personal care work, (such as helping clients in and out of bed, rolling clients in their beds in order to change sheets, dressing and helping clients in and out of into showers).

Secondly, there is also a compounding age discrimination factor arising from these workers' demographics, being more experienced but also closer to retirement age. Our long-term members in the sector, some with over 30 years' experience, frequently incur injuries as they reach their 50s and 60s. Typical injuries include shoulder and back strain, arthritis in limbs and knee or hip degenerative issues. For those with work related injuries, there is temporary job protection and certain obligations to provide modified duties initially under worker's compensation legislation.

However, we also see this manifest as non-work-related injuries or 'deemed' non-related work injuries where there is insufficient medical evidence to attribute an injury to work.

These workers are frequently targeted by their employer, (irrespective of the origin of their injury) because they typically view even mild to moderate injuries as a liability and a burden. The employers often claim that the business cannot provide reasonable adjustments in the form of permanent modified or facilitate redeployment within the organisation. Instead, reasonable adjustments are typically refused on the basis of unjustifiable hardship.

In many cases, the reasonable adjustments could easily be accommodated, with a degree of flexibility. Where injuries are more extensive, ideally, these workers should be transitioned into office-based duties such as allocators where possible, redeployed or utilised for training other workers.

Most of these cases are settled on a confidential basis, due to a general the reluctance to litigate matters under the DD Act, not only because of the need for expediency but also due to the DD Acts' limitations, complexities and uncertainties.

Consultation Question 20- ***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 or current employers and prospective and current employees before making employment decisions?***

UWU supports amending the DD Act to require employers to consider adjustments and to consult with applicants or employees with disability. This would ensure that assessments of inherent requirements are evidence-based rather than assumption-driven, consistent with Australia's obligations under the *Convention on the Rights of Persons with Disabilities* and would reduce barriers to equal participation in employment.

Furthermore, guidelines would be useful tools for employers, employees and prospective employees to engage with any amended consultation provision. There should also be triggers and requirements in the DD Act that set out consultation procedures, (similar to provisions in ss 65A and 65B of the FW Act with respect to requests for flexible working arrangements). For example:

- the request and response should all be in writing;
- the employer (or other duty holder) must provide a response with reasons within a certain timeframe;
- the response must address how the employer (or other duty holder) considered and assessed the nature and extent of any adjustment made and the details about the extent of consultation with any person with disability concerned; and
- when an employer (or other duty holder) may refuse a request.

These amendments would likely be more useful and transparent for current employees with disability. However, for prospective employees, it is unclear how they would trigger and enforce this process, unless the consultation process is legislated, including incorporating it into the employer's positive duty and/or ensuring the AHRC is empowered to act as an adjudicator in this space if requests are unresolved.

In addition to a legislated consultation process, there should also be an explicit right for employees and prospective employees to have a union representative present in the relevant consultation. This is a necessary measure to guard against the inherent power imbalance between individual employees (or prospective employees) and employers (or prospective employers).

In addition, there are important privacy issues to be considered regarding disclosures, because this process would likely require an employee or prospective employee to disclose health and private information. There should be, at a minimum, guidance for employers about how to deal with this information and uphold privacy principles.

Consultation Question 21- ***Are there other amendments to the Disability Discrimination Act that could support engagement between prospective or current employers and prospective or current employees to better understand the inherent requirements of a job?***

Firstly, there must be a clear procedure and/or framework set out in the DD Act to guide how engagement occurs, as outlined above in response to Consultation Question 20. It is important that employees be able to make the request at any time, to facilitate engagement, and so that employees who have been working for some time should not be prevented from making a request. However, once the request is made, employers should have clear time limits to provide written responses to requests. In fact, any provision that triggers engagement between employees and prospective employees on inherent requirements should have time limits for employer responses and they must be in writing, so there is a clear paper trail to facilitate accountability.

There should also be a legislated escalation process, like a dispute resolution procedure, particularly for prospective employees who are not otherwise covered by a despite resolution procedure in an enterprise agreement or award.

For prospective employees, creating a procedure for triggering this consultation which also makes people feel safe and confident is more difficult. Prospective employees have an inherently less secure relationship with prospective employers and proving that an employer chose not to engage in the process may be difficult.

Meaningful change for prospective employees may be bought about by the positive duty more generally, for example:

- If the positive duty is legislated, an employer may not discharge their duty if they fail to have a hiring policy or procedure for prospective employees for those who disclose a disability.
- In a similar vein, an employer who fails to adequately advertise the inherent requirements of the job may not discharge the positive duty.

Consultation Question 22- ***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?***

The DD Act should define the scope and factors to consider when determining 'inherent requirements', to avoid ambiguity. It should not just be what appears in a person's position description from human resources, which is often intrinsically broad, unrealistic and impractical. A key factor to consider would necessarily include input from the employee in question and other union delegates or employees on site, to ensure requirements are indeed reasonable and accurate. Employee input should be given adequate weighting, to avoid the employer being the sole gatekeeper for determining and assessing inherent requirements.

In addition, factors to consider when deciding whether a person can carry out the inherent requirement of the job should include:

- employment history, including with previous employers;
- education and training history;
- medical or professional opinions; and
- employee or prospective employee views.

This would better ensure that an employee's experience and attributes, in addition to custom and practice, are also taken into consideration.

Conclusion

It is paramount that the DRC's 15 recommendations for the DD Act be incorporated and reflected in the revised legislative framework. It is fundamental that better access and improved participation in employment is achieved for people with disability, not only in terms of removing barriers to entry into the workforce but barriers to remain in the workforce. Employers must proactively engage with the needs of people with disability and provide adjustments at the outset, to retain their employees and encourage prospective employees.

We strongly recommend a simplification of the four-part test for indirect discrimination, including a provision for a stand-alone duty to provide adjustments, the removal of 'reasonableness' requirement from adjustments and the insertion of a new positive duty to eliminate discrimination as far as possible from the outset. However, AHRC resourcing for adjudication and enforcement is also paramount for this to be effective. Additionally, when

determining the inherent requirements of a job, input from employees must be included. These proposed mechanisms, in addition to the Review's DRC recommendations will contribute to a more robust legislative framework which aims to fundamentally improve the DD Act, to better augment, uphold and protect the rights of those with disability.

For more information about this submission, please contact Kate Edmondson, Research Analyst, at [redacted]

Your sincerely,

Larissa Harrison
Director - Strategic Power
United Workers Union

[1] *Watts v Australian Post Corporation* (2014) 222 FCR 220 [22].
[2] *Dictionary*, definition of '*disability', Disability Inclusion Act 2024* (Act), https://www.legislation.act.gov.au/a/2024-44/
[3] Section 5, *Disability Inclusion Act 2024 (Act).*
[4] *Dictionary*, definition of '*intersectionality*', *Disability Inclusion Act 2024* (Act), https://www.legislation.act.gov.au/a/2024-44/
[5] Section 5, definition of '*intersectionality*', *Disability Rights, Inclusion and Safeguarding Act 2024* (Tas), https://www.legislation.tas.gov.au/view/pdf/asmade/act-2024-021/lh
[6] *Board of Bendigo Regional Institute of TAFE v Barclay* (2012) 248 CLR 500; *CFMEU v BHP Coal Pty Ltd* (2014) 253 CLR 243; *CFMEU v Endeavour Coal* (2015) 231 FCR 150; *State of Victoria (Office of Public Prosecutions) v Grant* (2014) 67 ALR 102-122.
[7] [2000] FCA 1565, at [17].
[8] *Watts v Australian Post Corporation* (2014) 222 FCR 220 [22].
[9] Australian Human Rights Commission 2023-24 Complaint Statistics, page 5, available at: https://view.officeapps.live.com/op/view.aspx?src=https%3A%2F%2Fhumanrights.gov.au%2Fsites%2Fdefault%2Ffiles%2Fdocument%2Fpublication%2Far_2023-24_complaint_stats_tables_1.docx&wdOrigin=BROWSELINK
[10] Annual Report 2024-2025, AHRC, page 7, available at: https://humanrights.gov.au/our-work/commission-general/publications/annual-report-2024-25
[11] '*Guidelines for Complying with the Positive Duty under the Sex Discrimination Act 1984 (Cth*)', Australian Human Rights Commission, August 2023, https://humanrights.gov.au/sites/default/files/2023-08/Guidelines%20for%20Complying%20with%20the%20Positive%20Duty%20%282023%29.pdf
[12] (2017) 256 FCR 247.