

25 June 2021

The Hon. Michaelia Cash MP
Attorney-General of Australia
PO Box 6100
Senate
Parliament House
Canberra ACT 2600

By email: senator.cash@aph.gov.au

Dear Attorney-General

**Ref: Reform of reasonable adjustment provisions under the
Disability Discrimination Act**

We write on behalf of the below signatories and endorsing organisations seeking urgent reform to remedy the ‘reasonable adjustment’ provisions in the *Disability Discrimination Act 1992* (Cth) (DDA), following the decision of *Sklavos v Australian College of Dermatologists*.¹

We wrote to the former Attorney-General, the Hon Christian Porter MP, about this issue in November 2018. In his response of 11 January 2019, he indicated that it would be a matter for consideration in the 46th Parliament. This correspondence is enclosed for your information. We are disappointed that this issue appears not to have progressed.

The ‘reasonable adjustment’ provisions in the DDA are a key mechanism for promoting substantive equality for people with disability in Australia. Targeted amendments to the DDA are essential to ensure people with disability can fully participate in employment, education, transport and other areas of public life.

Background

The effect of the *Sklavos* decision is that for the right to a reasonable adjustment to be enforceable, not only must a person with disability show they are disadvantaged by a failure to provide a reasonable

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¹ [2017] FCAFC 128.



adjustment, but that the failure to provide the adjustment was caused by the person's disability.

To illustrate, if a workplace will not provide the software a blind person needs at work, that person must now show the failure to provide that software is because they are blind. In practice, this will be nearly impossible to prove unless the workplace makes a clear statement such as 'I refuse to make adjustments for you, because you are blind'. The effect of the decision is that it is now substantially easier for employers, schools and other service providers to not make changes to existing structures and practices, even where reasonable to do so, to accommodate a person's disability.

The outcome of the *Sklavos* decision creates a new and impracticable legal hurdle for people with disability seeking a reasonable adjustment. The impact of the decision is also contrary to the intent of the *Disability Discrimination and Other Human Rights Legislation Amendment Bill 2008* (Cth), which sought to amend the DDA to clarify that there *is* a general duty to make reasonable adjustments, with the exception of adjustments that would cause unjustifiable hardship. The Australian Human Rights Commission (AHRC) has recently highlighted the importance of reasonable adjustments for the inclusion and participation of people with disability.

In its submission to the *Committee on the Rights of Persons with Disabilities* (July 2019) the AHRC observed that the additional requirements resulting from the *Sklavos* decision are too onerous, and also contrary to provisions in the CRPD providing that any limitation on the provision of a reasonable adjustment impedes the rights of persons with disabilities. The AHRC further recommended an amendment of the DDA by including a standalone positive duty to make reasonable adjustments.

Proposed amendments to the DDA

We assert that a new section (section 6A, as drafted below) should be added to the DDA to make it unlawful to fail to provide reasonable adjustments. Consequential amendments will be required to sections 5 and 6 of the DDA. The proposed new provisions of the DDA as enacted would then read as follows:

SECT 5 Direct disability discrimination

- (1) For the purposes of this Act, a person (the discriminator) discriminates against another person (the aggrieved person) on the ground of a disability of the aggrieved person if, because of the disability, the discriminator treats, or proposes to treat, the aggrieved person less favourably than the discriminator would treat a person without the disability in circumstances that are not materially different.
- (2) For the purposes of this section, circumstances are not materially different because of the fact that, because of the disability, the aggrieved person requires adjustments.



SECT 6 Indirect disability discrimination

(1) For the purposes of this Act, a person (the discriminator) discriminates against another person (the aggrieved person) on the ground of a disability of the aggrieved person if:

- (a) the discriminator requires, or proposes to require, the aggrieved person to comply with a requirement or condition; and
- (b) because of the disability, the aggrieved person does not or would not comply, or is not able or would not be able to comply, with the requirement or condition; and
- (c) the requirement or condition has, or is likely to have, the effect of disadvantaging persons with the disability.

(3) Subsection (1) does not apply if the requirement or condition is reasonable, having regard to the circumstances of the case.

(4) For the purposes of subsection (3), the burden of proving that the requirement or condition is reasonable, having regard to the circumstances of the case, lies on the person who requires, or proposes to require, the person with the disability to comply with the requirement or condition.

SECT 6A Discrimination by failing to provide reasonable adjustments

For the purpose of this Act, a person (the discriminator) discriminates against another person (the aggrieved person) on the ground of a disability of the aggrieved person if:

- (a) because of the disability, the aggrieved person requires adjustments; and
- (b) the discriminator does not make, or proposes not to make, reasonable adjustments for the person.

For the avoidance of doubt, it is not necessary for there to be a causal connection between the failure or proposal not to make reasonable adjustments and the disability of the aggrieved person.

Section 4 of the DDA will continue to assist with the interpretation of the meaning of 'reasonable adjustments' in stating: 'an adjustment to be made by a person is a reasonable adjustment, unless making the adjustment would impose an unjustifiable hardship on the person'. The unjustifiable hardship defence will continue to apply to all duty holders under the DDA (including employers, schools and other service providers).

The amendments we seek are straightforward and essential to ensuring that people with disability have rights to participate in Australian society on an equal basis to others. The amendments are



also consistent with the original intention of Parliament in legislating for a general duty to make reasonable adjustments. Failure to introduce these changes will leave people with disability without access to core provisions of the Commonwealth anti-discrimination law which are supposed to provide protection.

We seek a meeting with you to discuss the urgent need for these amendments. To arrange a meeting or for further information, please contact Giancarlo de Vera, Senior Manager of Policy at PWDA, at giancarlo@pwd.org.au.

Yours sincerely

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People with Disability Australia

Jonathon Hunyor
Chief Executive Officer
Public Interest Advocacy Centre



Endorsements

This letter is endorsed by the following organisations and individual signatories, who also seek urgent reform to remedy the 'reasonable adjustment' provisions in the *Disability Discrimination Act 1992* (Cth).

Organisational Endorsements



ACT Council of Social Services Inc



Blue Knot Foundation



Southern Disability Advocacy



Physical Disability Australia



Southwest Advocacy Association Inc



Disability Discrimination Legal Service



WA Council of Social Service



Disability Justice Australia Inc



Melbourne East Disability Advocacy



Council for Intellectual Disability



Deaf Victoria



Disability Advocacy Victoria



Community Legal Centres Australia



All Means All



Imagine More

A voice of
our own



Developmental Disability WA



Women with Disabilities Victoria



Queensland Advocacy Incorporated



Disability Rights Advocacy Service Inc



Disability Advocacy Network Australia Ltd



VACRO



Syndromes Without A Name



Forrest Personnel



Disability Advocacy NSW



Children and Young People with Disability Australia

Children and Young People with Disability Australia



FEDERATION OF COMMUNITY LEGAL CENTRES VIC

Federation of Community Legal Centres Vic



Disability Voices Tasmania



AED Legal Centre



Down Syndrome Australia



TasCOSS



NTCOSS



ACOSS



National Ethnic Disability Alliance (NEDA)



WWDA



Family Advocacy



ACDL



Advocacy for Inclusion



Community Legal Centres NSW



Northern Rivers Community Legal Centre



Rights Information and Advocacy Centre



UNSW
Kingsford
Legal Centre

Kingsford Legal Centre



Redfern Legal Centre



HIV/AIDS Legal Centre



Equality Lawyers



Australian Lawyers for Human Rights



The undersigned members of the Australian Discrimination Law Experts Group (ADLEG):

1. Dr Fiona Allison, University of Technology Sydney
2. Robin Banks, University of Tasmania
3. Dr Cristy Clark, University of Canberra
4. Dr Elizabeth Dickson, Queensland University of Technology
5. Liam Elphick, Monash University
6. Professor Beth Gaze, University of Melbourne
7. Professor Beth Goldblatt, University of Technology Sydney
8. Dr Paul Harpur, University of Queensland
9. Associate Professor Anne Hewitt, University of Adelaide
10. Professor Therese MacDermott, Macquarie University
11. Dr Sarah Moulds, University of South Australia
12. Associate Professor Jennifer Nielsen, Southern Cross University
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18. Dr Alice Taylor, Bond University
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Individual Endorsements

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