

# Submission re Fair Work Legislation Amendment Bill 2022

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## About the Public Interest Advocacy Centre

The Public Interest Advocacy Centre (PIAC) is leading social justice law and policy centre. Established in 1982, we are an independent, non-profit organisation that works with people and communities who are marginalised and facing disadvantage.

PIAC builds a fairer, stronger society by helping to change laws, policies and practices that cause injustice and inequality. Our work combines:

- legal advice and representation, specialising in test cases and strategic casework;
- research, analysis and policy development; and
- advocacy for systems change and public interest outcomes.

Our priorities include:

- Reducing homelessness, through the Homeless Persons' Legal Service
- Access for people with disability to basic services like public transport, financial services, media and digital technologies
- Justice for First Nations people
- Access to sustainable and affordable energy and water (the Energy and Water Consumers' Advocacy Program)
- Fair use of police powers
- Rights of people in detention, including equal access to health care for asylum seekers (the Asylum Seeker Rights Project)
- Improving outcomes for people under the National Disability Insurance Scheme
- Truth-telling and government accountability
- Climate change and social justice.

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# 1. Reasonable Adjustments for Workers with Disabilities

## 1.1 Introduction

PIAC welcomes the opportunity to provide this short submission in relation to the Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022.

We write to draw the Committee's attention to an important issue that has been omitted from the amendments in this Bill, but has an important role to play in advancing the Bill's objectives and protecting workers with disability from being excluded from employment.

The issue concerns the provisions of the *Disability Discrimination Act 1992* (Cth) (DDA) that are intended to require employers and service providers to make reasonable adjustments for people with disability. It is essential that these provisions are working effectively, to support people with disability to fully participate in workplaces and other parts of society.

Unfortunately, as set out below, those provisions are not working as was intended when they were recommended by the Productivity Commission.

There is a straightforward amendment to the *DDA* that will restore the operation of the reasonable adjustment provisions and we urge the Committee to call on the Government to address this issue, to support the changes in the present Bill.

## 1.2 Relevance to the Bill

The discrete reform we propose is closely aligned with the rationale for the Bill, articulated during the Second Reading Speech on 27 October:<sup>1</sup>

The Albanese Labor government wants to see a strong economy that delivers for all Australians. We want to see more workers in good jobs: jobs with security, fair pay and proper protections. We want workers to have a pathway to a better life and businesses to thrive. For this, we need fair, effective and up-to-date laws.

We strongly agree. Delivering for all Australians must include Australians with disability, and seeing more workers in good jobs, with security, fair pay and proper protections, must include workers with disability.

Unfortunately, for far too many people with disability, this is not the case. People with disability are already excluded from many workplaces:

- People aged 15-64 with disability are twice as likely to be unemployed as those without disability.
- The unemployment rate for people with disability rose from 8% to 10% between 2003 and 2018, while the rate for people without disability remained the same.<sup>2</sup>

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<sup>1</sup> The Hon Tony Burke MP, Ministers for Employment and Workplace Relations House of Representatives, Parliamentary Hansard, Thursday 27 October 2022, page 4.

<sup>2</sup> Australian Institute of Health and Welfare, People with Disability in Australia, 2020: <https://www.aihw.gov.au/reports/disability/people-with-disability-in-australia/contents/employment>

While there are a range of contributing factors to these higher unemployment rates, one of the key ways to support people with disability in the workplace is by having effective laws requiring reasonable adjustments to be made by employers.

### 1.3 The Problem

Unfortunately, the existing 'reasonable adjustment' provisions of the *Disability Discrimination Act 1992* (Cth) (DDA) have been rendered effectively unworkable by the decision of the Federal Court in *Sklavos v Australian College of Dermatologists*.<sup>3</sup>

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 adjustment, but that the failure to provide the adjustment was *caused by* the person's disability.<sup>4</sup>

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 the 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 contrary to the intent of the *Disability Discrimination and Other Human Rights Legislation Amendment Act 2008* (Cth). That Act sought to implement the recommendation of the Productivity Commission to include in the DDA a general duty to make reasonable adjustments, with the exception of adjustments that would cause unjustifiable hardship.<sup>5</sup>

### 1.4 The Solution

Fixing this problem requires a relatively straight-forward amendment to the DDA.

PIAC has worked in close collaboration with People with Disability Australia (PWDA) to have this issue addressed, including raising the issue with the current and previous government. We propose a new section 6A in the DDA, to clearly make it unlawful to provide reasonable adjustments, with consequential amendments to sections 5 and 6. The proposed new sections of the DDA would then read as follows:

#### **SECT 5 Direct disability discrimination**

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<sup>3</sup> [2017] FCAFC 128.

<sup>4</sup> *Ibid*, Bromberg J [30]-[53] (Griffiths and Bromwich JJ agreeing on this point), see particularly [43].

<sup>5</sup> Recommendation 8.1, Review of the Disability Discrimination Act 1992, Productivity Commission Inquiry Report, Report No 30, 30 April 2004: <https://www.pc.gov.au/inquiries/completed/disability-discrimination/report/disability-discrimination.pdf>

(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).

These simple amendments are essential to ensuring people with disability have rights to participate in Australian society on an equal basis to others, including in the workplace. They will also uphold the original intention of Parliament in legislating for a general duty to make reasonable adjustments.

## **1.5 Conclusion**

We urge the Committee to recommend that the *Disability Discrimination Act* be amended to address the issues with 'reasonable adjustments' caused by the Federal Court in *Sklavos*, to ensure that people with disability can fully participate in all aspects of public life, including supporting the participation of workers with disability in employment.

We would hope these amendments can be introduced as a matter of priority and receive support from across the Parliament.

### ***Recommendation***

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*That the Committee call on the Government to introduce amendments to the 'reasonable adjustments' provisions of the Disability Discrimination Act 1992 (Cth), to address issues created by the Federal Court decision in Sklavos v Australian College of Dermatologists, and to ensure people with disability can fully participate in all areas of public life, including workplaces.*