

# How can the requirement to provide adjustments to people with disability be improved?

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## Recommendations

- Section 4 of the *Disability Discrimination Act* should be changed to remove the word 'reasonable' from the definition of 'reasonable adjustments'.
- A standalone duty to provide adjustments should be introduced in the *Disability Discrimination Act*.

See *Free & Equal Reform 31* and *Disability Royal Commission Recommendation 4.25 and 4.26*.

## Introduction

The current requirement in the *Disability Discrimination Act 1992* (Cth) (**Disability Discrimination Act**) for reasonable adjustments is too narrow. The law should be changed to make this legal requirement fairer, simpler and more accessible to people with a disability.

**This explainer will tell you more about the current requirement for reasonable adjustments and why it needs to be changed.**

## What are reasonable adjustments?

The Disability Discrimination Act includes a requirement to make reasonable adjustments to reduce barriers for people with disability. A **reasonable adjustment** is when a change is made to a process or environment to remove barriers preventing people with disability from participating on an equal basis with others. An adjustment could be changes to a policy, procedure, technology or to the physical environment.

Examples of reasonable adjustments include:

- Businesses making important information available to customers in multiple formats for people who have low vision.
- Schools providing Auslan interpreters for students who are Deaf or hard of hearing.
- Purchasing or modifying office equipment to assist someone with a physical disability at work.

Businesses, organisations or people who are required to make reasonable adjustments are known as **duty holders**. It can be unlawful discrimination for a duty holder to refuse to make a reasonable adjustment for a person with disability. However, it is lawful for a duty holder to refuse to make a reasonable adjustment, if the reasonable adjustment would cause unjustifiable hardship on the duty holder. This is called the **unjustifiable hardship defence**.

To decide whether making reasonable adjustments would cause unjustifiable hardship, all relevant circumstances must be taken into account, including matters listed in the Disability Discrimination Act such as the positive or negative impacts on anyone involved, the cost of making the adjustment and the financial circumstances of the person relying on the defence.

When the Disability Discrimination Act first became a law in 1992, it did not include a requirement to make reasonable adjustments for people with disability. The Disability Discrimination Act was changed in 2009 to include this requirement. Now, the definitions of both direct discrimination and indirect discrimination include that failing to make reasonable adjustments can be discrimination.

The requirement to make reasonable adjustments is a **positive obligation** because it places a duty on someone to undertake a type of action when it is necessary – in this

case, to make the reasonable adjustment. Most of the requirements under the Disability Discrimination Act are considered **negative obligations**, because they place a duty on someone to **not** do something discriminatory.

The purpose of imposing an obligation to make reasonable adjustments is to eliminate discrimination, to the extent possible, by making all protected areas of public life safe and accessible for people with disability. The law allows a person with disability to request a reasonable adjustment, as a recognition that not all general accessibility measures will be appropriate for all people.

## The Sklavos decision and why it leads to worse outcomes for people with disability.

### ***Sklavos v Australasian College of Dermatologists (Sklavos)***

In 2017, the Full Court of the Federal Court of Australia made an important decision about reasonable adjustments in a case called *Sklavos v Australasian College of Dermatologists (Sklavos)*. The decision in Sklavos has made it harder for a person with disability to successfully claim that they were discriminated against by a failure of a duty holder to provide reasonable adjustments.

Sklavos was a doctor who was training to specialise in dermatology. He developed a disability preventing him from completing the College's final written and clinical exams to be admitted as a Fellow. Dr Sklavos made several requests for adjustments due to his disability, including asking for the College to admit him as a Fellow without him having to sit the final exams. The College denied these requests but told Sklavos it would consider any reasonable request he made for special conditions in the exams.

The Court required Sklavos to prove that his disability was the reason the College had failed to make reasonable adjustments. The Court found that Sklavos had not been discriminated against because he could not prove that the refusal to provide adjustments by the College was **because of** his disability. This was the first time the Court interpreted reasonable adjustments in this way.

### **What is the impact of the *Sklavos* decision?**

The Sklavos case has negative consequences for many people with disability who require reasonable adjustments. A person with disability must now show that a duty

holder's failure or refusal to provide adjustments was **because of** the person's disability. This makes it harder for a person with disability to prove they have been discriminated against and goes against the intended purpose of introducing the requirement to make reasonable adjustments.

Once the Federal Court makes a decision on how the law is to be applied, all lower courts in Australia have to follow that decision. This means that all lower courts, which does not include the High Court, have to apply the law in the same way that it was applied in Sklavos.

Currently, the decision in Sklavos makes it is easier for duty holders to refuse to make reasonable adjustments for people with disability.

**Example:** A person with a vision impairment might request that their workplace provide them with software for their computer that allows them to complete their work. If their workplace refuses to provide them with the software and the person with disability wants to make a disability discrimination claim, that person must show that the failure of the employer to provide the software is **because** the person has a vision impairment. This is very difficult to prove as the person with disability would have to know the reasons and thoughts of the other person or organisation to show the reasons why they made a decision, unless the workplace makes a clear statement such as 'I refuse to make adjustments for you, because you are blind'.

## How to improve the duty to provide adjustments?

Ensuring that people with disability have access to the adjustments they need is an essential part of eliminating discrimination and achieving equality for people with disability.

### Removing the reasonableness test

Adjustments will be lawful if they are:

- reasonable, and
- do not cause unjustifiable hardship on the duty holder.

The Disability Discrimination Act does not provide a definition or factors to consider in the assessment of what is 'reasonable'. Removing the reasonableness test would help to avoid the commonly mistaken belief that reasonableness is a necessary part of

deciding whether an adjustment must be made. This change will better protect people with disability. This will also make it easier for duty holders to understand their obligations, as they will only need to consider whether the adjustment will cause them unjustifiable hardship.

### **A stand-alone duty for adjustments**

Currently adjustments can only be considered in relation to direct or indirect discrimination claims. A stand-alone duty to provide adjustments means that Courts can focus on the adjustments requested in a claim on their own merit rather than only assessing adjustments in relation to direct or indirect discrimination. This recommendation makes sure that providing adjustments is a positive duty, meaning that a duty holder must provide adjustments to people with disability or show that the adjustments would cause unjustifiable hardship to be successful in defending a discrimination claim. This will make the Disability Discrimination Act fairer and more accessible for those who have experienced discrimination.