Submission No 102.

Submission to the Draft Disability Access to Premises – Building Standards 2009

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March 2009

This paper presents the Welfare Rights Centre Inc. (Queensland) submission to the Federal House of Representatives Standing Committee on Legal and Constitutional Affairs on the proposed Disability (Access to Premises – Building) Standards.

In summary the WRC believe the standards will provide certainty to builders, architects, developers, landlords and lessees of premises. It will provide better future access to the built environment over a period of time for all persons. The mark of a developed country is how it treats it's less advantaged persons. Persons with a disability will have the certainty that they will be able to access and use more and more premises over time.

Even though there is the potential for many thousands of complaints to be raised in relation to accessing premises, in practice only a relatively few are brought to the attention of HREOC. This may be that they are generally seen as social issues and there are relatively few socially active people who are resources or able to commit the time to bringing complaints of this nature. In addition matters that do get heard generally settle upon the basis of a confidential conciliated outcome that will rectify the individual case. The respondent will however not commit to rectifying his or her other premises as a result of the particular complaint. For example, in the case against a major bank regarding access through automatic doors had no systemic effect on other banks, or even on other branches of the same bank.

This paper has been prepared by Larry Laikind a visually impaired solicitor who works part time at the Welfare Rights Centre. We appreciate the opportunity to offer comment. Should you require clarification on any of our recommendations please contact Larry directly on 07 34212510.

Introduction

The Welfare Rights Centre is a specialist Community Legal Centre funded under the community legal centres program that is resourced by both the Commonwealth and State Attorney Generals and managed through Legal Aid Queensland. We specialise in two areas of law; disability discrimination and social security.

The Disability Discrimination Legal Advocacy Service (DDLAS) is part of the Welfare Rights Centre. It commenced operation on 14 February 1994. It provides legal advice and some representation to clients with all forms of disabilities with respect to State and Commonwealth Disability Discrimination legislation. There is also a limited scope for Community Legal Education, Law Reform and policy development in this area.

The Brisbane DDLAS has been involved in over 100 Access to Premises complaints over the past 15 years. It has been involved in major precedent cases that have changed the law in this area and have become the impetus or driving force for an Access to Premises Standard under the Disability Discrimination Act (Commonwealth 1992) (DDA).

Background to the Access to Premises Standards

The DDA was originally drafted to enable standards to be promulgated in certain areas enumerated in section 31 of the DDA. These areas were employment, education, accommodation, the provision of public transport and the administration of commonwealth laws and program. There was originally no capacity for an access to premises standard to be formulated by the Minister. A contravention of a standard becomes unlawful according to section 33 DDA.

Acting in compliance with a standard becomes a complete defence to a complaint of discrimination in that area as section 34 of the DDA removes the areas of discrimination that apply in relation to the standard. It therefore becomes a complete defence to point to compliance with a standard, where one has been formulated in a particular area.

The 1999 amendments to the DDA provided for not only the ability of DDA complaint to be heard by a court (Federal Court and the newly created Federal Magistrates Court) but also for the Minister to formulate an access to premises standard.

The Case of Cocks v. The State of Queensland [1994] QADT 3 (2 September 1994) is a landmark case in the area of access to premises. The case was run by the Welfare Rights Centre. It was the second decision of the Queensland Anti Discrimination Tribunal. The case involved front door access to the Brisbane Convention and Exhibition Centre (then under construction). The nearest bank of lifts was approximately 45 feet around the corner of the structure. The State of Queensland had complied with all aspects of the Building Code of Australia (BCA) as it was at that time. The BCA was silent regarding equitable access or front door access. The case was successful in the Queensland Anti Discrimination Tribunal (QADT).

The Cocks decision in gave force to anti discrimination legislation in Australia. It became immediately apparent that compliance was necessary with both the BCA and Anti discrimination legislation such as the DDA. Before the Cocks v. State of Queensland decision there was only one case the previous year in New South Wales which was unsuccessful. That case was Woods v. Wollongong City Council and Ors, NSW Equal Opportunity Tribunal (17 March 1993) EOC 92-486. That case involved access to a newly constructed shopping mall. A ramp was sought by a person with a physical disability. It was held that the design in question was not unreasonable.

Need to Make a Difference

Following Cocks v. State of Queensland the bar had been set quite high as to what would be required to provide access for people with disabilities. The two major defences applicable in this area, unjustifiable hardship or reasonableness, were shown not to be automatic defences for a building owner or developer. It became a weighing up of many factors to establish a cost benefit defence of unjustifiable hardship or unreasonableness.

It has been the experience of this service that nearly all of the access to premises complaints have settled in conciliation with the access sought being obtained. This may be a lift in a shopping centre or a ramp to a building with a small height differential, tactile ground surface indicators, accessible toilets, automatic doors or a variety of other accommodations. Generally, an access to premises complaint is about improving the access for the community and not about money.

Developers, building certifiers, local authorities, architects, building owners and people with disabilities seek certainty as to what is required to provide access to people with disabilities.

In 1999, work began on the development of an access to premises standard. A draft standard had been created in 2003/2004 after a great deal of consultation. This draft standard remained dormant for the next four years. With the change of Federal government the new Labour government has forwarded a draft access to premises standard which it anticipates may be accepted by parliament sometime in 2009.

Recommendation 1
That the Access to Premises standards be presented to both Houses of Parliament in an expeditious manner.

The proposed access to premises standards do not add additional rights to the requirements that already exist under the DDA and the various state anti discrimination Acts. In fact they may represent a compromise or lessening of existing rights in a number of areas. One example is in relation to two and three story buildings of less than 200 sq m floor space on each floor. No such exemption presently exists. We have several instances of access being provided following conciliation in these types of cases. Class 2 buildings (units) are to be exempted from the draft standard. The case of C v. A [2005] QADT 14 (8 August 2005) found that, pursuant to state Anti Discrimination legislation, home units can fall within an access to premises complaint. This case will be described at a later time. It is however important to minimise compromises in this area, as each compromise results in a reduction of

important access rights for people with various disabilities.

Complaints Driven Process

An Access to Premises standard is important as there are only a few access complaints, relatively speaking, that are brought to the attention of the Australian Human Right Commission (AHRC) or State Anti Discrimination Commissions. There are about 100 such complaints brought to the AHRC each year. This is a complaints driven jurisdiction and there must be a complaint to initiate the process of investigation and resolution. There could be many thousands of successful access to premises complaints brought each year, but access to necessary resources and support is limited. People often leave this to others or do not wish to get involved or do not bring a complaint for any number of reasons in the area of access to premises.

A second deficiency of the complaint process as it stands is that complaints are often settled on a narrow individual basis and not on a proactive basis that will have effect for many buildings and structures. One example from our experience is where a person who used a wheelchair for mobility sough automatic doors to enter a branch of a major Australian bank. The matter settled on that branch providing the automatic doors. The bank made no commitment in conciliation to examine other branches around Australia.

The settlement that is reached is usually concluded by the drafting of a confidential conciliated agreement. There is no precedent value in such an agreement. It has operation only on the individual basis as between those specific parties.

Respondents, since the inception of the DDA, have frequently been willing to disregard its impact under the knowledge that very few discrimination complaints are brought in this area. They do not have any problems with this legislation unless and until a discrimination complaint is lodged. So even though Cocks v. the State of Queensland set the compliance bar high, it is not often tested. It appears developers do not consider the implication of the DDA until a complaint is lodged against them.

Recommendation 2

That matters not addressed by the standard be allowed to continue as a potential complaint.

Standards and the Building Code of Australia

The BCA only relates to new structures and to modifications of existing structures. It has no application to existing structures. The access to premises standards have been drafted to fit into the general rubric of the BCA. Hence, they will only have application to new buildings

and to modifications of existing buildings. It is recommended that a possible amendment be inserted to section 34 of the DDA to enable the DDA to be used for a potential challenge to an existing building. There might be a building many years old that could be improved by a minor modification.

The access to premises standards will become part of the BCA. It will necessitate compliance for new buildings and major modifications of existing building. There will be a harmonisation of the DDA with the BCA. Developers and others who rely upon the building certification will have certainty that if they have complied with the BCA then they have also met their DDA requirements at the same time.

There have been thousands of buildings completed and certified during the past nine years when work was first commenced on an Access to Premises standard. Many of these structures would have fallen short of DDA requirements at the certification stage but have passed under the radar of a DDA (or state based complaint).

It was formerly thought that class 2 buildings were essentially private residences. As such, disability access would not be required as section 23 of the DDA does not cover premises not open to the public or a section of the public such as a private dwelling. This may no longer be the case for a number of reasons:
First, unit buildings in areas such as the Gold Coast are predominately short term rental accommodation or even hotel letting accommodation. Rental accommodation is covered by section 25 of the DDA.

Second, the case of C v. A [2005] QADT 14 (8 August 2005), under the Queensland Anti Discrimination Act (ADA) has found that a body corporate is liable under the provision of services (access to premises) as well as accommodation sections of the Queensland ADA in an owner occupier situation of a class 2 building. In that case "C" was a woman who owned a unit in an exclusive complex on the Southbank of Brisbane. "C" used a wheelchair and had multiple disabilities. "C" sought automatic doors in 5 locations to enter the complex, enter the outdoor swimming pool and barbeque area and to enter and leave her particular tower of the complex. Remote controlled automatic doors were ordered. Access to passageways, halls, common areas of rooms, swimming pool and other facilities was considered an access to premises issues in the form of a service provided by the body corporate of the building to the individual owner occupiers.

There has been a proliferation of large unit building complexes in Queensland since 1979 at the time of the first Building Units and Group Titles Act. It is no longer the case that a unit complex was a strip of three or four home units with little or no common area. There are now buildings with a hundred or more units and many facilities in their common areas. These

common areas require access for owners occupiers and guest with disabilities to access and use the facility.

The 2004 draft of the Access to Premises Standards included class 2 buildings. These were removed sometime during the past four years. We strongly advocate for their inclusion as very many persons with physical and other disabilities reside in class 2 buildings.

Recommendation 3
The class 2 buildings not be exempted from the Access to Premises Standards but be required to provide access.

Smaller Buildings

The category of exemption of small buildings open to the public of not more that 200 sq metres was one situation where the owner or lessee could with some certainty rely upon the defence of unjustifiable hardship to defend a previous complaint under the DDA. In our experience this is not necessarily the case.

We submit that certain uses of small buildings of the upper floors should be accessible (probably by lift) to persons with disabilities. The situation where there are government services, accounting service, health services such as doctor, dentist, physiotherapist, and speech therapist occupational therapist should be accessible. We have had situations where a dentist is located on the first floor of a building or a medical centre is situated in a high set Queenslander building. They have previously been the subject of DDA or ADA complaints.

Where a medical centre or other health service provider has facilities on both the ground floor and first floor of a small building it may be sufficient for an accessible surgery to be situated on the ground floor. This would enable patient access to that surgery. It would not however enable an employee who uses a wheelchair to work on the first floor. This is a concession that we make as the purpose is to provide essential medical and other services to the public with disabilities and not to consider it from an employment perspective.

In regional, rural and remote areas there may be only one doctor or one dentist. It would be quite unacceptable to exclude members of the public from accessing the only doctor or dentist in the region.

By excluding small 2 and 3 story buildings from the access to premises standards one is also excluding other forms of access to persons who may be able to use stairs but require other types of accommodations to use the building. For example a person with degraded vision may require a luminescence strip to demarcate stairs. If this is provided he or she can use

the stairs. If 2 and 3 story buildings are totally exempted then this simple accommodation would not have to be considered.

Recommendation 4

That certain uses of small buildings of 2 and 3 floors less than 200 sq meters not be exempted from the access to premises standards.

Fair Employment Opportunities

Persons with various disabilities are often employed in a warehouse setting. WRC has represented persons with hearing, visual and physical disabilities in these situations. Persons with sensory as well as physical disabilities often gain employment in lower based pay situations that involve warehouses. It would impose a significant barrier to employment not to be able to work or gain access to upper levels depending upon the size of the organisation. A promotion may depend on being able to access other levels of a building.

A small organisation or employer/respondent could have recourse to an unjustifiable hardship argument that remains within the access to premises standard.

Recommendation 5

That multi story warehouses in D.43 of the draft standards provide accessibility to the upper levels of the warehouse.

Directional Devices

Directional devices are not mentioned in the standard. Things that allow one to know where one is and where one wants to go and how to get there are omitted from the standard. Tactile ground surface indicators (TGSI) are important as a navigation tool for a person with a vision disability. A number of complaints have been raised concerning the positioning of these devices or the lack of these devices. The Access to Premises standard may be viewed as an evolving document, but if more specifics are provided then more protection is available for people with a disability.

Recommendation 6

It is important to include TGSI in the Access to Premises standard to enable a complaint mechanism to proceed where a lack of such device restricts access.

Recreational Accommodation/Facilities

There appears to be no magic in the figure of a 40 meter perimeter for a swimming pool open to the public. Many hotels have swimming pools of over 17 meters long that would be exempted from the standard as it presently reads. We submit that this figure should be

looked at in relation to the majority of hotel and unit swimming pool arrangements before a decision is made.

Recommendation 7

Reconsider the exemption of no access for swimming pools with a perimeter of less than 40 metres.

Most of the bed and breakfast accommodation is one to four units. As this is the case, no accessible facilities would be required in this type of accommodation facility.

Figures may need to be produced to indicate the percentages of bed and breakfast accommodation around Australia that is four or less units and greater than four units to justify what appears to be an arbitrary demarcation.

Recommendation 8

That cabin recreation and bed and breakfast accommodation exempting 1-4 cabins be reconsidered.

Many people with disabilities travel and reside in caravan parks. They are amongst to more financially disadvantaged groups in our society. It is necessary to have accessible facilities onsite.

Recommendation 9

Caravan sites to have accessible facilities for toileting and showering.

The current standard only requires accessible showering facilities in hospitals. There is a need to extend this requirement to include other facilities used by persons with disabilities. These additional facilities should include gymnasiums, swimming pool complexes, health centres and other recreational facilities.

Recommendation 10

Have accessible showering facilities in more 9A buildings other than hospitals alone.

Nursing Homes

A requirement of only 10% accessible nursing home rooms in a building or complex dos not take into account either the age of residents or often the reason why the person is residing within the nursing home. Many residents of nursing homes do not reside there by choice but because they have had strokes have mobility issues and cannot reside in their own homes.

Recommendation 11

In the case of high care nursing home facilities 50% of the rooms should be fully accessible. In the case of low care facilities it is submitted that 30% of the rooms be accessible.

If a lesser figure than those recommended is sought by the Property Council of Australia or other body then specific figures of usage of wheelchairs and other devices should be provided to substantiate the argument.

People in nursing homes generally have a greater need for hearing augmentation receivers then the community as a whole. Data should be sought as to the percentage of residents in a nursing home who have degraded hearing to the extent that they would benefit from the augmentation device. It is likely to be far greater than the population in a class 2 building for example.

Recommendation 12

Increase the number of hearing loops or hearing augmentation receivers in nursing homes to 10%.

Parking

It is noted that only 1 -2% of parking bay are required to be designated disability parking. It is noted that figures have been released in NSW that 13% of registered vehicles have been allocated disability parking permits. It is submitted that the percentage of disability parking bays in all public facilities should mirror the percentage of disability parking permits issued by the relevant authority in the community.

Recommendation 13

Disability parking in hospitals shopping centres and other areas should be increased to mirror the percentage of disability permits issued in the community.

Accessible Facilities in General

It is a curious and absurd result that where there is an accessible facility such as a unisex disabled toilet in a building then there may be no necessity for an accessible line of travel to enter or leave the building. This leads to curious results that have been observed overseas where an accessible toilet in a pub could not be accessed by a person who used a wheelchair as there were stairs into the building. The wheelchair accessible toilet became of use only if the person had sustained his or her disability while he or she was already inside the Public House.

Recommendation 14

There be an accessible line of travel leading from accessible facilities within a building despite whether or not the lessee has made the application.

A person who requires an accessible toilet requires it to be a close distance away so as to alleviate fatigue in it's usage. Large sporting venues have a number of banks of toileting facilities. It would not be enough to have one or more unit-sex disability toilets in one bank of toilets and no more accessible toilets for a 50,000 seat stadium. The accessible toilet should be close enough so that it is easily accessed by the patron.

Recommendation 15

In large facilities such as stadium to have an accessible toilet in a bank of toilets no more than 50 metres away from the next accessible toilet.

Full standards have not yet been promulgated in relation to the spaces immediately adjacent to a lift-well. This may be termed the lift landing area. There needs to be adequate area to turn a wheelchair and to manoeuvre the chair. These standards are in addition to the basic lift design of 1400 sq mm.

Recommendation 16

Review ancillary facilities concerning lift-well dimensions and landing areas adjacent to lifts.

By adding words to the descriptive picture it becomes clearer to the user as to the meaning of the sign. A person may have a disability but come from another culture and be confused by the picture description alone.

Recommendation 17

That in Part D3.6 (e) the section be reviewed to consider adding English language words to describe the feature such as toilet or parking.

It is submitted that modern technology in the form of visual egress alarms are an additional safety mechanism for a person with a hearing disability who cannot hear the auditory fire alarm and should be installed in new and newly modified buildings.

Recommendation 18

Assist persons with a hearing disability to consider requiring the installation of visual egress fire alarms in new buildings and newly renovated buildings.