Submission No 229

Victorian Equal Opportunity & Human Rights Commission

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RECEIVED SM
17 APR 2009
BY: LACA

Standing Committee on Legal and Constitutional Affairs
Draft Disability (Access to Premises – Buildings) Standards
Response to questions taken on notice

1. Numbers of discrimination complaints made about access to premises

Complaints of disability discrimination constitute a substantial proportion of total discrimination complaints made to the Commission. In 2007/08 the Commission received 481 complaints of disability discrimination, out of a total of 2168 complaints lodged. Over the same period, the Commission received 1276 public enquiries about disability discrimination.

The Commission is not in a position to provide the Committee reliable numbers of complaints lodged that relate to access to premises over time. This is largely because the way the *Equal Opportunity Act 1995* (Vic) is currently structured, and how complaints are captured in our case management system. Like other state and territory Acts, this Act covers discrimination against people on the basis of a number of personal attributes, such as age, race and sex – and not solely disability. In addition, we have no sections in this Act that relate specifically to access to premises. This means that when a person with a disability makes a complaint about not being able to access a building or facility, the complaint could be lodged either in any area, such as goods and services, education, employment, or clubs, depending on the premises or facility that was inaccessible to them. Further, any complaints about certifiers, architects and surveyors might be lodged as complaints of authorising and assisting discrimination in any one of these areas.

The Commission has manually searched the summary of each disability complaint lodged in the year 2007/08 and can report that 12 complaints appear to relate to the accessibility of buildings.

It is clear that complaints about access to premises form a small proportion of the complaints received by the Commission alleging disability discrimination. In the Commission's view, the low numbers of complaints raising building accessibility issues tends to indicate that an individual complaint mechanism is insufficient to tackle systemic accessibility issues.

2. Which jurisdictions use local planning powers to promote accessible class 2 accommodation?

To the Commission's knowledge, NSW is the only jurisdiction that uses local planning powers in this way. In NSW, planning authorities including local councils may prepare Development Control Plans.[1] In the case of a council, such Development Control Plans may specify criteria (in addition to but not inconsistent with any criteria prescribed by the planning regulations) that the council is to take into consideration in determining an application for development approval. [2]

[1] *Environmental Planning and Assessment Act 1979* (NSW) s 74C (1).
[2] *Environmental Planning and Assessment Act 1979* (NSW) s 74C (1)(d).

Such Development Control Plans may include accessibility provisions relating to development approval for new buildings or those where substantial alterations, or change of use is proposed.

For example, the *City of Sydney Access Development Control Plan 2004*[3] applies to all development, including interfaces with the public domain, proposed on land where the City of Sydney or Central Sydney Planning Committee is the consent authority.

Under this DCP all Class 3,5,6,7,8 and 9 buildings and some Class 10 developments are required to comply with all of the provisions of the BCA and relevant Australian Standards regarding the provision of equitable access. Class 2 residential flat buildings containing 7 or more dwellings may also be required to provide adaptable dwellings and access to and within the public areas of the building under the DCP.

This DCP does not supersede any provisions of the Building Code of Australia or any referenced Australian Standard.

3. Is it possible that the Victorian Supreme Court could make a declaration of inconsistency on the Victorian regulations that would import the Disability (Access to Premises- Buildings) Standards into Victorian Law? What would the implications of this be?

The Disability (Access to Premises – Buildings) Standards (**Standards**) would be made under the *Disability Discrimination Act 1992* (Cth). The Standards are also to be incorporated into Victorian law by virtue of the Building Code of Australia being adopted by the *Victorian Building Regulations 2006* (**Regulations**). This incorporation into Victorian law means that the *Charter of Human Rights and Responsibilities Act 2006* (Vic) (**Charter**) will apply to the Standards in Victoria. In essence, the implications of the application of the Charter are:

1. That the Regulations will be reviewed by the Scrutiny of Acts and Regulations Committee, Regulation Review Subcommittee; and
2. Once enacted, the Regulations will be subject to the interpretive provision in section 32 of the Charter, such that provisions must be interpreted, so far as possible consistently with their purpose, in a manner compatible with human rights.

In respect of the Charter's application to the Regulations, in the first instance, there are a range of checks and balances built into the Victorian regulation-making power and the Standards themselves. In accordance with the Charter, the Victorian Minister responsible for the Regulations would be required to ensure a human rights certificate is prepared for the amendment to the Regulations, setting out any limitations on human rights and whether they are reasonable, necessary, justified and proportionate in the circumstances. The Victorian Parliament Scrutiny of Acts and Regulations Committee, Regulation Review Subcommittee would review the

[3] www.CityofSydney.nsw.gov.au/Development/documents/PlansandPolicies/AccessJUne2004.pdf. See also *Inclusion (Disability) Action Plan: 2007-2011* www.cityofsydney.nsw.gov.au/Community/documents/AgedandDisabled/Inclusion DisabilityAccessPlan2007-2011.pdf at 7 April 2009.

Regulations and is empowered to recommend that all or part of a regulation be disallowed on the ground that a proposed regulation is incompatible with the human rights set out in the Charter.[4] The Standards themselves would be subject to five year reviews, thus providing a mechanism to ensure that the Standards continue to reflect technical advances and community expectations over time.

To date, the Supreme Court of Victoria has not made, nor advised that it was considering making, a declarations of inconsistent interpretation pursuant to section 36 of the Charter. In the Commission's view, it is impossible to predict whether the Supreme Court of Victoria would make a declaration of inconsistent interpretation in relation to the Regulations which incorporate the Standards. However, the Commission notes two factors that would suggest the likelihood of an inconsistency between the Regulations and the Charter is extremely low. Firstly, the draft Standards promote the equality rights and freedom of movement rights of those with disabilities and are progressive in terms of human rights protection. Secondly, it is clear that the Standards, once finalised, will have been formulated over a number of years (so as to clarify existing obligations under the Disability Discrimination Act), in consultation with people with disabilities, industry and government. In circumstances where a policy has been adopted following a comprehensive process that integrates human rights considerations, international human rights jurisprudence reveals that courts have needed much persuasion in order to determine that a particular balance struck by a policy is inconsistent with the relevant human rights instrument. In these circumstances, courts tend to apply a margin of appreciation when considering subject matter that has been established in a manner that includes an exhaustive and thorough process incorporating human rights.

In the event that there is a matter covered by the Regulations which, in its detail, was viewed by the Court to unjustifiably limit the rights of people with a disability and hence be inconsistent with the rights enshrined in the Charter, there are several possible implications. In a general sense, any regulation could itself be invalid if it goes beyond the powers conferred by its authorising Act. Without a clear acknowledgement from the Victorian Parliament that the Act or Regulations have the effect of limiting rights in a particular way, it may be that the relevant clauses of the Regulations could be ultra vires.[5]

The Commission understands that there may be some issues arising in relation to the Standards, the Regulations and the application of the Charter, in a constitutional context. The Commission is not in a position to address the constitutional issues, however we note them for the Committee's information only. In relation to the regulations incorporating Commonwealth enactments, such as the Standards, there may be an issue stemming from section 109 of the Constitution and a potential inconsistency between state and federal law. This might impact on the way in which the Charter and Regulation interact with each other. Secondly, the Commission understands that some legal commentators have identified a potential issue in relation to whether an avenue of appeal against a declaration of inconsistency made by the Supreme Court of Victoria would lie to the High Court under section 73 of the Constitution. The Commission notes that, to our knowledge, this issue is yet to be tested in relation to the Charter or the *Human Rights Act 2004* (ACT).

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[4] See section 30 of the Charter and section 21 of the *Subordinate Legislation Act 1994 (Vic).*

[5] Paragraph 32 (3)(b) of the Charter provides that the interpretive duty in sub sections 32(1) and (2) 'does not affect the validity of a subordinate instrument or provision of a subordinate instrument that is incompatible with a human right *and is empowered to be so by the Act under which it is made*' [emphasis added].

4. Examples of access issues being resolved early with developers/building owners

The Commission is unable to confirm whether has assisted resolution of access issues in this way without a manual review of all files being undertaken. The Commission's view, however, is that the likelihood of such complaints being made is low.

Discrimination complaints tend to be reactive, in that they usually occur after a building has been completed and a person has experience difficulties with access. There is limited involvement of persons with a range of disabilities in planning matters, so it is unlikely that disability access issues would be raised with the Commission at an early stage. It is possible that people with disabilities pursue amendments to building proposals through the planning process, rather than as a discrimination issue. There also is unlikely to be sufficient incentives for individuals to complain about accessibility issues where they may face other discrimination issues, or do not require ongoing access to a building.