INQUIRY INTO THE DRAFT DISABILITY (ACCESS TO PREMISES - BUILDINGS) STANDARDS – SUBMISSION BY ARMIDALE DUMARESQ COUNCIL, FEBRUARY 2009

Generally

The introduction of Access to Premises Standards under the Commonwealth Disability Discrimination Act 1992 (DDA) has been foreshadowed since the Act first came into effect in 1993. Accordingly, the current initiative is now long overdue and the publication of the Draft Standards and related materials on the Attorney General's web site is therefore most welcome.

This initiative and the objects in part 1.3 of Draft Standards are strongly supported, not only in the context of Australia's ageing population and increasing levels of disability in our communities, but also in terms of a broader human rights agenda, which Australia supports through its international treaty obligations. Moreover, providing adequate access for people with disabilities enhances access by all Australians, including many people with temporary access restrictions.

This submission is principally presented on behalf of Council in its role as the main 'building certifier' (as defined in part 2.2 of the Draft Standard) for Armidale Dumaresq. Our Council approved over $140Million worth of new building work in the three year period ending 30 June 2008.

Council is also a key service provider for the local population of over 24,000 people and many more thousands of visitors annually. As part of this work, Council convenes a local Access Working Group which includes people with various forms of disability, and employs a local access advisor who has been a long-term wheelchair user. Among other things, these people assist Council's development control staff in their day to day work concerning access to premises.

Council also owns and manages a variety of buildings and places for community use, including places of public entertainment, public transport buildings and other community facilities throughout our local government area. In this regard, the specific provisions of the Draft Standard relating to existing public transport buildings are noted and have been brought to the attention of the appropriate staff.

Council's commitments to ensuring long term, equitable participation by people with disabilities in the life of our community have been set out in a series of Disability Action Plans which have been registered with the Human Rights and Equal Opportunity Commission since the commencement of the DDA. Central to these commitments is the creation of a more accessible public environment in functional and service areas for which Council is responsible.

The proposed introduction of the Draft Access to Premises Standards and associated materials by the Commonwealth will have significant implications for our work, so the opportunity to provide input at this stage is appreciated.

Council's role as a 'Building Certifier'

Council notes the clear reference to 'building certifiers' in part 2.2 of the Draft Standards as persons to whom the proposed Standards apply. Building certifiers are defined as those having responsibilities for building approval processes, including, for example, building surveyors and local councils.

This, it seems to us, is an important development on the existing provisions of the DDA in connection with access to buildings, where building owners/managers and complainants have been the central stakeholders. While Councils clearly have responsibilities under state and territory legislation and the Building Code of Australia (BCA) for the assessment and determination of applications for building projects, this role has always seemed less well acknowledged under the DDA [1].

In this context, the clear inclusion of local Councils and their relevant employees amongst those responsible for the implementation of the proposed Standards is welcomed. This should assist, together with the proposed alignment of the proposed Standards with the BCA (see below), in the full integration of DDA considerations with building approval processes across the nation. In turn, the potential for post-construction complaints under the Act should be reduced.

Alignment of proposed Standards with the Building Code of Australia

The intended legislative framework, where compliance with the relevant parts of the BCA will automatically ensure compliance with the proposed Access to Premises Standards under the DDA and thus the Act itself, is strongly supported. As envisaged under part 1.3(b) of the Draft Standards, this should significantly improve certainty for stakeholders in this field, including both building certifiers such as councils, but also building developers and managers - and of course the community.

We are particularly supportive of the proposed move to a regulatory environment where intending developers should expect from the outset that compliance with the Access Standards should be the norm, unless specific exceptions apply (see below).

Existing buildings and concessions/exceptions

Council notes the proposed provisions in the Draft Standards for existing buildings, including a number of proposed exceptions and concessions in Part 4. The specific exceptions in relation to lessees, toilet and lift installations are noted and appear reasonable, as are the provisions in part D3.4 of Schedule 1, the Draft Access Code.

However, a continuing concern for Councils, particularly in relation to projects affecting existing buildings, is the manner in which the unjustifiable hardship provisions, pursuant to s.11 of the DDA, are to be implemented.

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[1] Although we are aware of a case where a NSW Council was subject of legal action in 1998 as a consequence of a complainant's concerns about inadequate access to a cinema, see Cooper v Coffs Harbour City Council (HREOC 97/232, 18/5/98).

Existing buildings and concessions/exceptions (cont)

We note that part 4.1 of the Draft Standards provides considerably more detailed criteria than the Act for use in the determination of unjustifiable hardship in relation to building access.

While these are no doubt intended to be helpful for stakeholders, we note in the Guidelines that have been issued with the Draft Standards that (at part 5.1):

> *"(3) There is . . . no mechanism in the DDA or the Premises Standards for anyone to give prior approval for non-compliance with any part of the Premises Standards on the grounds of unjustifiable hardship. Decisions about unjustifiable hardship can only be made by a Court following an actual complaint.*
>
> *(4) If a person responsible for a building chooses to not fully apply the Premises Standards they would make themselves vulnerable to complaints under the DDA.*
>
> *(5) When considering the use of the unjustifiable hardship provisions, no hard and fast rules can be used, as the outcome will depend upon individual circumstances. What is unjustifiable in one situation may not be so in another situation. Reference to recent case law may be a useful source of guidance when considering the use of the unjustifiable hardship provisions."*

In our experience since the DDA was first enacted, consideration of the unjustifiable hardship provisions that currently exist has been fraught with problems for local government. This was the key factor in the *Cooper* cinema case in NSW in 1997-98[2] and has remained a difficult issue since, especially in light of the matters quoted above.

Councils do not normally have ready access to the relevant financial details from a proponent, nor, necessarily, the capacity to interpret them. When questions have been raised pursuant to s.11 of the Act, there is commonly a reluctance to provide them to a Council, for reasons including privacy and the fact that the Council is not the ultimate arbiter of the matter in any case. The judgement in the *Cooper* case appears to have turned on the budget for the regular maintenance of the building in question, however it is notable that the criteria in the Draft Standard include consideration, at 4.1 (3)(d), of proponents' general capacity to pay, which is not necessarily project or premises dependent.

How will Councils now deal with such issues given that, as noted above, they are to become key participants in the implementation and enforcement of the proposed Standards, pursuant to 2.2 of the Draft?

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2 See Cooper v Holiday Coast Cinema Centres Pty Ltd (HREOC, 96/157, 29/8/97 and Cooper v Coffs Harbour City Council (HREOC 97/232, 18/5/98).

Existing buildings and concessions/exceptions (cont)

In NSW, legislation[3] provides that where a development application is received for development involving the rebuilding, alteration, enlargement or extension of an existing building, where:

> *"the proposed building work, together with any other building work completed or authorised within the previous 3 years, represents more than half the total volume of the building, as it was before any such work was commenced, measured over its roof and external walls",*

then a Council can require the building to be brought into total or partial conformity with the BCA. We would suggest that this form of threshold would provide a much simpler and clearer basis for implementation of the DDA in relation to existing buildings.

Nevertheless, we appreciate that intention is to provide full access wherever possible and that exceptions for unjustifiable hardship under s.11 of the DDA are likely to remain and will need to be managed into the future. In this regard we also note the "Model Process" protocol published on your website in connection with this initiative, for the administration of arrangements for Building Access under the DDA across the different state and territory jurisdictions. In that document, reference is made to the establishment of expert "Access Panels", which could provide advice, guidance and recommendations, where alternative solutions under the BCA/Premises Standard are sought or claims for unjustifiable hardship are proposed.

The option of interim "Building Upgrade Plans" to be developed with Access Panel input is also canvassed in this document, to provide for staged building alterations progressing towards improved access/compliance over time. We think this is also a sensible option for use in certain cases.

At present, no Access Panel or equivalent body exists in NSW, although we understand that comparable agencies do operate in other jurisdictions. The introduction of this sort of expert forum would be most helpful, provided it can be adequately resourced. While we understand that the ultimate arrangements for any such body in this state may be the responsibility of the NSW Government, we suggest that if it were to be established, it would have to be prepared for a considerable workload, and to be able to undertake site visits around the State. We believe that the costs of putting matters forward for Panel consideration (which should be mandatory if unjustifiable hardship claims are to be made) should be principally borne by the proponents. Councils will no doubt incur their own costs in providing information and submissions to Panels as part of this process.

While a Panel cannot replace the tribunal/court process allowed for under the Act, we also believe that parties should also be able to rely in good faith upon the findings of such a Panel. In particular, Councils as local development control agencies should not incur any liability in implementing a Panel's recommendation if a Court subsequently takes a different view in response to a complaint.

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[3] NSW Environmental Planning and Assessment Regulation 2000, clause 94.

Going beyond the Standards?

Notwithstanding the introduction of the Draft Standards, we would hope it will remain possible for individual Councils to apply local policy provisions that go beyond the Draft Standards, if they and their communities consider that appropriate.

This Council has adopted an award-winning Development Control Plan (DCP) for Access and Mobility which requires, for example, a proportion of units in multi-dwelling housing projects to meet the "adaptable housing" standards of AS4299.

The initial draft Premises Standards released for public comment in 2004 included a provision that would have required access to the common areas of Class 2 buildings (apartments and blocks of flats). While there may be continuing differences of opinion about what design features are appropriate inside flats and apartments, the Government should consider this issue in the context of Australia's ageing population and also remove further uncertainty for developers and any Body Corporate addressing their potential liabilities.

In addition, our DCP requires additional percentages of parking provision based on the recommended level of provision included in Appendix C of AS 2890.1-1993 (pending the planned publication of a new AS 2890.6 – Off Street Parking for People with Disabilities). We are pleased to see that this now appears to have been embraced in the Draft Access Code. Our DCP also makes reference to the augmented interior design standards in AS 1428.2 and 1428.3 for certain buildings, including in the latter case those to be used by children and adolescents.

As part of the current consultation process, the Government may wish to consider including more provisions in the Access to Premises Standards for such specialist buildings, as well as for access to and within smaller tourist accommodation premises than is currently proposed. In regional Australia, for example, many country towns have smaller bed and breakfast style establishments, and if only businesses with four or more bedrooms are required to provide accessible accommodation, we are concerned that many such premises may effectively preclude people with disabilities from their clientele.

Other issues/concerns

We have the following further issues and concerns at this time:

- The Draft Standards and related Guidelines do not appear to cover changes of use unless building work or a change of building classification requiring construction approval is involved. We can point to a number of instances where a significant change of use has occurred from a *town planning* perspective (eg change of use of an office to a dental surgery – both BCA class 5 premises) where only internal fit out and no change of building classification has occurred, but where there has been a significant change in public access needs.

- Access to public (outdoor) areas remains outside the scope of the Draft Standards and should be considered further. Possibly this could be a future amendment to these Standards, or a new Standard under the DDA, as access in the public realm (eg parks, pedestrian malls etc) is just as important as to and within buildings.

- Maintenance of and continued access to required facilities is vital to the continued enjoyment of facilities which are incorporated in the design and approval process. Moreover, it is desirable that such facilities are, wherever possible, capable of independent operation and not dependent on intervention of building managers for their use.

Industry training and further information

The intention to introduce the new Premises Standards in conjunction with new editions of both the BCA and the related Australian Standards is noted. These will be significant initiatives across the country and the provision of appropriate information and education to users of the Standards (including the design professions) and to key interest groups will be vital.

In the implementation of these national reforms, we would suggest that an effective partnership with local government throughout Australia will be essential. However, we have noticed that relevant training relating to building regulation changes through the ABCB is usually restricted to metropolitan areas only. We hope that this will not be the case here, given the significance and scope of the material now being presented.

If at all possible, we would also appreciate some advance notice of the introduction of any changes passed through the Parliament, as, like other local Councils, we will need to make changes to our local documentation such as our development control plan and related web page information, to reflect the new legislative and Standards framework which is enacted.

Finally, if you require any further information or clarification on the points raised in this submission, please feel free to contact our Director Planning and Environmental Services, Stephen Gow FPIA, on telephone (02) 6770 3841 or by email at sgow@armidale.nsw.gov.au

We look forward to hearing of the outcome of the Committee's deliberations and hope that this submission is of assistance in that process. Once again, we thank you for the opportunity to participate in this process.