



COMMONWEALTH OF AUSTRALIA

Official Committee Hansard

**HOUSE OF
REPRESENTATIVES**

STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL
AFFAIRS

Reference: Disability (Access to Premises - Buildings) Standards [draft]

THURSDAY, 26 FEBRUARY 2009

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HOUSE OF REPRESENTATIVES
STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS

Thursday, 26 February 2009

Members: Mr Dreyfus (*Chair*), Mr Slipper (*Deputy Chairman*), Mr Andrews, Mr Butler, Mr Georgiou, Mr Melham, Mrs Mirabella, Ms Neal, Mr Neumann and Mr Perrett

Members in attendance: Mr Dreyfus, Mr Melham, Ms Neal, Mr Neumann and Mr Perrett

Terms of reference for the inquiry:

To inquire into and report on:

The draft Disability (Access to Premises - Buildings) Standards covering:

- the appropriateness and effectiveness of the proposed Premises Standards in achieving their objects;
- the interaction between the Premises Standards and existing regulatory schemes operating in state and territory jurisdictions, including the appropriateness and effectiveness of the proposed Model Process to Administer Building Access for People with Disability;
- whether the Premises Standards will have an unjustifiable impact on any particular sector or group within a sector; and
- any related matters.

WITNESSES

ANTONE, Ms Rachel, Senior Legal Officer, Disability Discrimination Section, Attorney-General's Department 1

ARNAUDO, Mr Peter, Assistant Secretary, Human Rights Branch, Attorney-General's Department 1

FOX, Mr Stephen William, Principal Legal Officer, Disability Discrimination Section, Attorney-General's Department 1

Committee met at 9.32 am

ANTONE, Ms Rachel, Senior Legal Officer, Disability Discrimination Section, Attorney-General's Department

ARNAUDO, Mr Peter, Assistant Secretary, Human Rights Branch, Attorney-General's Department

FOX, Mr Stephen William, Principal Legal Officer, Disability Discrimination Section, Attorney-General's Department

CHAIR (Mr Dreyfus)—I declare open this public hearing of the House of Representatives Standing Committee on Legal and Constitutional Affairs for its inquiry into the draft Disability (Access to Premises—Buildings) Standards. This is the first public hearing that the committee has undertaken for this inquiry. The hearing is open to the public and a transcript of what is said will be placed on the committee's website. I welcome everyone here today. I am sure our discussions will be very informative.

To our witnesses here today, although the committee does not require you to speak under oath, you should understand that these hearings are formal proceedings of the Commonwealth parliament. Giving false or misleading evidence is a serious matter and may be regarded as a contempt of parliament. Do any of you—or all three of you—wish to make a brief opening statement before we proceed to some questions from the committee?

Mr Arnaudo—I can be very brief, because basically—

CHAIR—Take your time, Mr Arnaudo!

Mr Arnaudo—Thank you. We are very happy to be able to come and appear today. As a department, we are keenly watching the progress of these standards. The standards are taking a long time to develop, and a lot of consultation has been undertaken in various forms in recent years. They fit in as part of the broader disability discrimination framework that the Australian government is pursuing.

We are also aware that you will probably have a range of submissions and views put to the committee during the whole process of the inquiry. If we can assist in any way at further stages during the inquiry we would be happy to reappear again. Our colleagues in the Department of Innovation, Industry, Science and Research are responsible for the building aspects of it as well and I know that they would be very keen to be involved and to assist the committee in dealing with the issues that come forward. I am really in the hands of the committee but I am happy to provide you with a broad overview of the standards, how they fit into the disability discrimination framework and what their issues are likely to be. Also, if you have particular questions, I am happy to deal with them. We have all morning, basically.

CHAIR—The broad overview might assist. As I understand it the Attorney-General's Department administers the Commonwealth scheme of antidiscrimination legislation. That is the Disability Discrimination Act. That is the primary connection that the Attorney-General's Department has with the standards that we have been asked to look at.

Mr Arnaudo—I would be happy to do that. It probably takes about five to 10 minutes and it would help with some of the concepts that also appear in other parts of the standard that we are looking at and that your committee is examining, in particular. It will probably give you the context in which the standards are set.

CHAIR—I think that would be helpful.

Mr NEUMANN—In relation to the human rights aspect, can you give your views and how you feel about the standards as well?

Mr Arnaudo—Okay.

CHAIR—We will go to the overview first and if there are matters arising from the overview, we will move on to some questions from the committee.

Mr Arnaudo—Definitely. The aim of the standards is basically to try to eliminate as far as possible, in the same way as the Disability Discrimination Act, discrimination against people with a disability in a range of areas of public life; for example, access to goods and services, employment and education. The Disability Discrimination Act also has requirements in terms of accessing public premises. The way the Disability Discrimination Act and the standards that are made underneath it operate is that they try to seek to balance the concerns about costs of modifications to building with the rights of people with a disability to gain access. That is often done through this concept of unjustifiable hardship under the standards and also under the Disability Discrimination Act.

The concept of premises standards in the Disability Discrimination Act is quite general. It applies across the board and is stated very broadly. Often people have to go to the Human Rights Commission or eventually to the Federal Court or the Federal Magistrates Court to get some certainty as to whether they have discriminated against someone or whether they are able to claim the unjustifiable hardship exemption. Standards are instruments that are made under the Disability Discrimination Act and they try to provide a bit more clarity, certainty and specificity about what a building owner or manager needs to do in order to avoid disability discrimination. They fill the gap that the Disability Discrimination Act creates. The Disability Discrimination Act standard tries to provide a level of certainty, at the same time trying to harmonise the requirements under the building regulation system with the concept of the Disability Discrimination Act. So there is a bit more harmony between those two different systems. At the moment there is no harmony; they are separate schemes. Even though you might get a building that is compliant with the building regulations and the Building Code of Australia, there is no guarantee that that building would not be the subject of a successful discrimination law complaint by a person with a disability, for example. So, you are building a new building, you have gone through all the building checks, but you are still subject to the Disability Discrimination Act and the possibility that someone will make a disability discrimination complaint against you and be successful. It is very hard to know with any certainty where you have got to because the Disability Discrimination Act is quite general about what the obligations are.

It is probably also useful to think about how the Disability Discrimination Act operates in relation to access to premises. It is not that there are many buildings around Australia where

people say, 'Well, if you're in a wheelchair you are not allowed to come in.' It is not a form of direct discrimination where basically we say that people with wheelchairs or people with hearing impairments or vision impairments cannot come into this shop. But what can happen is the concept of indirect discrimination, which the Disability Discrimination Act treats as discrimination. Indirect discrimination, basically, is not saying that a person with that disability cannot go into a certain shop; it is saying that in order for them to go into that shop they have to go up a flight of stairs, or they have to be served at a counter that is two or three metres high rather than at a level where a person in a wheelchair might be able to transact their business. Indirect discrimination, for example, may be that I require you to use a toilet that a person with complete abilities might be able to use but a person in a wheelchair might not be able to use.

In those situations, courts say: 'You as a building owner are imposing a requirement on someone with a disability that they would find it difficult to comply with. Is that requirement reasonable, having regard to all the circumstances?' That is really all that the Disability Discrimination Act says. Again, that is one area of uncertainty, because what might be reasonable for me might not be reasonable for someone else. The standards are trying to provide a bit more certainty and clarity about what is required to be done in those sorts of situations. I think it is important to recall that discrimination is not just about saying, 'I don't say that people with wheelchairs are not allowed into my building,' but also about some of the other physical barriers and other things that appear on their face to be quite neutral but that in effect might be unreasonable and impose an unreasonable requirement on a person with disability who cannot comply with that requirement.

I should also note that there are proposed amendments to the Disability Discrimination Act that are currently before the parliament, and the House of Representatives considered that in the Disability Discrimination and Other Human Rights Legislation Amendment Bill 2008—I think that is the full title.

CHAIR—Which has now passed through the House.

Mr Arnaudo—Yes, that is right; it is now before the Senate. There are some amendments that are being made to the Disability Discrimination Act, particularly to clarify the concept of reasonable adjustments but also to amend the standard-making power. They are not substantial in that area; they are very much changing and updating some of the standard-making powers there, but I thought I would point that out to the committee as well.

As I said, the second aspect that we are trying to achieve here is to provide a greater harmony between the non-discrimination requirements of the Disability Discrimination Act and the Building Code of Australia, because there is that gap in compliance at the moment. The standards themselves are delegated legislation made under section 31 of the Disability Discrimination Act; they are subject to parliamentary disallowance as well. Generally, the approach taken is that a standard made under the Disability Discrimination Act cannot derogate from or remove rights that the Disability Discrimination Act itself puts forward. It is subsidiary legislation, subordinate legislation, and so cannot derogate from it. It has to operate within that field. There are standards already in place in relation to accessible public transport, and they have been underway for five years or so. They have been reviewed. That review is still under consideration. There are also standards in relation to education—

CHAIR—I will stop you there. Does that mean that we cannot ask you questions about how the accessible public transport standard has gone if it is under review?

Mr Arnaudo—I would be happy to take those questions by all means.

CHAIR—Great. We will come back to that. I have interrupted you.

Mr Arnaudo—There is a draft report that was released in the middle of last year as well, so there is some sort of indication there. The final report has not been provided to government. It should not be too far away. It is being conducted by an independent consultant outside the transport department and the Attorney General's department, but it is definitely relevant. How do they operate? Providing greater certainty of the transport standards is one way. Education is the other. Education does not get reviewed until 2010. We have these regular review cycles built into all the standards that we produce.

How the relationship between the DDA and a standard operates is that, basically, it is unlawful to contravene a standard. It is the same as if you are contravening a requirement under the Disability Discrimination Act. That effectively gives someone the right to go to the commission to lodge a complaint. The commission will attempt to conciliate that complaint. If that conciliation is not successful, they can terminate it and that gives that person the right to go to the Federal Court or the Federal Magistrates Court. The courts can then make a range of orders; they can order compensation or issue injunctions—a whole gamut of orders that are generally available to a court. Section 34 of the act also provides that if a person complies with a standard then the unlawful discrimination provisions of the Disability Discrimination Act do not apply to that action. So, in a sense, the DDA is actually creating a defence for someone, who can say, 'I have done exactly what the standards required me to do; therefore the unlawful discrimination aspects of the DDA do not apply to my actions and I cannot be taken to the commission or to the court.'

Ms NEAL—You said that the review can go to the Federal Court. How often has that actually happened?

Mr Arnaudo—I think it happens fairly frequently. There are two steps involved: the first is to go to the commission, and the commission as a first step tries to conciliate the complaint and get an agreement between the parties. But, clearly, in some circumstances complaints cannot be conciliated, either because, for example, the facts—

Ms NEAL—I understand that, but I am interested in how often people actually take that step, because it is obviously quite an onerous step.

Mr Arnaudo—It is quite onerous. When you look at the statistics that the commission puts out, access to premises is not high up in terms of disability discrimination complaints. Most complaints the commission deals with, and which often flow to the courts as well, relate to employment, education, and goods and services. Around 40 to 50 complaints a year with regard to access to premises is about the number that gets to the commission and then a certain number get through to the court because people cannot agree or the commission considers that they should not be conciliated any further. When you go into the court process itself, the Federal Magistrates Court is one body where it might be a bit easier and the costs of getting a matter

heard might be a bit cheaper. But some matters, particularly with premises where you might need to get expert evidence or other sorts of evidence in place, mean that the cost of action getting through the court process can be quite extensive. Of those 40 or 50 a year, I am not sure how many would get through to the courts. We could take that on notice and provide you with that information.

CHAIR—We would be assisted by that, thank you.

Mr PERRETT—Would you have the state access to building legislation data as well? Would they provide that to you as a matter of course?

Mr Arnaudo—We do not get that as a matter of course, but we could try to make some inquiries. I should also point out that there is a state scheme that operates there as well. We are talking very much here about the Commonwealth one and, of course, with section 109 of the Constitution, where there is some inconsistency between the two. We could take it over basically.

Mr NEUMANN—Are there legal aid funds in these types of actions?

Mr Arnaudo—Off the top of my head, there are legal services for disability that are dedicated to disability discrimination areas. I do not have the details of that in front of me, but we can take that on notice and provide you with the information.

Mr NEUMANN—That would be great.

Mr Fox—I am sure you will hear from other people who appeared before you that part of the reason why this direction was taken by the government was very much that people felt that bringing legal actions was difficult, that there was a limited impact in terms of the effect of those legal actions—because they were specific to the buildings and to the individuals who were affected—and that the overall assessment was that, despite the requirement being in the act, there was not a great deal of movement in terms of the stock of buildings that were accessible. So was there a good speed in terms of the take-up of providing access for people with disabilities? The feeling was that the speed was very slow and that some more consistent and effective mechanism was needed in order to try to improve that general stock of buildings which would be available to people with disabilities to have access on a reasonable basis, including the dignity of their access. I think that an element in the whole development of this set of provisions is that it is not only about allowing people to get into a building but to be able to use it and to use it with dignity in the same way as those who are not afflicted by a disability would be able to use it.

CHAIR—Mr Arnaudo, how are you going with your overview?

Mr Arnaudo—I have only one more page to go. We mentioned the Building Code before.

Mr PERRETT—I just want to add something. In terms of the provision of data about access to the buildings, could you have a look at the education stuff? Often the education case is about access to the building.

Mr Arnaudo—That is one of the issues—that you do not have to have one ground of discrimination only in terms of premises; it often relates to goods and services and those other sorts of things too. There are overlaps. We can look at those too. As I said before, the standard as to the way that premises operate in terms of buildings is quite short, I am glad to say. The bit that is quite large is the access code, which is effectively harmonising the same text that would be in the Building Code of Australia.

The Building Code of Australia is produced and maintained by the Australian Building Codes Board on behalf of the Australian government and state and territory governments. The way that code operates is that it has been given the status of building regulations in all the states and territories. They refer back to it and say, ‘You have to comply with the Building Code of Australia in terms of building this building.’ It contains some very technical provisions in terms of design and construction of buildings and other structures, covering such things as structure, fire resistance, how you access and exit the building, energy efficiency, health and amenity. That is why we have put schedule 1, the access code, in the draft standards. That is effectively what will be in the Building Code of Australia. By making it a schedule, we incorporate it into the disability discrimination standard to ensure consistency.

In terms of the access code and the way it operates, it uses the terminology and the classifications of the Building Code, so there are a whole range of classes of buildings that relate to what the buildings are used for. To try and produce harmonisation, we refer to particular buildings using the references of the Building Code. So we ourselves have not created class 1B buildings or class 3 buildings as ways of describing a hotel or bed and breakfast, for example; it is just the way that the Building Code works. Then the access code sets out the different access requirements.

The important thing to point out about the way the access code is that it generally operates in the same way as the Building Code. There are two ways in which can meet the requirements under the Building Code; therefore, there are two ways in which can meet the requirements under the disability standard. You can either meet them by meeting what is called a ‘deemed to satisfy’ provision. They are quite specific and say, ‘You will do it this way,’ and, if you have done it that way, you have met that. But there are also performance requirements within the access code that are a bit more general. What you can do is demonstrate you meet a performance requirement by producing something that is equivalent to the ‘deemed to satisfy’ provision. That is important in the building context because it allows innovation and can take account of changes in technologies and construction methods, while at the same time still ensuring that the outcome, the performance requirement, is achieved. It provides a certainty to a certain extent by saying: if you want to be absolutely sure that this is okay then meet the ‘deemed to satisfy’ requirement and you will be compliant that way.

Chair, I can now take you through what types of buildings are applied or not applied, but I am happy to also take questions.

CHAIR—I think we will move to questions because we are all a bit troubled about the prospect of being interrupted this morning. Mr Neumann, you have been waiting.

Mr NEUMANN—Yes, move on to that question, Mr Arnaudo. I would be really interested in the types of buildings you were talking about.

Mr Arnaudo—The standards apply to categories of buildings, as I said. They apply to many of the classes of the buildings that are covered by the Building Code of Australia. You can see in part A4 of the access code a range of building classifications. When reading the descriptions, though, you often wonder: what building are we talking about? There are broad types of buildings as well, and one building can have more than one class.

Disability standards will not apply to all buildings covered. For example, they will not apply to a class 1A building, which is a single dwelling house like a detached house or a townhouse—very much a residential situation. The reason why they will not be applying there is that the power in which the standards are being developed relates to publicly accessible premises, and generally private residences are not publicly accessible. In the same way, class 2 buildings, residential apartment buildings, are not covered by the standard at all.

What that means in practice is that, because they are not covered, if someone feels that there is, say, a class 2 residential building—a residential serviced apartment, for example—that is accessible to the member of the public, they could, as they are now able to, continue to take a complaint under the general provisions of the Disability Discrimination Act. Because the standard does not apply, the Disability Discrimination Act is still available. There is a mixture of residential apartments in class 1A buildings and class 2 buildings, and it is difficult to pull them out because at the moment the Building Code of Australia does not distinguish between serviced apartments that are for short-term rentals and class 2 buildings and longer term residential apartments that people own and use as a house.

Mr PERRETT—This goes some way towards Mr Neumann's question in a way. Has anyone ever attempted to put a figure on what it would be like to make all new buildings accessible to everybody?

Mr Arnaudo—You mean class 2 buildings as well?

Mr PERRETT—Class 1 and class 2, in terms of making doors wheelchair accessible. We are an ageing population and we are all going to need those things at some stage. Why not make every building user-friendly?

Mr Arnaudo—We could take that on notice, but the regulation impact statement to the standards is quite extensive and looks at a lot of those issues. It also sets out a lot of the cost issues in particular.

Mr PERRETT—So is it two per cent, three per cent, 100 per cent, 500 per cent? There are countries that have done this.

Mr Arnaudo—That is right, and our regulation impact statement goes through a fair bit of that as well. It overall found that the benefits outweigh the costs over 30 years basically.

Mr PERRETT—We are all getting older, elderly people in the next 50 years.

Mr Arnaudo—The tricky thing with the regulation impact statement is that it is hard to quantify some of the benefits. It is very easy to quantify the costs. We can tell you that it costs you—

Mr PERRETT—Could I have a percentage, an approximation? A doorway that is a little bit wider costs more timber but it does not cost as much for the wall.

Mr Arnaudo—For example, if you want to install a lift to a two- or three-storey building it is \$100,000. An accessible bathroom is about \$4,000-6,000.

Mr PERRETT—But the cost of renovating that when you become 65 and need that bathroom—

Mr Arnaudo—That is right. There is a whole range of costings attached to the back of the regulation impact statement that went to the different requirements. They used about 25 different case studies for different types of buildings. The other thing is that there is a whole range of buildings that are covered by this. Residential might be easier in one respect. Generally I think the regulation impact statement is saying that the larger the building, the more storeys that are in there, the proportional cost of actually adjusting and changing those requirements is less than, for example, a two- or three-storey building. That takes us to one of the exemptions under the standards for small buildings. They were exempted and because they were not exempted in 2004 that significantly reduced the cost of the proposal, because those small buildings are no longer required to meet the requirement of the standard and they would be exempt from that process, in the same way as they are likely to be exempt on the basis of unjustifiable hardship.

Mr PERRETT—In having a look at that, it does not show the cost of renovations and the like for type 1 and type 2 when later down the track there are too many stairs and you have to put a lift on them.

Mr Arnaudo—There was never a proposal to cover class 1 buildings in the standards. There was a proposal to cover class 2 buildings to the extent of common areas and those sorts of things, so we could probably get you costs on those. The current proposal, though, does not look at that. But we can definitely take that on notice and provide you with a bit more detail.

Ms Antone—I might just add that the reason why there are not any statistics or a clear answer to your question about single dwellings or residential areas more generally is that the Disability Discrimination Act does not actually cover residential areas, so it is beyond the scope of the act. That is a policy issue that goes beyond disability discrimination altogether.

Ms NEAL—The committee understands there were some areas where standards could not be resolved by consultation with stakeholders. What areas were they?

Mr Arnaudo—Class 2 buildings, residential serviced apartments, was one area where there were different views as to how to approach that issue. Other areas where there were some differences would be the bed and breakfasts and holiday parks.

Mr NEUMANN—Class 1b.

Mr Arnaudo—It is a class 1b building, and the way the standards apply to those is that in 2004 they applied to B&Bs and holiday parks with three or more dwellings or three or more bedrooms. Small tourism operators would find that a challenge in some respects. The current draft proposal is to apply to four or more. In some respects people are still calling for five or

more to be the number. I think the important thing to bear in mind with the bed and breakfasts and those sorts of areas is that the defence of unjustifiable hardship still applies. Unjustifiable hardship under the DDA has three or four subparagraphs. Under the standard we have set out a page or so of specific factors to take into account in working out whether something is unjustifiably hard or not, and that provides a bit more certainty and a bit more guidance as well.

Other areas include apartment buildings—which I mentioned before—and building upgrades. We do not apply to existing buildings. If you have building that you are not touching at all, the normal Disability Discrimination Act provisions apply and continue to apply. There is an issue as to when you start upgrading the building and what an upgrade is. The previous draft was on the basis of saying that, if it is 50 per cent or more of the volume of it over three years, you have to upgrade the whole building. We have reduced the cost substantially by applying it now more to where you make renovations that require you to lodge a building approval. In that case, you will need to upgrade the new work and the new work has to be up to the new standard. In some situations, depending on whether you are the owner or the tenant, you might also have to upgrade the path of travel from the new work to the principal entrance. That is to deal with the issue of, for example, if you are on the sixth storey and you upgrade the whole sixth story but you have steps at the front door on the ground floor, what is the point of accessing it up there? So there is a requirement there as well.

Another area went to small buildings and what is really a small building. The government, in its approach with the draft premises standards has decided that a small building is a building that has no more than three storeys with a maximum of 200 square metres per storey. If you have one of those buildings, the ground floor would have to be accessible and meet those requirements. But, in recognition of the cost of providing access to the upper storeys in a smaller building would be quite a large proportion of the value of that building, you do not have to provide access to the second or third storeys. That would cover a large number of typical suburban shops and those sorts of things. That has been controversial as well.

Proceedings suspended from 10.02 am to 10.15 am

Mr NEUMANN—I am interested in your attitude towards those classes of building, because certainly where I come from in South-East Queensland B&Bs are very common in places like Mount Tamborine, Maleny, Montville and other places, and of course we have the Gold Coast and the Sunshine Coast, which are full of residential flats. I am interested in your comments and thoughts. I do not want to sound like I am a journalist at the Australian swimming titles—‘How do you feel?’—but I do want to hear your thoughts about it.

Mr Arnaudo—As I said before, it is an issue that has generated controversy around how you actually apply the standards, because at the moment under the Disability Discrimination Act only premises that are publicly accessible or accessible to a section of the public are covered in terms of access to premises. I think there are arguments that other grounds under the Disability Discrimination Act might also be applicable. It is really a question of where you draw the line in terms of what types of buildings are covered or not covered. The decision that the government has made is that the standards would apply to bed-and-breakfast dwellings if they had four or more bedrooms. That is seen to be a fairly significant bed-and-breakfast operation. It is not, for

example, a mum and dad operation where they have a second bedroom out the back or a flat that they are operating.

Regarding residential apartments, yes, definitely there are serviced apartments that run effectively like hotels. You can walk up and it is like a hotel room but larger. Also, for example, if I have a holiday apartment on the Gold Coast and when I am not using it I put it on eBay for anyone who wants to rent it, effectively that is open to the public but it is also my private apartment. There is a difficulty in drawing the line as to where you apply it. As I said earlier, the 2004 draft required common areas of those sorts of apartments to be accessible but not the sole occupancy units within. The government's current approach is not to have the standards apply to those class 2 buildings at all, which means that the Disability Discrimination Act would continue to apply, so there is a bit of uncertainty there.

But it is very much about trying to draw the line. I think you will probably find in your consultations that not everyone will feel that their views have been completely adopted by government. It is very much about trying to balance those different interests, as we were saying beforehand, between the costs and the implications of those modifications with the rights of people with disability having reasonable access to services and facilities on the same basis as other people.

Mr NEUMANN—What about tourism operators? Were there any submissions to you in relation to that?

Mr Arnaudo—You will see that the regulation impact statement has a full section—I think it is section 11 or 12—that sets out a range of views that were put forward to the 2004 regulation impact statement. In fact, the views of tourism industries, the hotel industry and B&Bs were set out there. I am sure that representatives of those organisations will express similar concerns this time. To a certain extent, we try to take account of them as much as we can, but at the same time there is the question of making the decision as to where you draw the line on some of these issues.

Mr PERRETT—This is an open question, I suppose, to all of you: why has this taken so bloody long?

CHAIR—Leaving out the pejorative, we will make it just 'so long'.

Mr Arnaudo—It is a complicated issue because—

Mr PERRETT—It is quite simple, isn't it?

Mr Arnaudo—It is simple in one sense, but it is also complicated when you are trying to harmonise the Building Code with the Disability Discrimination Act. On the one hand you have something that is very general that basically says something very simple—'You cannot discriminate against someone in accessing a premises on the basis of their disability unless it leads to unjustifiable hardship.' That is really what it requires. But then, when you take it down to the Building Code in order to achieve that, what is the width of the doorway that is required to access that building? How much turning space is required in a corridor, for example? Is it unjustifiable to require a two-bedroom B&B to be accessible when they are very much a small

business? Would the unjustifiable hardship defence apply? When you bring it right down to those sorts of issues, it can become quite difficult and quite technical. The Australian Building Codes Board set up a Building Access Policy Committee, which had over 30 meetings to try to work out the policy on those different issues.

Mr PERRETT—With over 30 people in the meeting.

Mr Arnaudo—That is right, because there are a range of stakeholders that need to be heard and have their views taken into account, not only from the disability sector but also from the property and building industry and the states and territories, which actually have to regulate the Building Code on their patch, in a sense. I would not say this is the most complicated piece of public policy work I have ever looked at, but it is getting up there in terms of the development. The consequences are not only in terms of the rights of people with a disability; there are also economic consequences in terms of the overall building industry and the overall value in the stock of buildings that are out there. So it is not surprising that it would take that amount of time.

CHAIR—I might interrupt you and suggest that there are other aspects of the Building Code that have not taken nine years to resolve.

Mr Arnaudo—But perhaps they have not had to deal with the Disability Discrimination Act and linking them back into that act. That is what we are trying to achieve here—to provide more harmony between the Building Code and the Disability Discrimination Act. That can be a bit difficult. The level of generality in the Disability Discrimination Act does make it difficult, unless you have lots of courts with different findings that say, ‘This is the required standard to provide that level of standard.’ What the standard is trying to achieve here is to set that bar, set that level, and say, ‘This is what you are meant to achieve.’

Mr Fox—If I can add something in terms of the history: the draft that was issued in 2004 in fact did not have consensus from those who had been involved in seeking to draft that draft premises standard.

CHAIR—But the process did start in 2000.

Mr Fox—The process started in 2000—

CHAIR—And then there were draft standards issued in 2004.

Mr Fox—Correct—for public comment. That was not a consensus draft. It was a draft for comment, agreed to be allowed to try and draw out where there was—if there was—a great deal of concern or interest in particular aspects where there was not consensus. So there was a difficulty then in terms of the groups that had met within the Building Access Policy Committee of the Australian Building Codes Board. That committee continued to meet through until about the middle of 2005 and still could not agree, having assessed the responses. There were still matters on which there was lack of agreement, which led to the government at that time seeking to try and resolve those areas of disagreement through the formation of this thing called the disability access reference group, which had on it representatives, or people who could represent the views, of both the property and the disability sectors as well as government. It was only

effectively after that had reported that, in a sense, government was able to reach a position where the issues were narrow enough for government to be able to—

CHAIR—So that reports in 2005, and since 2005—

Mr Arnaudo—The disability access reference group reported last year.

CHAIR—I will go back a step, because I am interested in the process. The last public consultation about these standards was in 2004.

Mr Arnaudo—Correct.

CHAIR—So the committee process that we are now engaged in—these hearings and the reference from the Attorney-General in relation to the draft standard that the Attorney-General has published—are the first public consultation in five years.

Mr Arnaudo—Correct.

CHAIR—What happened between 2005 and 2008?

Mr Arnaudo—There were a range of issues that needed to be considered, as Mr Fox outlined. We had a lot of feedback from that public consultation process. Within government we were working through those issues to try and work it out. The other thing to bear in mind is that, in working out the cost implications, the regulatory impact statement had to be looked at as well to ensure that we could work through those sorts of issues too. It can take some time to work those things through.

A range of views needed to be considered. Progress was made up until 2007, but it was very much within government, working towards a process where we would be able to say, 'Here's a further draft, with consultation.' An election was called and there was a change of government, and that can also delay getting things up to speed again. That is where we are at the moment. Generally, there are views within the disability sector as well as within the property sector that the process has taken too long, that in that time a lot of buildings have been built and a lot of buildings have been renovated; there is still a level of uncertainty overall. Had the standards been implemented in, say, 2004 we might actually be conducting the first five-year review through this committee process or through another review process and being able to make changes with five years worth of knowledge and experience of how the standards have been operating. That is not there and, in a sense, you cannot buy back time.

Mr PERRETT—You said there are issues that have to be resolved, such as disagreement between the groups as to the actual measurements and things like that. Are there other countries that are world leaders that could provide us with guidance? Are there international standards or Australian standards, rather than reinventing the wheel through consultation? There must be some Scandinavian countries that are ahead of us on some of these things.

Mr Arnaudo—We have looked at that, and we can probably provide you with a short summary of the overseas examples. Again, the problem is the diversity and nature of the different changes in place. For example, I can say that the US experience has been a bit of a

hotch-potch of differences; some areas have been very positive and other areas have been quite negative. The New Zealand experience has been quite different in terms of its approach, and the UK is very different. We can provide you with some sort of detail there. I think that, overall, when you compare us with other leading Western countries that we might want to compare ourselves with the proposal is quite comparable, and in some areas we have some clear advantages—for example, in door widths and turning spaces. We can take small buildings as one example. New Zealand has a process where they have a small building exemption, but they add an extra requirement that if an essential services is being provided out of that building it is not exempt. The question then becomes: what is an essential service? For some people, having access to a lawyer is an essential service; other people might say that it is accessing banking or mortgage or doctor. We can all agree, but then there is always a bit of a debate.

There have been times when the debate has been around that, and that is one of the options we considered in terms of small buildings. Some lawyers operate out of very small buildings because they do not need that much space. Then you ask: are lawyers an essential service? What about architects, or other professions that perhaps are not immediately seen to be essential because they are not medical or health oriented? That is one of the challenges you face in those sorts of areas. How do you know that someone has not changed the nature of their service? For example, if a lawyer also provides accountancy services, are they as essential as the legal services? There are all those sorts of things to be considered as well. Because of the breadth of the issue it is difficult to provide you with one definite comparison that says, ‘This is how we rate against this country,’ or against another country, because there are differences.

CHAIR—I want to ask you what I call the ‘cooperative federalism’ question. Are you able to tell the committee how the premises standards will interact with state and territory provisions that are directed at discrimination in relation to premises? The specific question is: will these standards override the state and territory laws?

Mr Arnaudo—From memory, section 13(3) of the Disability Discrimination Act provides that:

This Act is not intended to exclude or limit the operation of a law of a State or Territory that is capable of operating concurrently with this Act

That is effectively a signal that the Commonwealth is not seeking to cover the field with the Disability Discrimination Act in this area. so if there is a state or territory law that can operate concurrently with the act, which includes the standards, that is fine. But where there is an example of a direct conflict, section 109 of the Constitution will come into play and the Commonwealth standard, the Commonwealth law, will prevail to the extent of any direct inconsistency between the two.

That, hopefully, is minimised to a certain extent because we are harmonising the Building Code, which is what state and territory building regulation refers to, with the requirements in the Disability Discrimination Act. So there should not be those sorts of inconsistencies between building regulations and disability regulations. Where other standards are made—for example, under state discrimination laws—that might, for example, require a lesser standard or impose a higher standard, then the question becomes: is it still possible for them to operate concurrently? The general view, though, is that the Commonwealth is very much setting the standard in terms

of discrimination. I know states and territories are looking towards us finalising the standard to provide some guidance as to how people with disabilities can access premises or not within their own state and territory jurisdictions.

Mr Fox—It may be that some building regulations in the states and territories would extend beyond into class 2 areas such that the Commonwealth is not seeking to provide a standard in relation to class 2, if that is what is ultimately adopted. In which case, the standards applicable in the various states and territories—and if they are different, the different standards—would continue to apply to those structures in terms of the Building Code. So there may still be some lack of consistency or lack of certainty in terms, if somebody complied with those provisions, whether or not they still could be subject to some kind of claim under the DDA.

Ms Antone—Chair, I might also draw your attention to one of the proposed amendments in the Disability Discrimination and Other Human Rights Legislation Amendment Bill which relates to this matter directly. The subsection that Mr Arnaudo referred to, subsection 13(3), is being amended. Well, it is not being amended itself; subsection 13(3)(a) is being added to section 13, and that will provide a little more clarity to this matter. It will actually state that subsection 13(3) will not apply to disability standards.

Mr Arnaudo—That makes it clear in the standard-making power that we can make a standard that can overrule a state and territory law.

Ms Antone—That is correct.

Mr Arnaudo—But that is a decision where a standard itself would have to say, ‘We want to overrule that.’

Ms Antone—In terms of the antidiscrimination laws in the jurisdictions, a standard—insofar as its scope covers a particular field, as Mr Fox and Mr Arnaudo were pointing out—will become the standard and the antidiscrimination laws will not be operable in the sense that a person will not be able to opt for making a complaint under a state or territory antidiscrimination law that covers an area that one of our standards covers. That is if this particular amendment actually commences before the standards come into play.

In terms of the other amendment that Mr Arnaudo has referred to, that is an amendment that provides that a disability standard may itself provide the extent to which it overrides a state or territory law. It refers to state or territory law more generally, so it is not just antidiscrimination laws, which section 13 covers, but relevant state or territory laws more generally—building regulations in this instance. So that will provide an opportunity for each standard to clarify the exact scope and the exact intention with respect to overriding state or territory laws.

CHAIR—Thank you. I raised before the question of the two standards that already exist—the one in the public transport area and the other one in the education area. I am not so much interested in how they have worked in the education area or in the public transport area specifically, but have they worked as a device? Has it been the experience? By that question I am drawing attention to the way in which these are intended to work, which is compliance with the standard is compliance with the Disability Discrimination Act. Have they achieved that purpose

of reducing the need to go to court, reducing the need for disputation about what the Disability Discrimination Act means in those areas?

Mr Arnaudo—I think you will get different answers, depending on who you ask. Particularly when you just look at—

CHAIR—It is a key question because the purpose of these standards is, after all, said to be: we are going to reduce the need to go and litigate every time what the Disability Discrimination Act means in this instance.

Mr Arnaudo—The other issue is that the education and the transport standards are quite different. The transport ones are very prescriptive. They make it quite clear that transport systems like prescription. That is how it was developed. It fits in quite well.

CHAIR—We are talking about the gap between entrance to the train and the platform or the height of the first step on the tram in Melbourne or the height of the bus step and so on?

Mr Arnaudo—Exactly, and that is quite prescriptive. In that sort of standard it is quite easy to say whether you are compliant or not. You do not have to go to court because you measure it. You say, ‘The gap is too far’ or ‘It is too small’ and ‘You are compliant’ or ‘You are not compliant.’ That provides that level of certainty.

Mr PERRETT—And changes behaviour of providers quickly.

Mr Arnaudo—I think so. That is why the transport standards have this staggered implementation approach for a lot on their features as well. For example, they have dates every couple of years and a certain percentage of the different facilities of a transport operator need to be up to date to that standard, recognising, however, that transport infrastructure takes time to evolve and change. You cannot change it overnight.

Mr PERRETT—And it will happen.

Mr Arnaudo—Perhaps. On the other hand, because of the types of education courses and institutions and the range of educational needs, education standards are quite general. While a bit more specific than what the education requirements are under the Disability Discrimination Act, they are still quite general and open as well. It might be that there is still a bit more scope in that area to provide for people going to courts eventually as well. If you are meant to get an educational outcome through the education standards and if you feel that you have not, the only way of saying that the standard has not been complied with is to go through the commission and eventually to the courts. I think that is likely to be the sort of reaction you will get depending on who you ask. If you ask some of the public transport operators they would say: ‘Yes, the specificity is quite clear. It is quite clear what needs to be met.’ Whether it is being met or not is another matter.

Education might be a different story in a sense. As I said, the whole aim of the standard is to provide an additional level of clarity that the Disability Discrimination Act does not provide. I think the other point is that it is not the solution to everything. It is one of the tools that government or the community would use as a way of trying to achieve these outcomes in the

broadest sense and in the longer term. Linking the building regulation system with the premises standards is one way in particular of trying to add to that level of compliance. You do not have that level of compliance or that requirement under the education approach or under the transport approach. In education, you do not need them because they are legislative instruments and are meant to be complied with. But you then do not have building surveyors or building certifiers going around train stations or schools saying, 'Do you meet this standard or not?' You still rely very much on individuals taking those complaints.

CHAIR—That is helpful, Mr Arnaudo, and we will bear that difference in mind between the public transport, the education standard and this one. I have to end the hearing. I thank you for your attendance today. It has been very helpful, particularly the overview at the start. You have some homework to do and you will send us further materials.

Mr Arnaudo—As I said before, if there are any other issues that come up during the hearings or if you want us to provide more information, by all means please contact us and we will do our best.

CHAIR—Actually, we have one further question.

Mr NEUMANN—You mentioned the Federal Magistrates Court, which exercises federal jurisdiction. But of course the state courts and territories can deal with issues in relation to disability discrimination as well. Has there been any difference in interpretation in the jurisprudence between the states and territories and the Federal Magistrates Court?

Mr Arnaudo—The state courts cannot examine matters under the Commonwealth Disability Discrimination Act. They can do it under their own state and territory acts.

Mr PERRETT—They are often mirrored.

Mr Arnaudo—They are often mirrored.

Mr NEUMANN—The Queensland one is.

Mr Arnaudo—There is a process under the Standing Committee of Attorneys-General to examine greater harmonisation of discrimination laws between states and territories and the Commonwealth. They are not exactly harmonised. There are differences in different states. There are different limits on compensation payable. The Disability Discrimination Act, the Age Discrimination Act, the Sex Discrimination Act and the Racial Discrimination Act of course are also slightly different as well, although they have similar themes in terms of what they are trying to address. The case law that comes out is often applicable across the whole range, bearing in mind that they all have to find their way back to the legislation that creates them, whether that is state or Commonwealth. The Federal Magistrates Court and the Federal Court are interpreting the Commonwealth acts. They are not interpreting the state and territory ones.

Mr NEUMANN—I am aware of that. Generally in discrimination in this area the state courts and jurisdictions deal with it in a peripheral way. I am interested in the jurisprudence there: whether it accords with the federal experience in your observation.

Mr Arnaudo—In my observation, generally it would, although there probably would be differences in, for example, the amount of compensation that might be able to be made. In some cases I think that the fact that the Commonwealth system has a conciliation process to go through first, which is run by the commission, is an attraction. Rather than going to court straight away, we can go through the conciliation process to try to resolve the argument. If that does not work out then we will go to court.

CHAIR—Thanks very much, Mr Arnaudo. The secretariat will send you a copy of the transcript of today's hearing so that you can make any corrections. I would be grateful if you could liaise with the secretariat about the additional material that you have offered to provide. Thank you very much for attending today.

Resolved (on motion by **Mr Neumann**):

That this committee authorises publication, including publication on the parliamentary database, of the transcript of the evidence given before it at public hearing this day.

Committee adjourned at 10.41 am