Victorian Equal Opportunity & Human Rights Commission

submission to

House of Representatives Legal and Constitutional Committee

Inquiry into the Draft Disability (Access to Premises- Buildings) Standards

February 2009

Victorian Equal Opportunity & Human Rights Commission

1. Introduction

The Victorian Equal Opportunity and Human Rights Commission (the Commission) welcomes the opportunity to make a brief submission to the Inquiry into the Draft Disability (Access to Premises-Buildings) Standards [Standards].

The Commission is an independent statutory body that administers both the *Equal Opportunity Act 1995* (EOA) and the *Racial and Religious Tolerance Act 2001* (RRTA). Functions undertaken by the Commission include conciliating individual and representative complaints about discrimination, sexual harassment and racial and religious vilification; providing education about equality of opportunity, racial and religious tolerance and human rights; undertaking projects and activities aimed at eliminating discrimination and racial and religious intolerance; conducting research and providing legal and policy advice.

In addition, the Commission undertakes specific functions in relation to the Victorian *Charter of Human Rights and Responsibilities Act 2006* (the Charter). These include providing an independent assessment of how well State and local Government comply with the Charter, and investigating particular human rights issues and concerns.

Consistent with the Commission's obligations, this submission adopts a human rights framework in examining the issues under consideration by the Legal and Constitutional Committee.

The submission is in the two parts. The first section considers substantive issues associated with the draft Standards. In welcoming the Standards, we also identify omissions that we consider need consideration by the Committee and suggest how these might be resolved. We also identify issues that require clarification in order to promote certainty.

The remainder of the submission briefly examines the interplay between the *Disability Discrimination Act 1992* [DDA], the Standards and the EOA. We also consider the procedural aspects that will operate in Victoria, noting that when the Building Code of Australia is amended, any associated building laws in Victoria will also require amendment, thereby triggering a human rights assessment as part of the usual operation of the Charter.

2. Substantive issues arising from the Standards

The Commission warmly welcomes the introduction of the Standards. We consider the finalisation of the Standards as a long overdue and significant step in the realization of human rights of people with disability.

We note that the process of developing the Standards has taken many years to develop. During that time, thousands of buildings have been built or redeveloped without the improved access the Standards require. We therefore urge the Committee and the Australian Government to proceed quickly to finalise the Standards and bring this important piece of work to fruition.

The Commission acknowledges the significant efforts of the Australian Government, building industry, disability community and the Australian Human Rights Commission in developing and negotiating the Standards over the last

decade. We congratulate them on producing a set of draft Standards that will provide certainty for industry, decision makers and community members.

In particular, we note that the Standards will alleviate the current inconsistency between the Building Code of Australia (BCA) and the DDA, with subsequent inconsistencies flowing to Australia's obligations under the *UN Convention on the Rights of Persons with Disabilities.*

Resolving this inconsistency and achieving congruence in the regulatory environment across all states and territories illustrates how our legal system can simultaneously promote inclusion whilst cutting red tape and transaction costs. Through providing a more certain legal environment in which developers, the building industry and decision makers operate, the Standards provide an excellent example of how human rights makes good business sense.

Further, the Standards will address access issues at a systemic level for all new and renovated buildings.[1] This will reduce the need for individuals to pursue their rights through complaints mechanisms and the courts.

The Commission particularly welcomes improvements in access requirements around issues such as circulation space, signage, facilities, hearing assistance and access to upper levels of new and renovated buildings. [2]

While the Standards have the capacity to enhance the inclusion of people with disability in the community, the Commission notes that as the Standards apply to public buildings only, they do not deal with the equally significant issue of universal design in residential housing.[3] This is an area where urgent action is required at a Federal and state/territory level if our housing stock is to meet the needs of the community now, and into the future.

The Commission further notes that while the definition of 'premises' in the DDA includes more than just buildings, the Government has requested the Standards be limited, at this stage, to improving those access issues already addressed in the BCA.

This includes, for example, access to shops, offices, theatres, restaurants, schools, swimming pools, sports facilities, hotels, carparks, hospitals and aged care facilities. It does not include public footpaths, road crossings, parks, and playgrounds.

Further, within those buildings, the BCA covers features such as accessible toilets, lifts, entrances, ramps, stairway features, door circulation space, signage, hearing augmentation and handrails. It does not cover features such as reception counter heights, change rooms in retail shops, information on building tenants or the accessibility of customer queuing systems. These issues will continue to be subject to the current DDA complaints mechanism.

---

[1] The Commission notes that for buildings where the standards are not 'triggered' a person with disability may still bring a claim under the general provisions of the DDA.

[2] Noting that 'unjustifiable hardship' is still available as a defence to a DDA claim and that certain exceptions and concessions also apply within the Standards.

[3] Including social housing.

The Commission recognises that ultimately the Standards, the BCA and Australian Standards must all be aligned to ensure consistency. We note that as decisions have been made about the content of the Standards the committees responsible for developing the referenced Australian Standards have been asked to update the technical information to reflect the content of the [DDA] Standards.

The Commission welcomes this effort, however we note the concerns of the disability sector regarding transparency around the process of developing the Australian Standards to provide technical detail on how to meet deemed-to-satisfy solutions under the BCA and DDA standards. In particular, we note their concerns that timeframes for the finalisation of the premises standards, BCA and Australian Standards are congruent.

2.1 Omissions

Class 2 Buildings

The Commission also notes that while the Standards will promote inclusion across much of the built environment, there a number of significant omissions from the Standards. In particular, we note that apartment buildings (Class 2 buildings) appear to be omitted from the Standards.

The Commission is of the view that Class 2 buildings form such a significant and growing feature of the built environment that they should be included in the Standards.

We note that in some jurisdictions, local government planning powers facilitate Class 2 inclusion in accessible planning requirements. However, In Victoria, no such local planning power exists. This means that access to apartment living for people with disability in Victoria compares less favourably than other jurisdictions. As time passes and new Class 2 developments are built, this inequity grows.

Further, we note that Class 2 buildings were included in the 2004 draft Standards. We cannot identify any strong business case for their exclusion. We consider that the recovery of costs associated with building an accessible apartment building would be likely offset by demand for such housing, particular in metropolitan Victoria where urban consolidation is encouraged.

Rather, there are significant benefits that arise from the inclusion of Class 2 buildings. These include: certainty for developers and any Body Corporate regarding potential liability under the DDA (which arguably could still arise if Class 2 premises are not included); the removal of existing inconsistencies in requirements between local council areas; and the progressive improvement in housing stock to better meet the needs of people with a disability and our ageing population.

We recommend that the following arrangements be included in the Standards as a reasonable balance between the rights of people with disability to access premises and the financial impost upon developers.

RECOMMENDATIONS

It is recommended that:

1. Class 2 buildings and those subject to significant renovation be subject to the Standards.

2. The Standards require an accessible path of travel to the front door of apartments on the same floor as the principal entrance (ground floor), and where common facilities such as a laundry or gymnasium are provided, that an accessible path of travel be available to common facilities.

3. In addition, if the block of flats has a lift or ramp servicing other levels, an accessible path of travel must also be provided to the front door of the units on the levels serviced by the lift or ramp and to any other common use facilities on those other levels.

Emergency egress

The Commission notes that during early stages of the development of the Standards it was acknowledged by all stakeholders that significant work was required to identify technical solutions to some of challenges around accessible emergency egress. As a result, it was agreed that existing BCA access standards would continue to apply, effectively creating a general reservation around emergency egress standards.

We understand that this agreement was based on an assessment that the technical solutions would have been found by the time the Standards reached the final stages progression into law.

The Commission notes that while technical solutions have not been found for all aspects of emergency egress, some have been resolved. [4] Therefore, for those areas of emergency egress where technical solutions have been found, the Standards should reflect those as the requirement.

The Commission does not consider it appropriate that a blanket style reservation on emergency egress continue to operate. To continue to use the current BCA standards, which no longer reflect technical capacity would be backward looking and undermine the safety of people with disability. In no other area of public life would we allow outdated solutions and standards to apply in regards to public safety and emergency management.

Recommendations

It is recommended that:

Where technical solutions exist, such solutions be included in the Standards regarding emergency egress.

Where technical solutions have not yet been identified, the existing BCA emergency egress standards should continue to apply, subject to the five year review of the Standards.

---

[4] For example visual alarms for emergency egress.

2.2 Issues requiring clarification – interpretive issues

Way-finding[5]

The existing BCA has quite limited way-finding requirements, and is largely restricted to signage and wayfaring to accessible facilities rather than way-finding though out the premises.

The Commission understands that while some research on technical solutions that could be included as 'deemed to satisfy' provisions in the BCA and Standards has been undertaken, the issue of way-finding is often closely related to the individual capacity of the person with disability and the environment which they are attempting to navigate.

Given this challenge, the Commission is of the view that if wayfaring in the Standards is limited to that associated with accessible facilities (as is the case with the current BCA) then the remainder of wayfaring issues would remain open to a general discrimination claim under the DDA or EOA. This is consistent with other access issues not covered by the Standards, which will remain open to a general discrimination claim.

To ensure certainty it is important that Parliament make it very clear that the limited range of wayfaring included in the Standards does not cover the field. Potentially this could be done by way of the Minister making an explicit statement to this effect during the process of finalising the regulations. While this may not have the interpretive effect of a similar statement during a second reading speech, it would nonetheless be a matter to which a court might refer when considering this issue.

To promote community understanding, particularly amongst the building industry, this interpretative information should also be include in any publications, guides or other educational materials associated with the implementation of the Standards.

Recommendation

That the Committee explicitly report that the correct interpretation of the Standards is that the way-finding provisions in the Standards do not cover the field. Therefore, a general discrimination claim may still be made under the *Disability Discrimination Act 1992* for way-finding and other matters not covered by the Standards.

That this interpretation is included in any Ministerial statements associated with the laying of the regulations before the Parliament, and in any subsequent publications, guides or other educational materials associated with the implementation of the Standards.

Exemptions and concessions

The Commission notes that the Standards are triggered when a new building is being constructed or when significant renovations (those requiring building approval) are contemplated.

---

[5] Way-finding is the ability to: know where you are, where you are headed, and how best to get there; recognize when you have reached your destination; and find your way out--all accomplished in a safe and accessible manner.

We also note that the Standards contain some specific concessions that apply in relation to existing lifts and existing accessible toilets that meet existing Australian Standards. Some exemptions also apply in regards to lessees and relations to small buildings based on a floor space ratio.

The Commission is concerned that some builders, developers and occupiers may misunderstand the scope of such concessions and exemptions. Clearly, the exemptions and concessions that apply in relation to the Standards do not apply to premises or accessibility issues that are beyond the scope of the Standards. Rather, the DDA continues to apply, including the unjustifiable hardship provisions.

The Commission respectfully submits that the Committee make a clear statement of the law on this point so that all stakeholders are able to understand and fulfil their legal obligations under the DDA.

Recommendation

It is recommended that:

That the Committee report specify that the exemptions and concessions arising from the Standards are not applicable in general discrimination claims under the DDA, that is, for matters relating to premises or access issues for which the Standards do not apply.

3. Interplay between the *Disability Discrimination Act 1992* [DDA], the Standards and the EOA.

The DDA expressly preserves the operation of state and territory legislation relevant to disability discrimination[6], however, DDA standards impact upon state and territory anti-discrimination bodies' handling of certain types of complaints, as well as their education and research work.

In practice, existing disability standards on transport and education affect the way the Commission handles both particular impairment complaints and systemic disability discrimination issues.[7]

Where a complaint of indirect discrimination on the basis of impairment is made about a matter covered by a DDA standard, whether or not the relevant requirement, condition, or practice is not reasonable is likely to be resolved by looking at whether or not the requirement is consistent with the applicable standard.[8] It follows that where a requirement, condition or practice imposed by a respondent appears to contravene a DDA standard, this indicates that the requirement, condition or practice is likely to be not reasonable under the

[6] See section 13 of the DDA. Section 13(3) provides that, '[t]his 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'.

[7] Commission work that raises both disability and either transport or education considers whether the standards cover the particular issues raised. This consideration recognises that the standards were created, after extensive consultation and research, to clarify the obligations imposed by the DDA, which are similar in nature to those imposed by the EOA. It also recognises that Victorian service and educational authorities have concurrent obligations under both the DDA and EOA and any projects, education or consultancy services dealing with disability in transport and education should be conducted in light of all applicable legal requirements related to discrimination.

[8] See section 9 of the EOA, 'Indirect discrimination'.

EOA. Conversely, where a requirement, condition or practice complained of is in accordance with a disability standard formulated under the DDA, it is unlikely to be not reasonable under the EOA.

The DDA allows for complaints to be lodged under section 23, which is a specific 'access to premises' provision. There is no similar provision in the EOA, however, there are a range of complaint options available for 'access to premises' subject matter. Complaints about access to premises may be made in a number of different areas of public life covered by the EOA, such as the provision of goods and services, employment, or accommodation. Complaints of authorising and assisting discrimination under the EOA may also be lodged against local councils, building surveyors, developers, builders and architects.

In addition, section 51 of the EOA is a specific stand-alone provision that makes it unlawful for accommodation providers to refuse reasonable alterations to meet the needs of a person with impairment in certain circumstances. This section is interpreted in a way that is consistent with the Victorian *Building Act 1993*, which incorporates the Building Code of Australia (BCA) through its regulations.[9]

Accordingly, while the DDA standards do not refer to complaints lodged under state anti-discrimination acts, the standards do establish a common reference point for the specific disability discrimination issues they cover, which will be relevant to the activities and complaint handling of other state and territory based Commissions.

It is also important to understand that the Commission will continue to receive complaints relating to access to premises about matters not covered by the draft Standard.

The ability of state and territory anti-discrimination legislation and DDA standards to be applied in a generally consistent manner has a number of benefits:

- it allows complainants to lodge a complaint in the jurisdiction of their choosing
- it allows complaints to be made on the basis of disability in the areas covered by the Standards, but also other attributes that may be covered by state legislation (such as physical features in Victoria).

4. Amending building laws in Victoria

It is intended that the Standards will be translated into the BCA which is given legal effect in each state and territory by way of legislation regulating building.

In Victoria, the BCA is adopted by and forms part of the Building Regulations 2006. The BCA allows for state variations to provide additional requirements or set out administrative matters. The changes to the BCA will trigger the requirement for the Victorian government to complete a human rights assessment in relation to whether it will modify any aspects of the BCA in its application in Victoria, as part of the usual operation of the Charter. The

[9] Section 51(2) of the EOA provides that section 51 is '...in addition to, and does not affect or take away from, any requirements imposed by or under the Building Act 1993.'

Scrutiny of Acts and Regulations Committee must further consider all new Victorian Bills or regulations to determine whether there are incompatible with human rights.[10]

It is also important to note that Victorian public authorities, including the Building Commission and local councils, are required to consider human rights, including the right to equality, when performing their public functions.[11]

[10] See section 30 of the Charter and section 21 of the *Subordinate Legislation Act* 1994 (Vic).
[11] See section 38 of the Charter.