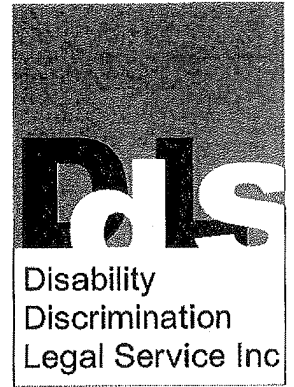


Submission No 78

RECEIVED
16 MAR 2009

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12 March 2009

Committee Secretary
House of Representatives Standing Committee on
Legal and Constitutional Affairs
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Dear Sir/ Madam

Disability Access to Premises Standards 2009

The DDLS¹ supports any policy, legislation, or initiative that protects the rights of differently abled persons and promotes their participation in social activities and access to premises. The Disability Access to Premises Standards Bill (Premises Standards) includes numerous innovations and practical responses to the perennial and widespread lack of, or inadequate accessibility of public buildings. This includes private facilities that are open to the public, or authorised occupiers such as employees or recipients of goods and services. For purposes of brevity, these submissions deal with the serious concerns and matters relating to the

¹ The Disability Discrimination Legal Service Incorporated is an independent, community organisation that specialises in disability discrimination matters. It is a not for profit incorporated association that provides free legal service to people with disabilities. It also provides community legal education and undertakes law and policy reform projects in the areas of disability and discrimination.

A committee of volunteers manages the service. The DDLS Management Committee includes people with disabilities. Many people with disabilities, volunteers and students contribute their efforts to the work of the DDLS.

The DDLS works as an active member of the community legal sector and the disability advocacy sector.

current draft of Premises Standards that the DDLS has serious concerns or objects to.

Summary of submissions:

1. The Premises Standards and the Disability Discrimination Act 1992 ("DDA").

The Premises Standards were drafted pursuant to Section 31 of the DDA which also provides that compliance with the Premises Standards is a complete defence to a complaint of disability discrimination.

In general, unjustifiable hardship is a defence against claims of breach of the DDA. Given that the Standards are a byproduct of Section 31 of the DDA, and that unjustifiable hardship is a reiterated defence under the Standards, the Committee needs to further address the question and determination of what constitutes unjustifiable hardship, and provide a greater test than that which is proposed.

2. Compliance with the Premises Standards is triggered by a building permit application and building construction, but does not apply to subsequent disability access issues that may arise. Consistent and parallel to the duty of a diligent occupier to maintain safety in the premises occupied, the Premises Standards should impose the same compliance requirements in the maintenance and management of subject buildings.
3. The criterion of public access should dominate the definition of buildings subject to compliance rather than the physical structure or design of the building.
4. Substantial access should not be a substitute to equal access or compliance with the Premises Standards. There should be sufficient guidelines to clarify the notion of substantial access, and it should only be a default position if compliance with the Premises Standards would impose unjustifiable hardship.
5. The heritage character of the building should be subject to disability access, instead of disability access being compromised on account of the heritage value of the premises. That heritage value or character may be lost or diminished as a result of providing disability access or compliance with the premises standards is largely false.
6. The Premises Standards must specify the laws that attract the exemption provided under Section 4.2, remove the current ambiguity of Section 47 of the DDA, and prevent undue exploitation of that ambiguity.

7. The access dimensions provided under the Premises Standards are better than those provided under the Australian Standards. Compliance with the Premises Standards should be preferred where possible instead of encouraging non compliance by an automatic exception to those who had previously complied with the lesser requirements of AS 1428.
8. The current description of the exempted areas under Section D3.4a is ambiguous if the statutory construction of "ejusdem generis" is applied.
9. The Premises Standards should clarify the meaning of "unique feature".
10. The Premises Standards should maximise the use of tactile ground surface indicators.
11. The provisions on accessible parking and wheelchair seatings are insufficient.
12. The Premises Standards do not address gender issues adequately in the provision of fitting rooms.

A. The provisions on unjustifiable hardship

The DDLS does not agree that the following factors ought to be considered in the determination of the question of unjustifiable hardship:

- 1) Section 4.1 (3) c- *the extent to which the building is provided by or on behalf of a public authority for public purposes.*

The fact that the building is provided for public purposes or use suffices and makes the **extent** of use an irrelevant consideration in the assessment of unjustifiable hardship. Any building intended or designated for public use needs to be accessible to the public, otherwise the manner of providing services in such places may be not only discriminatory, but also dereliction of duty. A requirement about the extent of use poses philosophical as well as practical problems. For instance, evidence of future or increased use may not be at hand at the time the permit application is made, nor knowledge of the possibility that the specific public purpose of the building may change into another type of public purpose. Once a building is identified to be for a public purpose, any discussion about the need to provide disability access is moot and academic.

- 2) Section 4.13f- *any exceptional technical factors (such as the effect of load bearing elements on the structural integrity of the building) or geographic factors (such as gradient, topography or regional or remote location), affecting a person or organisation's ability to comply with the requirement.*

The primary test for any government or business activity that would be conducted in a building is that the goods or services or facilities subject of that activity are fit and proper for the purpose intended. The same principle applies when locating, planning and constructing the building where those services would be provided. Accessibility is an indispensable element of the activity being fit and proper for the purposes intended. There is no presumption or intention that the consumers or potential clients of the business or government agency are limited to persons who do not have disabilities or requirements for access. Hence, prior to the site being considered for the purposes intended, disability access ought to be a primary and indispensable requirement, instead of the inability to provide disability access being justified or excused by technical or geographical factors. Considering the financial expenses and time involved, it is unwise to commit to or permit an investment where access to the venue has been identified to be discriminatory from day one.

It is recommended that this factor should not be considered for new buildings.

- 3) Section 4.1.3k- *if detriment under paragraph (j) involves loss of heritage values — the extent to which relevant heritage value or features of the building are essential, and to what extent incidental, to the building.*

The heritage value of any building is a community legacy. The enjoyment, appreciation and use of the building, will cross generations of Australians. An increasing number of these people will have various types of disabilities as a result of congenital predisposition, illness, accidents, aging or performance of duty. The latter case includes law enforcement and defence force personnel who participated in domestic or foreign conflicts. Denial of access is wrong generally, but it becomes supremely ironic if such persons are denied access to a building under the label of loss of heritage value. If heritage is to be preserved, it has to be preserved for everyone, including those with disabilities.

There is no clear evidence that the provision of access “destroys” or “diminishes” the heritage character of a building. The essence of heritage is about people and history, not the brick, mortar, wood or steel that holds a structure. Modern building materials, technology

and design, and techniques are more than adequate to add an access structure that esthetically complements and does little to negate the heritage character of building.

The standards should avoid proliferating the vicious myth that loss of heritage character comes before disability access or compliance with the standards.

- 4) Section 4.1.3l- *whether compliance with the requirement may reasonably be achieved by less onerous means than those objected to by a person as imposing unjustifiable hardship.*

This is a confusing and misleading factor in the determination of unjustifiable hardship because the precise issue is compliance with the requirements of the Premises Standards. The Premises Standards stipulate basic requirements. Satisfying these basic requirements in the least costly and onerous manner is implicit, and is an option that does not attract a claim under the DDA because the DDA provides compliance with the Premises Standards as a complete defence. The notion that the requirements may be complied with by less onerous means is therefore superfluous and unhelpful. The subsection may create a misleading indication that compliance may be achieved without actually observing what the Premises Standards already prescribe expressly as minimum compliance mechanisms.

- 5) Section 4.1.3m- *any evidence regarding efforts made in good faith by a person to comply with these Standards, including consulting access consultants or building certifiers;*

Evidence of efforts made in good faith to comply with the Premises Standards ought to refer to actual or concrete attempts to comply with the Premises Standards. Consulting access consultants or building certifiers is effectively and practically a statutory obligation under the Premises Standards, because the Premises Standards are obviously not for the safe consumption of an unaided lay person. The application of the Premises Standards is triggered by a building permit application which necessarily contains technical specifications. To include the mere act of consultation as an evidence of good faith gives unwarranted significance to an exercise that may not be motivated by a genuine intent to comply but merely to attract the accord that the proposed subsection provides. Good faith is really only manifested by the action taken or attempted **after** being put on notice of the recommendations made by the access consultants or building certifiers. If a person does not consult an access consultant or building certifier, then such person puts themselves at a disadvantage as a

result of their inaction. Consultation with experts alone is closer to self-interest and far from being an evidence of good faith.

The respondent to a claim of breach of the DDA or the Premises Standards has the onus to establish unjustifiable hardship. If the permit applicant stops at consultation, does nothing, or fails to attempt to address compliance issues arising from the consultation, then this is hardly conduct that demonstrates good faith to actually comply.

6) Section 4.1 (4)- *If a substantial issue of unjustifiable hardship is raised having regard to the factors mentioned in paragraphs (3) (a) to (p), the following additional factors are to be considered:*

(a) the extent to which substantially equal access to public premises is or may be provided otherwise than by compliance with these Standards;

(b) Any measures undertaken, or to be undertaken by, on behalf of, or in association with, a person or organisation to ensure substantially equal access.

This subsection effectively creates an alternative route to compliance by "providing substantial equal access" instead of actual compliance with the Standards. The section merely requires an applicant to **raise** a substantial issue of unjustifiable hardship as opposed to proving it, and does not provide a definition or clear guidance on what may constitute "substantial equal access".

B. Use of the Building Not Structure

The Standards follow the classifications of buildings under the Building Code of Australia and provide the access requirements for each category of buildings included in the standards. The DDA does not classify buildings but looks at the rights of any person to access the building. Buildings, whether covered by the DDA or the Premises Standards, are required to provide disability access subject to the defence of unjustifiable hardship, hence if the building permit applicant has recourse to the same defence, the underlying criterion for a building's inclusion in the Premises Standard is the nature of the use or intended purpose, rather than its structure or design. If the building is intended for public use or subject to client access, then it should comply with basic access requirements. If the building has areas excluded from public access, there must be regard to access by employees.

1) Excluded Buildings

If an excluded building (ie. Class 1 or 2) is used to provide goods or services, the Premises Standards do not apply and the recipients or

prospective recipients of those goods and services who are aggrieved have no recourse but to go through what a litigious process such as afforded under the DDA.

The use of the building rather than the type or classification by structure determining the application of the Premises Standards would encourage the growth of accessible properties in the real estate market. At present, the special needs public housing program of each state is derailed by the substantial costs of the modification of existing rental properties even if only to provide basic access requirements such as ramps, entry doors, or spacious toilet/bathrooms. For instance, if the Premises Standards required minimum requirements such as basic dimensions for entrance doors and corridors at construction stage, private properties that subsequently go on the rental market would already have the basic accessibility requirements which would temper or minimise the costs of later renovations.

If a Class 1 or 2 building is offered for rent, then the building is for the provision of goods and services, instead of being the private dwelling of an owner. In such a case, if there were minimum requirements under the Premises Standards, any further access issues would be minimised or be made easier to accommodate.

2) Section 4.3

Section 4.3 provides:

Lessees

(1) If the lessee of a new part of a building submits an application for approval for the building work, the following people do not have to ensure that the affected part of the building complies with these Standards:

- (a) the building developer;
- (b) the building certifier;
- (c) the building manager.

(2) Subsection (1) does not apply if a building with a new part is leased to only one person.

If the building is not covered by the Premises Standards and an action is brought under the DDA, the above-described persons may be liable under Section 122 of the DDA, on the basis of authorising, assisting or permitting discriminatory conduct. There appears to be no reason why such an exemption is provided under the Premises Standards. The exemption means that the said persons would continue to have the

control or supervision of the construction of the building or the activities held in the building without a corresponding duty or responsibility under the Premises Standards. The fact that they may be liable under the DDA means that the Premises Standards affords an aggrieved person a lesser recourse.

3) Lift and toilet concessions

The Premises Standards require particular features and layout of new accessible toilets including floor dimensions of 1900mm by 2300mm.

The concession means that:

- a) *where there is an existing accessible toilet in an existing building that meets the layout requirements and floor dimension requirements of the 2001 edition of AS 1428.1 of 1600mm by 2000mm, there would be no need to increase the size of the facility to meet the new requirements.*
- b) *where an accessible toilet compliant with AS 1428.1 (2001) is already available, requiring a person to rebuild it could impose an unreasonable cost.*

The standards provide better dimensions and mobility space than those under AS 1421.1 (2001) and for very good reason. Instead of removing the onus to comply with the new requirement of the standards, the toilet concession should be qualified as follows:

- i) If the new building works would affect an existing toilet facility, then the Standards should apply; and
- ii) In any other case, the permit application should be accompanied by a costs estimate to support any claim of unjustifiable hardship (instead of the unreasonable costs of complying with the Premises Standards).

C. Ambiguous Provisions

1) Section 4.2 Acts - done under statutory authority

The Standards do not render unlawful anything done in a circumstance mentioned in section 47 of the DDA. They only make sense if correlated to Section 47 in relation to "anything done by a person in direct compliance with a prescribed law", however, it is unclear what laws are prescribed.

2) **Section D3.4a-** provides that; *"The following areas are not required to be accessible:*

a) *A cleaner's store room, a commercial kitchen, a staff serving area in a bar, a foundry floor, a cool room, a fire lookout, lighthouse, a rigging loft or the like."*

The principle of "*ejusdem generis*" as used in statutory construction means that if general words follow particular or specific words the general words may be restricted to things of the same kind (genus) which preceded them. Before the *ejusdem generis* rule can be applied it is necessary to identify a relevant genus to which the specific words which it is said qualify or restrict the general words belong. The use of the term "*and the like*" makes the enumeration vague because it is unclear how the different places enumerated are of the same kind.

It is recommended that the phrase "and the like" be removed to prevent an arbitrary basis for including or excluding other areas in the provision of disability access.

3) **What is a unique feature in relation to first/second stories**

It is not clear from the Premises Standards, what constitutes a "unique feature". The lack of clarity may attract potential arbitrary claims in order to avoid compliance with the Premises Standards. A definition or a list of what may be considered a "unique feature" will provide certainty and an objective guideline for those with split level premises.

D. **Premises Standards to do more than the Australian Standards**

1. **A-1 accessways-**

The definition of accessways refers to a "*continuous accessible path of travel*" but has no reference to the installation of tactile ground surface indicators (TGSIs) for persons with vision impairment. Whilst the Access Code refers to TGSIs under AS 1428.4.1, the said requirement of TGSIs is limited only to certain areas of the path of travel to warn people who are blind or vision impaired of potential hazards such as a change in level or overhead obstructions. This means that whilst the accessway does not incorporate any steps, stairway, turnstile, revolving door, escalator, moving walkway or other impediment, the lack of TGSIs on the length of the path of travel does not provide a blind person with equal or similar safety provisions when navigating the accessway.

We strongly suggest that the Premises Standards should set the course for the installation of TGSi as an integral component of what is considered to be an accessway or accessible path of travel. A contrary approach would mean that the accessway is only an accessway for a person who does not have a vision impairment.

2. Swimming pool change rooms- gender issue for carers

The standards needs to address the gender issues that arise when the carer or support person of a person with a disability is of the opposite gender. For example, a female carer of a male person should not be required to be in the presence of other males in the changing room, nor should the person with a disability be required to use a changing room designated for the gender of his or her carer. It is recommended that a unisex changing facility be a standard feature or that changing rooms provide an adequate level of privacy and dignity for persons sharing the room.

3. Parking

The current ratio of parking under Australian Standards is grossly insufficient. Instead of adapting the same ratio, the Premises Standards should increase the number of disability accessible parkings in proportion to standard car spaces.

4. Wheelchair seating under D3.9

The current ratio under Australian Standards is grossly insufficient. Instead of adapting the same ratio, the Premises Standards should increase the number of wheelchair seating spaces in proportion to standard seats, or require venues to provide a substantial number of convertible seats.

5. Sanitary compartment (FP2.1)

"Sanitary compartment" does not include a drier, but if a drier is provided, it should be part of the sanitary compartment of each toilet and should not be placed in the common area. The reason being that it would cause inconvenience and result in unhygienic conditions for a person who may have to use mobility equipment with wet hands. For instance, if a person who is reliant on a manual wheelchair for mobility washes his or her hands, he or she would have to first wheel herself out of the sanitary compartment whereas a person who does not have the same disability simply needs to open the door and reach for the drier in the common area.

Finally, we also submit that the Premises Standards should institute a mechanism for issuing and enforcing a notice of non-compliance by the persons authorised to issue a building permit. The thrust of the Premises Standards should be to identify non-compliance at the point of permit application rather than simply permit a challenge by an aggrieved person, so aggrieved after the building is completed.

If the DDLS can be of further assistance please do not hesitate to contact us.

Yours sincerely

/s/ Placido Belardo
Principal Solicitor

/s/ Julie Phillips
Manager