



Disability Discrimination  
Legal Centre (Inc.)

Submission No 51

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**Submission: Draft Disability (Access to Premises – Buildings) Standards 2009**

**March 2009**

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The views expressed in this submission are those of Disability Discrimination Legal Centre and not necessarily those of Blake Dawson.

**This submission is endorsed by:**

The Disability Discrimination Unit WA (Sussex Street Community Law Service)

Darwin Community Legal Service

Disability Discrimination Legal Advocacy Service at the Welfare Rights CLC, Qld

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## 1 Introduction

The New South Wales Disability Discrimination Legal Centre (“DDLC”) welcomes the opportunity to comment on the proposed Disability (Access to Premises – Building) Standards 2009 (Standards).

DDLC supports the introduction of the Standards as it will address the issue of access to new and significantly renovated buildings at a systemic level.

It is pivotal that the Standards are adopted by the Parliament at the earliest opportunity. The Standards have been in development since 2000. Consequently, there have been many new and significantly renovated buildings constructed without adequate access for people with disability.

In the interests of Parliament adopting the Standards in a timely manner, it is our position that any issues that cannot be resolved quickly and easily should be noted and addressed as part of the five year review of the Standards.

This submission will focus on the effectiveness of the Standards in meeting their stated purpose, which is “to ensure that reasonably achievable, equitable and cost effective access to buildings, and facilities and services within buildings, is provided for people with disabilities”.<sup>1</sup>

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## 2 About DDLC

The NSW DDLC was set up in 1994 to help people with disability to use disability discrimination laws. Our role is to provide accurate and easy to comprehend advice to people with disability in NSW who want to make a complaint of disability discrimination. We give free legal advice, run disability discrimination cases and represent people with cases of disability discrimination.

The NSW DDLC aims for a society where people will be able to participate in all aspects of life through the:

- removal of barriers;
- elimination of discrimination;
- empowerment of people with disabilities;
- promotion of awareness; and
- ability to exercise rights.

DDLC’s objectives are:

- To promote community awareness of the potential to use discrimination laws to advance the rights of people with disabilities;
- To provide legal services for people with disabilities, their associates and representative organisations, who have been discriminated against;
- To ensure the effective participation of people with disabilities in the management and operation of the Centre;

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<sup>1</sup> Standards 1.2(2).

- To reform laws and change policies, practices and community attitudes that discriminate against people with disabilities;
- To develop and be involved in appropriate networks; and
- To maintain the necessary infrastructures and administration systems in order to further the Centre's aims and objectives.

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### **3 Summary of recommendations**

#### **Recommendation 1:**

That Part 4.1(f) be amended to remove the words "regional and remote location".

#### **Recommendation 2:**

That Class 2 buildings (unit blocks) be covered in the Standards.

#### **Recommendation 3:**

That Part D3.1 be amended to reduce the trigger to three bedrooms or cabins for existing small accommodation facilities. There should be no concessions for new Class 1b accommodation.

#### **Recommendation 4:**

That Part D3.2(2)(b) be amended to require that an accessible path of travel be provided between a pedestrian access which is not accessible and an accessible pedestrian access.

#### **Recommendation 5:**

That Part D3.3 be amended to remove the exemption of fire isolated stairs from the requirements of access features in accordance with AS1428.1.

#### **Recommendation 6:**

That Part D3.4(d) be removed from the exemption to accessible areas.

#### **Recommendation 7:**

Narrow the class of exempt buildings in Part D3.4 (f) so that Government buildings and buildings used in the provision of health services are not exempt.

#### **Recommendation 8:**

The percentage of accessible parking be increased to reflect the percentage of disabled parking permits issued to the community.

#### **Recommendation 9:**

That Part D3.6(e) be amended to include a requirement that, in addition to the international sign for access, there is signage providing written information indicating the feature the sign is referring to (for example, toilets, ramps, parking).

#### **Recommendation 10:**

That Part D3.6 be amended to include a provision requiring an accessible path to the accessible pedestrian entrance from the place of the sign.

**Recommendation 11:**

That Part D3.9 be amended to cover the full range of Class 9b buildings and specifically include other entertainment venues such as theatres and concert halls.

**Recommendation 12:**

Part D3.9 be amended to include provisions that wheelchair seating for theatres and other venues (excluding cinemas) be representative of the range of seating provided to patrons generally.

**Recommendation 13:**

That the Guidelines to Part D3.9 be amended to make it clear that removable seating may only be put into wheelchair spaces after it is clear that the wheelchair spaces are not required.

**Recommendation 14:**

That Part D3.7 be amended to increase the number of hearing augmentation receivers in Class 9b buildings to 10% of an audience.

**Recommendation 15:**

That the table contained in Part D3.1 be amended to increase the number of accessible units in Class 9c buildings by a factor of 3 in each number of units range.

**Recommendation 16:**

That the Standards be amended to require Class 9c buildings to have hearing augmentation in meeting rooms.

**Recommendation 17:**

That Parts D3.10(1) and D3.1 be amended to include smaller swimming pools.

**Recommendation 18:**

Before the Standards are finalised, the technical aspects of the various Australian Standards regarding lifts should be reviewed by the Standards Australia Committee.

**Recommendation 19:**

That the Standards be amended so that the concession in relation to the availability of unisex accessible toilets on levels where there is more than one bank of toilets be limited so that the unisex accessible toilet is not more than 50m away.

**Recommendation 20:**

That the Standards be amended to provide that Class 9a buildings and amenities associated with recreation facilities must have at least one 'Changing Places' facility.

**Recommendation 21:**

That Part F2.4 be amended to ensure that at least some en-suite facilities associated with individual caravan sites are required to be accessible for people with a disability.

**Recommendation 22:**

That the Standards be amended to ensure that there is a provision for visual egress alarms in new or significantly renovated buildings.

**Recommendation 23:**

That the Standards should be amended to make clear that, where a matter is not dealt with by the Standards, any act in relation to that matter is subject to the unlawful discrimination provisions of the DDA.

**Recommendation 24:**

Statements of the values embodied by the Standards, and the objectives sought to be achieved, should be included more explicitly in the Standards. These statements of principle should be developed through consultation with relevant stakeholders.

**Recommendation 25:**

That the Disability Discrimination Commissioner be granted the power to investigate and bring complaints regarding breaches of the Standards where there are cases of broader systemic non-compliance, without requiring an individual complainant.

**Recommendation 26:**

That adequately resourced advocacy organisations be guaranteed standing to initiate complaints intervene in cases involving breaches of the Standards.

**Recommendation 27:**

That data be collected to monitor compliance with the Standards during the first five years.

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## 4 What we want from the Standards

It is essential that the Standards genuinely provide improved access to as many people with a disability as possible, in as many situations as possible. People with disability are often significantly disadvantaged because they are unable to access premises that provide a variety of services used by the community in everyday life.

The proposed new AS1428.1 and other referenced Australian Standards are not available to the public to review and consider. The document titled "*Summary of Main Australian Standards Referenced in the Access Code*" does not provide sufficient information to allow organisations and individuals to make considered submissions.

Broadly speaking, we want Standards which constitute fulfilment of the obligations in relation to access to premises imposed by the United Nations Convention on the Rights of Persons with Disabilities (CRPD) which Australia ratified in July 2008. Article 9 of CRPD - Accessibility, provides:

1. *To enable persons with disabilities to live independently and participate fully in all aspects of life, States Parties shall take appropriate measures to ensure to persons with disabilities access, on an equal basis with others, to the physical environment, to transportation, to information and communications, ... and to other facilities and services open or provided to the public, both in urban and in rural areas. These*

*measures, which shall include the identification and elimination of obstacles and barriers to accessibility, shall apply to, inter alia:*

- a. Buildings, roads, transportation and other indoor and outdoor facilities, including schools, housing, medical facilities and workplaces...*

In particular, we want Standards which achieve the following:

- Increased accessibility to a broad range of buildings for people with disability.
- Greater legal responsibility placed on building owners and developers to provide access for people with disability.

Finally, we want Standards that are complied with, and for this to occur a monitoring body is required, as discussed below at paragraph 20.

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## **5 Unjustifiable hardship exemption**

DDLC acknowledges that, in exceptional circumstances, it may be unreasonable to require full compliance with the Standards because it would impose unjustifiable hardship on a party.

However, DDLC is concerned about some of the circumstances that are specifically dealt with in Part 4.1 of the Standards that are deemed to be relevant in determining whether compliance with a requirement would constitute unjustifiable hardship.

In particular, Part 4.1(f) of the Standards provide that any exceptional technical factors or geographical factors are relevant. The example of relevant geographical factors includes regional or remote location.

People with disability living, working or travelling to regional and remote locations, including indigenous people with disability, already suffer a disproportionate disadvantage because of the current lack of facilities and services they can access. For example DDLC recently advised a client, who is an Aboriginal man living on the New South Wales South Coast. He is unable to access the only dentist in his town as it is not wheelchair accessible.

People with a disability require access to premises regardless of where they live, work or travel. The fact that premises are located in a regional or remote location should not be an accepted basis for claiming unjustifiable hardship. This part implies that the need for disabled people to access premises in regional or remote locations is reduced or that compliance with the Standards would necessarily result in unreasonable additional expense. DDLC submits that this is not the case. To the contrary, there is greater work that needs to be done in regional and remote locations to ensure access to premises for people with disability as there are fewer public spaces and even fewer that are accessible.

### **Recommendation 1:**

That Part 4.1(f) be amended to remove the words "regional and remote location".

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## **6 Class 2 buildings (unit blocks)**

Class 2 buildings (unit blocks) are not covered under the Standards, the result being that



people with a disability may be unable to rent or buy these units. This is an unacceptable result especially given the affordability of housing and the financial constraints on many people with disability mean that they live in units rather than houses. As a minimum, unit blocks should have accessible common areas and at least a percentage (for example, 10%) of units in the block should be constructed to AS4299. The requirement to provide this level of access is consistent with many local government Development Control Plans (DCPs). On this basis, there would be no additional cost associated with providing this level of access in these Local Government Areas.

DDLC is concerned that excluding Class 2 buildings from the Standards may result in local governments removing their access requirements from their DCPs, which would allow developers to return to building unit blocks with no accessible areas or adaptable units.

**Recommendation 2:**

That Class 2 buildings (unit blocks) be covered in the Standards.

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## **7 General building access requirements**

Under Part D3.1(b) of the Standards the trigger for providing disability access in Class 1b small accommodation facilities, such as bed and breakfast accommodation, cabins in caravan parks and eco villages, is four bedrooms or cabins. This trigger applies to existing buildings, converted buildings and new buildings.

DDLC is concerned that this trigger will mean that almost all bed and breakfast accommodation would be exempted from the Standards, which means that many people with disability will be entirely excluded from this vacation experience. DDLC submits that the Standards be amended to reduce the trigger of four bedrooms to three for existing bed and breakfast accommodation. However, concessions should be removed for all new Class 1b purpose built accommodation. DDLC proposes that the concessions should be removed in this instance because accessibility issues could be easily resolved in the design phase of the development.

**Recommendation 3:**

That Part D3.1 be amended to reduce the trigger to three bedrooms or cabins for existing small accommodation facilities. There should be no concessions for new Class 1b accommodation.

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## **8 Path of travel between non-accessible and accessible pedestrian accesses**

Part D3.2(2)(b) of the Standards requires access ways to be provided to accessible buildings. The Standards provide that if a building has a total floor area of more than 500m<sup>2</sup>, a pedestrian entrance which is not accessible must not be located more than 50 metres away from an accessible pedestrian entrance.

DDLC is concerned that there is no reference in the Standards to the provision of an accessible pathway between the non-accessible pedestrian entrance and the accessible pedestrian entrance. DDLC submits that the Standards should be amended to explicitly require that an accessible pathway between non-accessible pedestrian entrances and accessible entrances be provided to ensure that people with disability are able to easily travel to an accessible entrance.

**Recommendation 4:**

That Part D3.2(2)(b) be amended to require that an accessible path of travel be provided between a pedestrian access which is not accessible and an accessible pedestrian access.

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**9 Parts of buildings to be accessible**

Part D3.3 exempts fire isolated stairs from requirements for access features that would assist people to evacuate safely. This will jeopardize evacuees with disability, particularly for people with physical disability and people with a vision impairment as well as the people assisting them in a crisis where they are forced to use this exit. It is DDLC's position that this exemption should be removed and access features such as handrails on both sides of the stairs, no open treads and tactile ground surface indicators should be implemented in accordance with AS1428.1.

**Recommendation 5:**

That Part D3.3 be amended to remove the exemption of fire isolated stairs from the requirements of access features in accordance with AS1428.1.

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**10 Accessibility exemptions**

The inclusion of people with disability within the workforce is a matter of great importance. People with disability experience higher rates of unemployment than people without disability.<sup>2</sup> It is essential that people with disability are given every opportunity to actively participate in the workforce without being hindered by a lack of accessibility to certain premises. This right is upheld by Article 27 of CRPD which provides that:

*State Parties recognize the right of persons with disabilities to work, on an equal basis with others; this includes the right to the opportunity to gain a living by work freely chosen or accepted in a labour market and work environment that is open, inclusive and accessible to persons with disabilities*

It is for these reasons that some of the exemptions contained in Part D3.4 of the Standards cause concern.

**10.1 Warehouses**

Of particular concern is the exemption in Part D3.4 (d) relating to upper floors of warehouses used solely for wholesale of logistics/distribution purposes. Exempting these areas from accessibility requirements will limit some people with disability from being employed on or being able to visit these types of areas. Accordingly, DDLC submits that the exemption at Part D3.4(d) of the Standards should be removed.

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<sup>2</sup> Human Rights and Equal Opportunity Commission 'Final report of the National Inquiry into Employment and Disability' February 2006.

**Recommendation 6:**

That Part D3.4(d) be removed from the exemption to accessible areas.

**10.2 Certain buildings exempt**

A further concern is the exemption in Part D3.4(f) as these buildings represent the majority of buildings in Australia, particularly in rural and remote Australia. The exemption of these buildings will have a greater impact on indigenous people with a disability, as most live in regional areas. In 2006, 69% of Indigenous Australians lived in regional and remote Australia.<sup>3</sup> In 2002, just over a third of the indigenous population had a disability.<sup>4</sup>

DDLC submits that there should be a narrower class of exempt buildings in this Part. For example, Government buildings and buildings used in the provision of health services should not be exempt.

**Recommendation 7:**

Narrow the class of exempt buildings in Part D3.4 (f) so that Government buildings and buildings used in the provision of health services are not exempt.

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**11 Availability of disabled parking**

The number of accessible car parking spaces in Part D3.5 is too low.

The number of people with disabled parking permits now far exceeds the number of accessible parking spaces that are available. In 2004, 13% of the two million cars in NSW had a disabled parking permit.<sup>5</sup>

To meet the current demand for accessible car parking spaces, the percentage of accessible parking should be increased to reflect the percentage of disabled parking permits issued to the community.

With respect to Class 9a buildings DDLC submits that hospital (non-outpatient areas) should have a percentage increase by a factor of five.

**Recommendation 8:**

The percentage of accessible parking be increased to reflect the percentage of disabled parking permits issued to the community.

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<sup>3</sup> Australian Bureau of Statistics, 4705.0 - *Population Distribution, Aboriginal and Torres Strait Islander Australians, 2006* <http://www.abs.gov.au/AUSSTATS/abs@.nsf/Lookup/4705.0Main+Features12006?OpenDocument>

<sup>4</sup> 4714.0 - National Aboriginal and Torres Strait Islander Social Survey, 2002, <http://www.abs.gov.au/AUSSTATS/abs@.nsf/mf/4714.0/>

<sup>5</sup> Physical Disability Council of New South Wales, *Mobility Parking Scheme - Who's Eligible?*, <http://www.pdcnsw.org.au/archive/04/eligibility.html>

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## **12 Improvement of access signs**

Part D3.6(e) of the Standards simply requires that signage incorporating the international symbol of access be provided where an entrance is not accessible. DDLC submits that this provision should be broader in scope.

The utility of signs indicating access would be improved if the signage included written and pictorial information indicating the feature or facility that the sign is referring to (for example, toilet, ramp, parking or entrance). It will also be necessary, where a sign indicates that there is an accessible entrance, that there is an accessible path to that entrance from the place of the sign.

### **Recommendation 9:**

That Part D3.6(e) be amended to include a requirement that, in addition to the international sign for access, there is signage indicating the feature the sign is referring to (for example, toilets, ramps, parking).

### **Recommendation 10:**

That Part D3.6 be amended to include a provision requiring an accessible path to the accessible pedestrian entrance from the place of the sign.

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## **13 Accessibility of Class 9b buildings**

### **Coverage of Class 9b buildings**

DDLC is concerned that Part D3.9 of the Standards only refers to cinemas. Accessibility and access to seating is required at all types of entertainment venues classified as Class 9(b) buildings.

DDLC submits that Part 3.9 of the Standards should be extended to include all Class 9(b) buildings, including theatres, live entertainment venues and concert halls.

### **Recommendation 11:**

That Part D3.9 be amended to cover the full range of Class 9b buildings and specifically include other entertainment venues such as theatres and concert halls.

### **13.1 Provision of seating in other Class 9b buildings**

DDLC supports the Standards relating to the placement of wheelchair seating in cinemas. In cinemas, front row seating is not desirable for patrons. However, due to the set up of theatres and certain sporting venues, front-row seating may be desirable for patrons. On this basis, DDLC submits that the location of wheelchair seating for theatres and other venues (excluding cinemas) is representative of the range of seating provided to patrons generally.

### **Recommendation 12:**

Part D3.9 be amended to include provisions that wheelchair seating for theatres and other venues (excluding cinemas) be representative of the range of seating provided to patrons generally.

### **13.2 Provision of wheelchair seating**

DDLC is concerned that a number of cinemas are adopting a practice of placing removable seating into wheelchair spaces, rather than leaving the spaces vacant for those requiring them.

DDLC submits that the Guidelines should be amended to make it clear that removable seating should only be put into wheelchair spaces after all bookings have been made and it is clear that the wheelchair spaces are not required.

**Recommendation 13:**

That the Guidelines to Part D3.9 be amended to make it clear that removable seating may only be put into wheelchair spaces after it is clear that the wheelchair spaces are not required.

**13.3 Hearing augmentation**

Part D3.7 limits the number of hearing augmentation receivers in Class 9b buildings to 3.5% of an audience. This is disproportionate to the number of people in Australia with a hearing impairment. In 2005, it was estimated that there were 21.6% of Australian adults with hearing loss.<sup>6</sup> Therefore, it is DDLC's position that the number of hearing augmentation receivers in Class 9b buildings should be increased to 10%, to more adequately reflect the number of people in Australia with a hearing impairment.

**Recommendation 14:**

That Part D3.7 is amended to increase the number of hearing augmentation receivers in Class 9b buildings to 10% of an audience.

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**14 Accessibility of Class 9c buildings**

**14.1 Accessible sole occupancy units in Class 9c buildings**

DDLC is concerned that the number of sole occupancy units in Class 9c buildings that are required to be accessible in accordance with the table contained in Part D3.1 is the same as in Class 3 buildings. This is inappropriate, given that people who are admitted to an aged care facility are much more likely to have a severe mobility disability. DDLC submits that the table contained in Part D3.1 should be amended to increase the number of accessible units in Class 9c buildings by a factor of 3 in each number of units range.

**Recommendation 15:**

That the table contained in Part D3.1 be amended to increase the number of accessible units in Class 9c buildings by a factor of 3 in each number of units range.

**14.2 Hearing augmentation in meeting rooms in Class 9c buildings**

DDLC is concerned that there is no requirement in the Standards for Class 9c buildings to have hearing augmentation in meeting rooms. A large number of residents in aged care facilities have hearing impairments. In 2005, over one million Australians over 71 had a hearing impairment.<sup>7</sup>

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<sup>6</sup> Access Economics Pty Ltd, *Listen Hear! The economic impact and cost of hearing loss in Australia* (February 2006), p30

<sup>7</sup>Ibid., p. 35

**Recommendation 16:**

That the Standards be amended to require Class 9c buildings to have hearing augmentation in meeting rooms.

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**15 Access to swimming pools**

Part D3.10(1) requires the reader refer to a table contained in Part D3.1 in order to determine whether the Part applies. DDLC submits that this provision would be clearer if the Class of buildings to which the provision applies is contained within Part D3.10.

DDLC is also concerned that Part D3.10 limits its operation to pools with a perimeter of greater than 40 metres. Many facilities that are easily capable of providing access are exempt from doing so under the current provisions.

In the interest of improving access to swimming pools, DDLC submits that the trigger for compliance in Parts D3.10(1) and D3.1 should be amended to include smaller swimming pools.

**Recommendation 17:**

That Parts D3.10(1) and D3.1 be amended to include smaller swimming pools.

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**16 Lift installation**

Adequate specifications for lift installations are essential for improving access to premises for people with disability. Lifts must be accessible and large enough to allow people using wheelchairs to manoeuvre within them.

The Standards incorporate a number of Australian Standards relating to various types of lifts as setting the standard for lift installation and specifications. However, DDLC is very concerned that the Australian Standards currently incorporated into the Standards are out of date and are in urgent need of review.

DDLC believes that a number of technical changes are required to the current Australian Standards covering issues such as lift landings, lift car size, door size, levelling of lift cars, control mechanisms and communication systems. DDLC is concerned that, if the Australian Standards are incorporated into the Standards in their current form, inadequate access will be provided. Accordingly, DDLC submits that the Standards should not be finalised until the technical aspects of the various Australian Standards regarding lifts are reviewed and updated by the Standards Australia Committee.

**Recommendation 18:**

Before the Standards are finalised, the technical aspects of the various Australian Standards regarding lifts should be reviewed by the Standards Australia Committee.

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**17 Accessibility of bathroom facilities**

DDLC supports the requirements for accessible sanitary facilities to be provided under the Standards.

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### **17.1 Unisex accessible toilets where a storey has more than one bank of sanitary compartments**

Table F2.3 of the Standards requires that where a storey has more than one bank of sanitary compartments containing male and female compartments, there must be a unisex accessible toilet at no fewer than one of those banks.

DDLC submits that there should be limits to this concession, in that the nearest accessible toilet is not more than 50m away.

#### **Recommendation 19:**

That the Standards be amended so that the concession in relation to the availability of unisex accessible toilets on levels where there is more than one bank of toilets be limited so that the unisex accessible toilet is not more than 50m away.

### **17.2 'Changing Places' facilities in recreational facilities**

DDLC submits that Class 9a buildings, as well as amenities associated with recreational facilities, should be required to provide at least one 'Changing Places' facility.<sup>8</sup>

The provision of Changing Places facilities in Class 9a buildings and recreational facilities would enhance community participation of people with severe and multiple disabilities.

#### **Recommendation 20:**

That the Standards be amended to provide that Class 9a buildings and amenities associated with recreation facilities must have at least one 'Changing Places' facility.

### **17.3 Caravan en-suite facilities**

People with disabilities are more likely to require the use of en-suite facilities. Therefore, DDLC is concerned about the exemption contained in Part F2.4 relating to caravan sites. If there is an exemption for individual caravan sites from providing en-suite facilities, this will significantly reduce the ability of people with disability and their families to use caravan parks.

DDLC submits that there should be some en-suite facilities provided to allow people with disability to access and utilise these sites.

#### **Recommendation 21:**

That Part F2.4 be amended to ensure that at least some en-suite facilities associated with individual caravan sites are required to be accessible for people with a disability.

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## **18 Visual egress alarms**

The draft standards do not provide for visual egress alarms to alert deaf people of a fire or other emergency.

DDLC submits that the Standards be amended to ensure that there is a provision for visual egress alarms in new or significantly renovated buildings.

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<sup>8</sup> Changing Places facilities are adult changing facilities and should accord with the minimum standards as set out in Annexure 1

**Recommendation 22:**

That the Standards be amended to ensure that there is a provision for visual egress alarms in new or significantly renovated buildings.

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**19 The need to clarify the extent of protection provided by compliance with the Standards**

Section 34 of the *Disability Discrimination Act 1992 (DDA)* provides that if a person acts in accordance with a disability standard then the existing unlawful discrimination provisions do not apply to the person's act. DDLC is concerned that building developers, managers and certifiers may rely on section 34 in combination with the Standards to excuse a broader range of conduct than was intended. In particular, if a matter is not explicitly addressed by the standards, respondents may argue that they are still acting in accordance with the Standards and therefore section 34 of the DDA means that the general unlawful discrimination provisions do not apply to the discriminatory act. This experience has been gleaned from the operation of the *Disability Standards for Public Transport 2002 (The Transport Standards)* and the *Disability Standards for Education 2005*.

For example, DDLC recently ran a case concerning the unavailability of concession fares for companions of people with disability on trains. DDLC was concerned that people with disability who are required to travel with a companion due to their disability were required to pay the full fare of their companion. The Transport Standards only cursorily deal with the issue of fares, and do not speak to the issue of concession fares for companions of people with disability. Therefore it was open to the Respondents in this case to argue that they were acting in accordance with the Transport Standards and that their actions could not be dealt with by the remaining provisions of the DDA. In order to prevent this situation from arising with the *Disability (Access to Premises – Buildings Standards)*, DDLC submits that the Standards be amended to make it clear that where a matter is not dealt with by the Standards, any act in relation to the matter is subject to the unlawful discrimination provisions of the DDA.

Further, in order to assist in the interpretation of whether a matter is dealt with by the standards, statements of objectives and values of the Standards should be explicit in the Standards.

**Recommendation 23:**

That the Standards should be amended to make clear that, where a matter is not dealt with by the Standards, any act in relation to that matter is subject to the unlawful discrimination provisions of the DDA.

**Recommendation 24:**

Statements of the values embodied by the Standards, and the objectives sought to be achieved, should be included more explicitly in the Standards. These statements of principle should be developed through consultation with relevant stakeholders.



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## 20 Monitoring

One implication of the individual complaints based model, as provided by the DDA, means that the onus continues to be on an already disadvantaged individual to enforce the breach of the Standards. Predominately for this reason, breaches of both the *Disability Standards for Public Transport 2002* and the *Disability Standards for Education 2005* have not yet been heard in a Court.<sup>9</sup>

The result is that breaches of the Disability Standards rarely result in a respondent ameliorating the breach, rather it is usually resolved by the payment of compensation to the person with disability. This occurs for the following reasons:

- In Australia, alternative dispute resolution in the form of conciliation, is employed at first instance for discrimination complaints. The advantage of alternative dispute resolution is it is a relatively informal process and minimizes the expense to the parties. However, the conciliation process can disadvantage the complainant as there is often a power imbalance between them and the respondent, which is almost always a company or a government agency.
- Even when a complaint is resolved at conciliation, the settlement is only binding between the parties to the complaint. This means that if the respondent fails to fulfill their obligations under the settlement agreement, only the complainant who is party to that settlement agreement can enforce the settlement. There is no enforcement agency and enforcement (usually through the Local Court) is not an easy process and therefore it rarely occurs.
- In general, discrimination law settlements are compensatory in nature only and the amount of compensation awarded tends to be comparatively low to that awarded in other areas of law. There is no punitive element and it is unlikely that the relatively small sum of damages will prevent further discriminatory practice. It is also rare for policy change to be part of the settlement or court finding. In circumstances where a settlement provides for systemic outcomes, such as training or policy changes, conciliated agreements are often confidential which means the outcome cannot be used by other people as precedent to seek improvements more generally. Court decisions are also often applicable to the facts of the case only.
- In circumstances where the conciliation has failed, the complainant may apply to have the allegations heard and determined by the Federal Court or the Federal Magistrates Court. Pursuing action at this level presents financial obstacles for the individual complainant which further disadvantage people with disability, who have higher levels of unemployment and are more likely to be in a position of economic disadvantage.<sup>10</sup> Should the complainant be unsuccessful they will be ordered to pay the legal costs of the respondent. This increases the pressure on the complainant to seek a mediated

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<sup>9</sup> Please note that *Corcoran v Virgin Blue Airlines Pty Ltd* is currently before the Federal Court and is the first case to consider the Transport Standards. For information about the facts of this case, please see *Corcoran v Virgin Blue Airlines Pty Ltd* [2008] FCA 864, which is a decision in this case in relation to costs capping.

<sup>10</sup> Human Rights and Equal Opportunity Commission, *'Final report of the National Inquiry into Employment and Disability'* February 2006

settlement and reduces the chance that the matter will reach hearing and a judicial decision. This is escalated by the fact that the viability of the case rests not only on proving discrimination but also that measures required to adhere to the Standards would not cause unjustifiable hardship. In addition to the financial costs, barriers to physical access, the psychological costs and the time commitment, more often than not deter complainants, and in particular complainants with disabilities from pursuing litigation. The result is that there is a dearth of decided cases and corresponding expertise amongst the judiciary in this area of law, making it even more difficult for practitioners to provide advice on prospects of success to complainants. This again leads to more cases settling and fewer systemic outcomes.

Given the highly technical nature of the Access to Premises Standards and level of expert knowledge required to understand their operation in conjunction with the Australian Standards, we suspect even fewer individuals will bring complaints regarding breaches of the Access to Premises Standards, compared to the other Disability Standards.

#### **AHRC power to bring complaints**

In order to address the above issues, it is DDLC'S position that the AHRC Disability Discrimination Commissioner, be granted the power to investigate breaches of the Standards, and bring complaints, where there are cases of broader systemic non-compliance, without requiring an individual complainant. This recommendation was made by the Allen Consulting Group in its Draft Report reviewing the Standards for Accessible Public Transport.<sup>11</sup> It goes without saying that the Australian Human Rights Commission will need to be adequately resourced to do this.

#### **Recommendation 25:**

That the Disability Discrimination Commissioner be granted the power to investigate breaches of the Standards, and bring complaints in relation to breaches of the standards, where there are cases of broader systemic non-compliance, without requiring an individual complainant.

#### **Advocacy organisation's power to bring complaints**

In order to ensure effective monitoring of the Standards, it is also imperative that advocacy organisations are granted standing to initiate complaints in cases involving breaches of the Standards. Currently, there are barriers to these organisations doing this.

In *Access For All (Harvey Bay) v Harvey Bay City Council*, it was found that the Applicant, an advocacy organisation, did not have standing to commence proceedings in the Federal Court, because it was not itself affected by the relevant conduct, but only had an intellectual interest in the proceeding.<sup>12</sup>

This decision came out of a conflict between the representative complaints provisions in the *Human Rights and Equal Opportunity Act 1986 (HREOC Act)* and those in the *Federal Court of*

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<sup>11</sup> Allen Consulting Group (2008), *Draft Report Reviewing the Standards for Accessible Public Transport* at p165. (Note the final report has not yet been released.)

<sup>12</sup> [2007] FCA 615

*Australia Act 1976.*

Under section 46P(c) of the HREOC Act a complaint can be made 'by a person or trade union on behalf of one or more other persons aggrieved by the alleged unlawful discrimination.' However, under section 46PO(1) in order to proceed beyond the AHRC to the Federal Court or the Federal Magistrates Court with such a complaint only an individual 'who was an affected person in relation to the complaint' may make a complaint. In order to proceed as a representative complaint, a member of the representative class must commence the proceedings and be able to name at least seven members of the class who consent.

The result is that systemic issues cannot be dealt with through advocacy organisations representing the class of people affected, unless seven members of a class can be identified, or unless it can prove that it itself is affected by the conduct, which, given the barriers noted above, happens very rarely. Advocacy organisations are now reluctant to bring complaints to challenge instances of systemic discrimination due to uncertainty as to whether the organisation will be found to have standing to do so if the matter proceeds beyond the AHRC level. If complaints are not brought in relation to the Standards, they will not be effective in eliminating the barriers faced by people with disability in gaining access to premises.

Amending the *Federal Court of Australia Act 1976* to make the standing provisions consistent with those in the *HREOC Act* would address this issue.

Further, in light of the technical nature of the Standards, it is recommended that additional funding be granted to disability legal centres and advocacy organisations to enable them to access experts to advise them on the technical aspects of the Standards.

**Recommendation 26:**

That disability advocacy organisations be guaranteed standing to initiate complaints and intervene in cases involving breaches of the Standards.

**Data Collection**

DDLC submits that it should be mandatory that building certifiers, building developers and building managers collect and make publically available data demonstrating their compliance with the Standards. This will both encourage compliance with the standards and allow information to be gathered for the five year review which will assist in measuring the effectiveness of the Standards. Furthermore, data collection of this nature is necessary to fulfil Australia's obligations under Article 31 of CRPD, which provides that:

*States Parties undertake to collect appropriate information, including statistical and research data, to enable them to formulate and implement policies to give effect to the present Convention.*

**Recommendation 27:**

That data be collected to monitor compliance with the Standards during the first five years of the operation of the Standards.

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## **Conclusion**

DDLC submits that the proposed *Disability (Access to Premises – Buildings) Standards 2009* will be an important addition to the suite of Standards created under the *Disability Discrimination Act 1992*.

We hope you give our recommended changes careful consideration. Of particular concern are recommendations 3, 6, 7, 23, 24 and 25 and we recommend that these changes be implemented urgently. That being said, DDLC again reiterates the need for the Bill to be passed quickly by Parliament.

We look forward to the opportunity to participate further in the Inquiry into the *Disability (Access to Premises – Buildings) Standards 2009*.

Yours Sincerely,

**Fiona Given**  
**Policy Officer, DDLC**

**Joanna Shulman**  
**Principal Solicitor, DDLC**

## Annexure 1

### Changing Places facility – Minimum Standards

Equipment needed in a Changing Places toilet	Consortium recommendation	Minimum requirement to be acceptable as a Changing Places toilet
A height adjustable, adult-sized changing bench	The length of the changing bench should be 1.8m or greater The bench must be height-adjustable The bench can be either free-standing or wall mounted.	The changing bench must be a minimum length of 1.5m The bench must be height-adjustable The bench can be either free-standing or wall mounted.
A tracking hoist system, or mobile hoist	A tracking hoist system is preferable	A mobile hoist is acceptable
Adequate space in the changing area for the disabled person and up to two carers	The space should exceed 3.5m x 2m or the equivalent floor space 7m <sup>2</sup> . Providers should allocate as much space as possible.	The minimum size acceptable is approximately 3.5m x 2m or the equivalent floor space 7m <sup>2</sup>
A centrally placed toilet with room either side for the carers	A peninsular toilet should be provided (note that the Changing Places toilet should be provided in addition to a standard accessible toilet)	A corner toilet is acceptable where a tracking hoist is provided and the tracking covers the toilet
A screen or curtain to allow the disabled person and carer some privacy	A screen or curtain must be provided	
Wide tear off paper roll to cover the bench	Wide tear off paper roll must be provided	
A large waste bin for disposable pads	A large waste bin for disposable pads must be provided	
A non-slip floor	A non-slip floor should be provided	A non-slip floor should be provided