

## Implementation and review

- 7.1 Implementation and administration of the Premises Standards will be crucial in ensuring the Standards' success in providing equitable and dignified access to people with a disability. This chapter will consider possible strategies for enforcement of the Premises Standards and whether a transitional period for building approvals is required. This chapter also considers the Model Process to Administer Building Access for People with a Disability, which is intended to ensure the consistent application of the Premises Standards in the States and Territories. Finally, this chapter will consider the proposed five year review.

### Transitional arrangement

- 7.2 Once finalised, it is intended that the Premises Standards will be tabled in Parliament. If no amendments are made in either the House of Representatives or the Senate within 15 sitting days of tabling, the Premises Standards would take effect from the day immediately after that 15<sup>th</sup> sitting day.<sup>1</sup> As discussed in Chapter 2, the Access Code of the Premises Standards would be reflected in new access provisions of the Building Code. The adoption date for changes to the Building Code would depend on the timing of the tabling of the Premises Standards.
- 7.3 The timing of the commencement of the Premises Standards, and in particular, the Access Code was raised as an issue by the Housing

---

1 Section 31(4), *Disability Discrimination Act 1992* (Cth). Where the days differ in respect of each House, the Premises Standards will take effect from the day immediately after the latter of those 15 sitting days.

Industry Association, who were concerned that certain development applications currently in the process of obtaining approval would have to start the approval process again to ensure they complied with the Premises Standards.

- 7.4 This problem is a result of the time it takes to receive development approval. For Class 2 to Class 9 buildings, the Housing Industry Association estimated that the process of obtaining development consent takes 12 months and can sometimes take up to 18 months or two years.<sup>2</sup>

Unfortunately, planning approvals are no longer sketches. They have shifted quite considerably, particularly in states like New South Wales and Queensland. When you are talking about a building that is beyond a home that has two, three, four or 70 stories in it, you do not get planning approvals on sketches.<sup>3</sup>

- 7.5 Given the length of time between application and approval, and the detail required for development approval, the Housing Industry Association proposed that a transitional period of 12 months be included in the Premises Standards.<sup>4</sup> Under the proposal, where development approval has already been obtained, a 12 month period would be provided for building applications to voluntarily comply with the Premises Standards.<sup>5</sup>

## Committee comment

- 7.6 The Committee acknowledges that transitional periods have certain advantages for the building industry and notes the evidence that Victoria and Western Australia both have some type of transitional period for building approvals.<sup>6</sup> However, the Premises Standards is not a new proposal. It has taken over eight years for a draft version of the Standards to be tabled in Parliament and it will no doubt take more time before a final version is introduced. Peak building groups have been involved in negotiations through out this period and should be aware of the possibility of new obligations. Indeed, a number of submissions noted that prudent developers have been complying with the provisions since 2004.<sup>7</sup>

---

2 Ms Kristin Tomkins, Housing Industry Association, *Transcript of Evidence*, 19 March 2009, p. 5.

3 Ms Kristin Tomkins, Housing Industry Association, *Transcript of Evidence*, 19 March 2009, p. 6.

4 Housing Industry Association, *Submission 48*, pp. 4-5; see also Ms Kristin Tomkins, *Transcript of Evidence*, 19 March 2009, p. 5.

5 Housing Industry Association, *Submission 48*, pp. 4-5; see also Ms Kristin Tomkins, *Transcript of Evidence*, 19 March 2009, p. 5.

6 Ms Kristin Tomkins, Housing Industry Association, *Transcript of Evidence*, 19 March 2009, p. 6.

7 John Moxon, Physical Disability Australia, *Transcript of Evidence*, 25 March 2009, p. 17. See also the Disability Council NSW, *Submission 58*, at p. 20 note that LANDCOM have released a

- 7.7 As well, the Regulation Impact Statement acknowledges that the Premises Standards simply codify the existing obligation not to discriminate:
- Thus, in a conceptual sense, neither the standard nor the equivalent amendment to the BCA can be regarded as creating new legal obligations beyond those currently imposed.<sup>8</sup>
- 7.8 Changes to the Building Code are made every year on 1 May. It is unlikely that the Premises Standards requirements will be incorporated into the Building Code before that date and, in effect, this may provide a period in which builders would be able to ensure that their development applications comply with the requirements of the Premises Standards.
- 7.9 Given the protracted history of the Premises Standards, the Committee considers it would be undesirable to delay the introduction of the Premises Standards any further. Consequently, the Committee does not support any additional transition period for the implementation of the Standards.

## The Protocol

- 7.10 A Model Process to Administer Building Access for People with a Disability was tabled, along with a number of other documents, as part of the Committee's terms of reference. The Committee has been asked to comment specifically on the appropriateness and effectiveness of the proposed model process, or 'the Protocol' as it also known.
- 7.11 The Protocol is intended to ensure that the Building Code is applied consistently with the Disability Discrimination Act and the Premises Standards to minimise the possibility that a successful complaint may be brought against a building owner.
- 7.12 State and Territory authorities are not obliged to adopt the Protocol, however Article 10 of the Protocol points out that the 'level of certainty

---

series of design guidelines and have committed to ensuring that 25 per cent of housing in new land release areas will be designed and build to incorporate key accessibility elements; see also Australian Human Rights Commission, *Submission 57*, p. 35; Mr Mark Relf, *Submission 90*, p. 5; Australian Network of Universal Housing Design, *Submission 95*, p. 11.

- 8 *Regulation Impact Statement: Proposal to Formulate Disability (Access to Premises – Buildings) Standards and Amend the Access Provisions of the Building Code of Australia (RIS2008-02)*, October 2008, p. 4. Hereafter 'Regulation Impact Statement 2008'. The Regulation Impact Statement 2008 is also *Exhibit 4* to the Committee's inquiry.

afforded by following this Protocol would only be available to those abiding by it.<sup>9</sup>

7.13 The Protocol has a number of stated purposes:

- provide for decisions to be made about access to premises in the course of the building approval process in an efficient and timely manner; and
- give the building industry and its practitioners confidence that when an approval is made, the requirements of the Premises Standards are intended to also be satisfied; and
- assist Administrations and Building Control Authorities to undertake an assessment of Alternative Solutions in a manner that is nationally consistent; and
- give people with a disability confidence that the building approval systems of the States and Territories address the provision of access to and within buildings for people with disability; and
- assist the Australian Government and the States and Territories in fostering an efficient and competitive building industry that is responsive to community needs and the objects of the Premises Standards.<sup>10</sup>

## Scope of the Protocol

7.14 The Protocol would apply where an alternative solution<sup>11</sup> is proposed, or where there are appeals against an interpretation of the Building Code; where modifications or exceptions to the full application of the Building Code are sought; and to existing buildings where the Building Control Authority<sup>12</sup> is vested with discretion to require the upgrading of a building.<sup>13</sup>

7.15 Developers or certifiers are not obliged to take issues to Access Panels or to use the Protocol. A certifier or building approval authority may decide a proposed alternative solution is appropriate without reference to an Access Panel. However, Access Panels would be available to provide

---

9 Article 10(2), A Model Process to Administer Building Access for People with a Disability (hereafter 'the Protocol'). The Protocol is *Exhibit 5* to this inquiry,

10 Article 3, the Protocol. Some emphasis from the original text has been removed.

11 An approval authority may still issue an approval if it differs in whole or in part from deemed-to-satisfy provisions in the Building Code of Australia if it can be demonstrated that the design satisfies the relevant performance requirement.

12 The Building Control Authority means the person or body in the jurisdiction responsible for building approval of building solutions.

13 Article 1(1), the Protocol.

expert advice where a certifier or a building approval authority seeks advice about the suitability of a proposed alternative solution.

- 7.16 As discussed in Chapter 4, the Premises Standards contain an unjustifiable hardship exemption which provides that failure to comply with a requirement of the Premises Standards is not unlawful to the extent that doing so would cause unjustifiable hardship. In general, State and Territory building laws do not have an unjustifiable hardship exemption.<sup>14</sup> The Protocol sets out a process which State and Territory building control authorities may adopt to help them consider claims that full application of the Building Code may cause an unjustifiable hardship.
- 7.17 The Protocol envisages that Access Panels would be established by State and Territory administrations to give expert advice on access related matters within the scope of the Protocol as stated above.<sup>15</sup> However, decisions of Access Panels would be non-binding.<sup>16</sup> It would still be possible to lodge complaints under the Disability Discrimination Act to the Australian Human Rights Commission and ultimately, the federal courts.<sup>17</sup>

## The Protocol and States and Territories

- 7.18 The Protocol would be implemented by State and Territory governments. As the regulatory system is different in each state and territory, implementation of the Protocol, if adopted, would also vary. The Australian Building Codes Board told the Committee that:
- There are eight pieces of relevant legislation in each of the jurisdictions and there are different approaches... for example, Victoria – such a concept could easily be integrated within the existing administrative framework for the delivery of the building code. That is not the case in New South Wales, I understand.<sup>18</sup>
- 7.19 The New South Wales Government did not indicate clearly its support or opposition to the Protocol but noted that legislative and administrative change would be required to facilitate the introduction of the Protocol and

---

14 Preamble, p. 4, the Protocol.

15 Article 4, the Protocol.

16 Article 5, the Protocol.

17 Article 8, the Protocol.

18 Mr Ivan Donaldson, Australian Building Codes Board, *Transcript of Evidence*, 12 March 2009, p. 10.

recommended that the Premises Standards not be enacted until each jurisdiction had made these changes.<sup>19</sup>

- 7.20 The Victorian Government expressed its support for the Premises Standards more generally but did not specifically comment on the Protocol.<sup>20</sup>
- 7.21 The Tasmanian Government implied support for the Protocol, noting that the Protocol 'could be accommodated in Tasmania by the use of Tasmania's current Building Appeal Board with the addition of more access experts to the Board.'<sup>21</sup> Minor legislative amendments and additional resources would be required to allow the Board to act as an Access Panel.<sup>22</sup>
- 7.22 Similarly, the South Australian Government noted that Access Panels could be incorporated into the existing Building Rules Assessment Commission with some legislative amendment and membership changes.<sup>23</sup> The submission from the South Australian Government notes that the Building Rules Assessment Commission already provides 'expert advice on compliance with the performance requirements in the Building Code for specific building proposals.'<sup>24</sup>
- 7.23 In comparison to Tasmania and South Australia, the Australian Capital Territory (ACT) does not use a statutory process to ensure compliance with the Building Code.<sup>25</sup> Rather, a licensed building surveyor, when appointed as a building certifier, gives building approval.<sup>26</sup> The submission from the ACT Government noted that:
- The ACT has not had resources allocated to administer such systems or processes, and therefore would prefer complete discretion to decide if or not it adopted such a system or process.<sup>27</sup>
- 7.24 The ACT Government also pointed out that the 'system of redress through certifiers had not produced situations in the ACT that would warrant the adoption of the protocol.'<sup>28</sup>
- 

19 New South Wales Government, *Submission 141*, p. 15.

20 Victorian Government, *Submission 139*, p. 1.

21 Tasmanian Government, *Submission 131*, p. 11.

22 Tasmanian Government, *Submission 131*, p. 11.

23 South Australian Government, *Submission 7*, p. 1.

24 Victorian Government, *Submission 7*, p. 1.

25 ACT Minister for Planning, *Submission 46*, p. 9.

26 ACT Planning and Land Authority website, <[www.actpla.act.gov.au/topics/design\\_build/manage\\_construction/building\\_approval](http://www.actpla.act.gov.au/topics/design_build/manage_construction/building_approval)>, accessed 18 May 2009.

27 ACT Minister for Planning, *Submission 46*, p. 9.

7.25 There was some acknowledgement that while each jurisdiction has different ways of regulating building and development, the Protocol was intended to establish a 'core set of principles' and there would be some flexibility in establishment and implementation:

The states and territories would have to see how they could meld that into their existing building administration and appeals processes, and that would differ between the states.<sup>29</sup>

7.26 Mr Ivan Donaldson from the Australian Building Codes Board told the Committee that he sees the Protocol as providing a necessary interim measure to assist in the implementation of the Premises Standards:

...there is this awareness-education process that is going to need to follow the introduction of the [Premises Standards]...certifiers will need some support during that period. That is the way I see these access panels and the protocol operating in the early years. But, in time, it would simply be part of the normal process of getting a building approved.<sup>30</sup>

7.27 The Australian Human Rights Commission pointed out that the main purposes of the Protocol is to provide certainty:

...the whole point of the administrative protocol is to provide the building industry with some comfort and some surety that, when faced with legitimate questions about alternative solutions or full application of the [Building Code], they can make decisions which reflect the very same decisions that would be made in the context of a [Disability Discrimination Act] complaint of noncompliance with the premises standards.<sup>31</sup>

## Committee comment

7.28 The Committee notes that the purpose of the Protocol is to assist in the implementation of the Premises Standards by providing assistance to building certifiers and greater certainty to developers during the implementation of the Premises Standards and the Building Code.

---

28 ACT Minister for Planning, *Submission 46*, p. 9.

29 Mr Detlef Jumpertz, Department of Innovation, Industry, Science and Research, *Transcript of Evidence*, 12 March 2009, p. 16.

30 Mr Ivan Donaldson, Australian Building Codes Board, *Transcript of Evidence*, 12 March 2009, p. 17.

31 Mr Michael Small, Australian Human Rights Commission, *Transcript of Evidence*, 25 March 2009, p. 36.

- 7.29 The Committee supports the use of the Protocol in principle but notes that its benefits would only be available in those jurisdictions where it is adopted. It is appropriate that state and territory governments would decide whether or not to adopt the Protocol. The Committee suggests that further consultation with state and territory governments would be worthwhile to ensure that adoption of the Protocol is as extensive as possible.
- 7.30 Finally, the Committee does not support the recommendation of the NSW Government that the Premises Standards should not be enacted until after legislative and administrative arrangements are finalised for the implementation of the Protocol. This would create an unnecessary and potentially indefinite delay to the introduction of the Premises Standards.

## Access Panels

- 7.31 Access Panels would be established by the Protocol to assess and endorse building upgrade plans,<sup>32</sup> alternative solutions,<sup>33</sup> requests for modifications or exceptions to the full application of the Building Code in relation to new work on existing buildings and, where required, hear appeals against decisions of the building control authority.<sup>34</sup>
- 7.32 Annex 1 of the Protocol states that the body empowered under State or Territory law to rule on other building regulatory matters may also act as the Access Panel for access related matters, provided it is duly authorised and contains persons with the appropriate expertise.<sup>35</sup>
- 7.33 As noted above, the ACT Government indicated that it is unlikely it would adopt the Protocol or establish Access Panels.<sup>36</sup> However, most submissions supported the establishment of Access Panels:<sup>37</sup>

---

32 Clause 1.5, Annex 1, the Protocol states that:

Building upgrade plans may propose an interim solution that is outside the scope of building regulations. An example would be to provide alternative building entrance arrangements, with appropriate signage and staff to provide direction, as an interim measure until such time as all entrances required to be accessible can be provided. If such interim arrangements are not honoured, the recommendation made by the Access Panel using this Protocol would no longer be applicable and a subsequent complaint under the DDA may be successful.

33 As mentioned in Chapter 2 of this report, an approval authority may still issue an approval if it differs in whole or in part from deemed-to-satisfy provisions described in the Building Code if it can be demonstrated that the design complies with the relevant performance requirement.

34 Article 2(1)(b), the Protocol.

35 Clause 1.3(1) Annex 1, the Protocol.

36 ACT Minister of Planning, *Submission 46*, p. 9.



At present, no Access Panel or equivalent body exists in NSW, although we understand that comparable agencies do operate in other jurisdictions. The introduction of this sort of expert forum would be most helpful, provided it can be adequately resourced.<sup>38</sup>

- 7.34 Representatives from the Department of Innovation, Industry, Science and Research told the Committee that the purpose of Access Panels is to provide certainty and flexibility within building approvals processes:

Having got a ruling on a particular alternative solution from an access panel, they also want to be reasonably confident, in implementing that solution, that it will have some certainty and that it will not be subject to unreasonable challenge. So we have attempted to provide as much flexibility for people to make sensible arrangements, especially in relation to building upgrades; to have a properly constituted expert body that can help provide that advice; and to provide as much certainty as possible from the decisions of a panel, but recognising that we cannot ultimately usurp the power of the courts.<sup>39</sup>

## Committee comment

- 7.35 The Committee supports the use of Access Panels as an appropriate means of ensuring that the Building Code is applied consistently with the Disability Discrimination Act and the Premises Standards. The Committee acknowledges and supports the flexible approach provided by the Protocol which allows the state or territory building approval authority to also act as the Access Panel for access related matters, provided it is duly authorised and contains persons with the appropriate expertise.

## Membership of Access Panels

- 7.36 The Protocol provides that at least one *person competent in access* would sit on an Access Panel and where the Access Panel consists of more than 3 persons, at least one-third of the Panel must be represented by *persons competent in access*.<sup>40</sup> The Annex to the Protocol also provides that

---

37 See for instance: Tasmanian Government, *Submission 131*, p. 11; South Australian Government, *Submission 7*, p. 1.

38 Armidale Dumaresq Council, *Submission 15*, p. 4.

39 Dr Michael Green, Department of Innovation, Industry, Science and Research, *Transcript of Evidence*, 12 March 2009, p. 17.

40 A *person competent in access* means a person recognised by the State or Territory Administration as having the necessary qualifications and experience in access matters

‘members must have expertise relevant to the issues (eg lifts, sensory or mobility aspects of a building).<sup>41</sup>

7.37 Issues were raised in submissions relating to the composition of Access Panels:

We are concerned about the *make up of access panels* and who will be seen as the ‘access expert’ and how their advice will be taken. Will the access expert be the lone voice on the panel struggling to get the concepts of ‘equity’, ‘independence’ and ‘dignity’ heard in a positive way that results in improvements for people with disabilities and not further concessions against access?<sup>42</sup>

7.38 In contrast, the Property Council of Australia proposed that only one member of an Access Panel should be a ‘person competent in access’ even if the size of the panel increases.<sup>43</sup>

7.39 The Australian Human Rights Commission favoured a balanced approach:

We think the access panel’s representation should be balanced. There needs to be people with knowledge of disability access as well as people with industry experience and independent chairing. That is the standard approach for any panel.<sup>44</sup>

7.40 The Government of South Australia proposed that the Access Panel’s members should depend on the circumstances of the particular matter:

Members must have expertise relevant to the issues (eg lifts, sensory or mobility aspects of a building, and in the case of a heritage building a Heritage Conservation Architect should be also included in the panel).<sup>45</sup>

## Committee comment

7.41 The Committee concludes that membership of Access Panels should be balanced and where appropriate, members should have relevant expertise. The Committee considers the formula provided in the Protocol to be

---

appropriate to be part of, and provide advice to, an Access Panel: Article 2(1)(o) of the Protocol.

41 Clause 1.3(2) Annex 1 of the Protocol.

42 HC Harrison Consultants, *Submission 42*, p. 4.

43 Property Council of Australia, *Submission 84*, p. 8.

44 Commissioner Graeme Innes, Australian Human Rights Commission, *Transcript of Evidence*, 25 March 2009, p. 35.

45 Government of South Australia, *Submission 33*, p. 6.

appropriate, however, as there appear to be sensitivities with regard to the membership of Access Panels, consideration should be given to clarifying the membership of Access Panels in the 'Guidance Advice' included at Annex 1 to the Protocol.

## Decisions of Access Panels

7.42 Access Panels would have limited scope to make recommendations. Specifically, they would be able to make recommendations on access related matters associated with the construction of new buildings, building work on existing buildings, and change of use to existing buildings where an alternative solution is proposed; or where an unjustifiable hardship exemption is sought.<sup>46</sup>

7.43 A number of submissions from both the building industry and the disability sector argue that decisions of Access Panels, particularly with regard to unjustifiable hardship, need to be binding if they are to provide certainty.<sup>47</sup> The Housing Industry Association argued that:

It is also essential that the proposed Access Panels, if introduced, are sufficiently authorised and recognised by legislation, either in the Premises Standard or the [Disability Discrimination Act], to ensure that a determination of [unjustifiable hardship] is binding for the building owner.<sup>48</sup>

7.44 The Cairns Community Legal Centre agreed on this matter:

We are of the opinion that constituting a statutory body which only *assists* State administrations and building control authorities by making *recommendations* **will in no way ensure compliance** with the Premises Standards (and BCA) and thus the [Disability Discrimination Act].<sup>49</sup>

7.45 Representatives from the New South Wales Government pointed out that this is a widespread concern:

When you read the preamble to the protocol, it tends to suggest that the only body that can really determine unjustifiable hardship is the court, based on a complaint. So it is almost after the event. A lot of people are struggling and trying to come to terms with how you are then going to be able to adjudicate on unjustifiable

---

46 Article 5(1), the Protocol.

47 Master Builders Association, *Submission 50*, p. 17.

48 Housing Industry Association, *Submission 48*, pp. 5–6.

49 Cairns Community Legal Centre, *Submission 93*, p. 18, original emphasis.

hardship as part of the building approval process with any great degree of confidence.<sup>50</sup>

- 7.46 However, providing Access Panels with the authority to make binding decisions would not just provide certainty, it may also have unintended consequences. The Australian Human Rights Commission pointed out that making the decisions of Access Panel binding would exclude the capacity of people to lodge complaints about Access Panels under the Disability Discrimination Act.<sup>51</sup>
- 7.47 The other, arguably more serious, consequence is that giving Access Panels the power to make binding decisions would effectively fetter the jurisdiction of the courts. At present, complaints of unjustifiable hardship are decided by the Federal Court. This is reiterated in the Guidelines to the Premises Standards, which states:

There is ... no mechanism in the [Disability Discrimination Act] or the Premises Standards for anyone to give prior approval for non-compliance with any part of the Premises Standards on the grounds of unjustifiable hardship. Decisions about unjustifiable hardship can only be made by a Court following an actual complaint.<sup>52</sup>

## Committee comment

- 7.48 The Committee understands the need for certainty, particularly in relation to claims of unjustifiable hardship. It would appear that the intention of the Protocol and the establishment of Access Panels was to provide as much as certainty as possible within the existing framework.
- 7.49 However, it is not the intention of the Protocol to allow Access Panels to make binding decisions and nor should it be. The Federal Court has the appropriate standing and authority to make these kinds of determinations. Given enough time, a body of case law will inevitably develop to provide guidance on unjustifiable hardship. The Committee concludes that the decisions of Access Panel should not be binding.

---

50 Mr Stephen Durnford, NSW Department of Planning, *Transcript of Evidence*, 25 March 2009, p. 96.

51 Commissioner Graeme Innes, Australian Human Rights Commission, *Transcript of Evidence*, 25 March 2009, p. 35.

52 Part 5.1(3), Disability (Access to Premises – Buildings) Standards Guidelines 2009. The Guidelines are *Exhibit 3* to the Committee's inquiry.

## Enforcement and review

### Enforcement

- 7.50 The Premises Standards is a significant shift away from a complaints-based approach towards a compliance based framework. The incorporation of the Access Code into the Building Code establishes the mechanism of compliance and State and Territory building approval mechanisms would provide a level of enforcement.
- 7.51 Disability discrimination complaints can still be made where a building has not complied with the provisions of the Premises Standards. However, it is clear from the experience of the Transport Standards, and the Disability Discrimination Act more generally, that relying on individual complaints is not an effective means of enforcement.<sup>53</sup> Success would therefore be substantially reliant on the ability of State and Territory building approval authorities to enforce compliance with the Premises Standards.
- 7.52 The Public Interest Advocacy Centre pointed out a number of reasons why enforcement of the Premises Standards might be difficult even after the shift towards a compliance-based approach: the highly technical nature of the Premises Standards; the untested nature of the requirements for building certifiers, developers and managers; and, the sometimes unreliable building certification process in ensuring compliance with existing access requirements.<sup>54</sup> With regard to this last point, the Public Interest Advocacy Centre's submission points to the Australian Human Rights Commission's report, *The Good, the Bad and the Ugly*, which states that 'in far too many cases the requirements of even the current [Building Code] and its referenced technical specifications found in a number of Australian Standards are not being met.'<sup>55</sup>
- 7.53 To ensure that compliance with the Premises Standards is effectively monitored, the NSW Disability Discrimination Legal Centre recommended that the Disability Discrimination Commissioner:

---

53 NSW Disability Discrimination Legal Centre, *Submission 51*, p. 17. However, the submission goes on to note that *Corcoran v Virgin Blue Airlines Pty Ltd* is currently before the Federal Court.

54 Public Interest Advocacy Centre, *Submission 91*, p. 12.

55 Australian Human Rights Commission, *The Good, the Bad and the Ugly*, <[www.hreoc.gov.au/disability\\_rights/buildings/good.htm](http://www.hreoc.gov.au/disability_rights/buildings/good.htm)> , accessed 14 May 2009.

...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.<sup>56</sup>

7.54 The Public Interest Advocacy Centre suggested three mechanisms for monitoring compliance with the Premises Standards:

- Resourcing of the state and territory Auditors General to enable an annual audit of a sample of BCA-certified new buildings or building work;
- Establishment of a mechanism within state and territory building administrations to enable an appropriately broad sample compliance audit of certified new building and building work; and
- Requiring and resourcing local government development approval bodies to undertake a BCA compliance audit on a sample of certified new buildings and building work.<sup>57</sup>

7.55 The Public Interest Advocacy Centre suggests that the first option, requiring State and Territory Auditors General to audit compliance, is preferable.<sup>58</sup>

## Committee comment

7.56 The Committee notes the concern relating to the enforcement of the Transport Standards. However, the Committee also notes that the Premises Standards would not necessarily experience the same difficulties with compliance because of the incorporation of the Access Code into the Building Code. The Committee is confident that the building approvals process would assist in enforcing the provisions of the Premises Standards. Consequently, there would be less reliance on individual complaints for enforcement.

7.57 Although the incorporation of the Access Code into the Building Code would increase compliance with the Premises Standards, it does not mean that monitoring and enforcement are not necessary.

7.58 The Committee agrees that the Disability Discrimination Commissioner should be given the power to investigate non-compliance with the Premises Standards and to bring complaints where there is systemic

---

56 NSW Disability Discrimination Legal Centre, *Submission 51*, p. 18; This suggestion was also made in the draft report of the Review of the Transport Standards: Allen Consulting Group, *Review of the Disability Standards for Accessible Public Transport: Draft Report*, January 2008, p. 149. Available from < [www.ddatransportreview.com.au/?x=report](http://www.ddatransportreview.com.au/?x=report)>, accessed 12 May 2009.

57 Public Interest Advocacy Centre, *Submission 91*, p. 13.

58 Public Interest Advocacy Centre, *Submission 91*, p. 13.

non-compliance with the Premises Standards without requiring an individual complainant.

- 7.59 The Committee considers that an audit of a sample of Building Code certified new buildings or building work prior to the review would assist in identifying any areas of non-compliance. In addition, monitoring and enforcement of the Premises Standards should be assessed as part of the five year review with the view to determining the most appropriate and effective monitoring and enforcement mechanism given the rate of compliance with the Premises Standards over the first five years of operation.

### **Recommendation 17**

- 7.60 **The Committee recommends that the Disability Discrimination Commissioner be given the power to investigate non-compliance with the Premises Standards and to bring a complaint where there is non-compliance with the Premises Standards without requiring an individual complaint.**

### **Recommendation 18**

- 7.61 **The Committee recommends that an audit of a sample of new buildings or building work be conducted by the Australian Government prior to the review of the Premises Standards.**

## **Review**

- 7.62 Section 5.1 of the Standards provides that the Minister for Innovation, Industry, Science and Research, in consultation with the Attorney-General, is to review, five years after their commencement, the effectiveness of the Standards in achieving their objects.
- 7.63 The proposed review was evidently a matter important to submitters. Many submissions indicated that although the Premises Standards was not a perfect document, there should be no further delay in their

introduction.<sup>59</sup> It is expected that the review process would provide the opportunity to assess the effectiveness of the Premises Standards.

7.64 The Australian Human Rights Commission has made the point that the review process is particularly important given the highly technical nature of the Standards and the difficulty that many individuals would have in challenging non-compliance.<sup>60</sup>

7.65 Submissions have suggested that the review should:

- assess whether the natural building upgrade cycle in existing buildings had in fact triggered the requirement for the owner to upgrade the building to the Premises Standards;<sup>61</sup>
- assess whether the agreed compliance target for existing buildings had been met;<sup>62</sup>
- analyse the level of compliance with the Premises Standards and new Building Code of Australia, including compliance with deemed-to-satisfy technical solutions;<sup>63</sup>
- analyse the Alternative Solutions proposed to meet the performance requirements of the Premises Standards and Building Code of Australia;<sup>64</sup>
- consider whether problems brought to Access Panels reflect interpretive problems or identify particularly onerous demands, particularly on existing building owners and operators.<sup>65</sup>

7.66 To achieve this data must be collected.<sup>66</sup> The NSW Disability Discrimination Legal Centre recommended that data must be collected by

---

59 See Rhonda Galbally, Victorian Disability Advisory Council, *Transcript of Evidence*, 30 March 2009, pp 53-54; Minister for Planning (ACT), *Submission 46*, p. 10; Australian Human Rights Commission, *Submission 57*; Office of the Anti-Discrimination Commissioner (TAS), *Submission 62*, p. 1; Public Interest Advocacy Centre, *Submission 91*, p. 10; Australian Institute of Building Surveyors, *Submission 97*, p. 11; NSW Disability Discrimination Legal Centre, *Submission 51*, p. 4.

60 Australian Human Rights Commission, *Submission 57*, p. 31.

61 Physical Disability Australia, *Submission 45*, p. 3; Australian Human Rights Commission, *Submission 57*, p. 28; Disability Council NSW, *Submission 58*, pp. 24–25; People with Disabilities (ACT), *Submission 72*, p. 7.

62 Physical Disability Australia, *Submission 45*, p. 3.

63 Australian Human Rights Commission, *Submission 57*, p. 31.

64 Mr Michael Small, Australian Human Rights Commission, *Transcript of Evidence*, 7 April 2009, p. 271; see also Australian Human Rights Commission, *Submission 57*, p. 31.

65 Mr Michael Small, Australian Human Rights Commission, *Transcript of Evidence*, 7 April 2009, p. 27.



building certifiers, building developers and building managers demonstrating their compliance with the Premises Standards.<sup>67</sup> The data should be made publicly available.<sup>68</sup>

7.67 The Australian Human Rights Commission suggested that:

This data might be collected throughout the first five years of the Premises Standards by sample audits undertaken by building administrations or other appropriate bodies in partnership with professional associations and representatives of the disability community.

7.68 The Public Interest Advocacy Centre recommended that:

An appropriate body be established before or at the time the Draft Premises Standards come into effect to:

- (a) identify and collect the baseline data necessary to inform the five-year review;
- (b) determine key criteria for the five-year review; and
- (c) work with key stakeholders to ensure that data is collected and reported in standardised (and therefore comparable) form across jurisdictions.

7.69 The NSW Disability Discrimination Legal Centre also pointed out that data collection is consistent with Australia's obligations under the Convention on the Rights of Persons with Disabilities. Under section 31, States Parties are obliged to:

Undertake to collect appropriate information, including statistical data and research data, to enable them to formulate and implement policies to give effect to the present Convention.<sup>69</sup>

## Lessons learnt from the review of the Transport Standards

7.70 The Transport Standards review commenced after the Transport Standards had been operating for five years. It has now been seven years since the Transport Standards commenced and two years since the review

---

66 Public Interest Advocacy Centre, *Submission 91*, p. 18; Australian Human Rights Commission, *Submission 57*, p. 31; Mr Peter Simpson, *Submission 94*, p. 4; NSW Disability Discrimination Legal Centre, *Submission 51*, p. 19;

67 NSW Disability Discrimination Legal Centre, *Submission 51*, p. 19.

68 NSW Disability Discrimination Legal Centre, *Submission 51*, p. 19.

69 Section 31, *Convention on the Rights of Persons with Disabilities*.

process commenced and the report of the review is not finalised or publicly available.<sup>70</sup>

- 7.71 In addition to the delay, a number of submissions have pointed out that the deficient monitoring and compliance of the Transport Standards means that a proper assessment of its objectives is difficult:

This was particularly highlighted in the process of the five-year review of the Public Transport Standards, with the consultants identifying a lack of data available for review that could indicate whether or not there had been any significant improvements or otherwise in access to public transport over the five-year period.<sup>71</sup>

- 7.72 The Committee can learn valuable lessons from the current review of the Transport Standards. The recommendations made in this chapter are intended to avoid some of the difficulties experienced by the review of the Transport Standards and to establish an effective review process for the Premises Standards.

## Committee comment

- 7.73 The review of the Premises Standards serves both a practical and a symbolic purpose. The Committee agrees with the Australian Human Rights Commission's comments that:

We need to give confidence to the disability community that the standard is working for them. We need to allow the professions, through the review, to identify areas where they need to supplement training information and professional development for their professional members, because problems in implementation will come out. Finally, the benefit for industry is that they will, through that review process and monitoring, be able to identify areas where their concerns are shown to be correct. As a result, if they can justify that their concerns are correct, then some changes can be made.<sup>72</sup>

- 7.74 The Committee agrees that the Review must include certain requirements to be effective. The review should specify a commencement date and a completion date and should take no longer than 12 months. The review

---

70 A draft report is available on the Allen Consulting Group website: <[www.ddatransportreview.com.au](http://www.ddatransportreview.com.au)>

71 Public Interest Advocacy Centre, *Submission 91*, p. 11.

72 Mr Michael Small, Australian Human Rights Commission, *Transcript of Evidence*, 7 April 2009, p. 27.

should be completed within five years of the commencement of the Premises Standards.

- 7.75 Prior to the commencement of the Premises Standards, the Government should identify what data will be collected, how it will be collected and allocate sufficient resources to support this process prior to the commencement of the Premises Standards. Baseline data is required for an effective assessment of the Standards and collection of data should commence immediately. Data collection should be consistent across the jurisdictions.
- 7.76 The review should consider the extent to which existing buildings have been upgraded, the level of compliance with the Premises Standards and new Building Code, and provide an analysis of the Alternative Solutions proposed to meet the performance requirements of the Premises Standards and Building Code of Australia.<sup>73</sup>
- 7.77 In addition to monitoring and evaluating the requirements of the Premises Standards, consideration should be given to specific matters that are currently not addressed in the Premises Standards or where the Committee has identified that they should be reviewed. These areas are identified by the Committee through out the report. They are:
- The small building exemption: specifically, whether the cost involved in installing a lift is less than estimated in the RIS and subsequently, whether it would appropriate to remove the exemption altogether.
    - ⇒ If the small building exemption is maintained, whether the threshold should be changed from 200m.
  - The lessee concession: the review should consider the number of applications for new work submitted by lessees and whether building owners should take on the responsibility of providing access between the entrance and the new work.
  - 90<sup>th</sup> vs 80<sup>th</sup> percentile dimensions: new research should be completed on wheelchair dimensions for use by the review process. The review should consider the impact of the 90<sup>th</sup> percentile dimensions on the building sector and whether the 90<sup>th</sup> percentile dimensions should be adopted by the Premises Standards as a whole.
  - Locking off lifts: if the Premises Standards continue to allow the use of lifts controlled by constant pressure devices and which require locking

---

73 Mr Michael Small, Australian Human Rights Commission, *Transcript of Evidence*, 7 April 2009, p. 271; see also Australian Human Rights Commission, *Submission 57*, p. 31.

off, these provisions should be re-examined at the time of the five year review to determine whether they continue to be necessary.

- Accessible toilets: the review should consider whether the requirements for accessible sanitary facilities proposed by the Premises Standards are adequate, particularly with regard to construction costs, distance between facilities and access where there are multiple tenancies on a single storey.
- Swimming pools: the review should consider whether the 40 metre threshold for accessibility has exempted an unjustifiably large number of swimming pools. The cost-effectiveness of providing access to small swimming pools should also be reviewed.
- Accessible parking: the review should consider whether the accessible parking provisions of the Premises Standards are adequate.
- Class 1bs: the review should consider (1) how many Class 1b buildings were exempted from compliance by the four room threshold, and how many were not; and (2) whether the imposition of access requirements has had an effect on the conversion of existing buildings to Class 1b buildings as well as on the construction of new Class 1b accommodation.
- Wayfinding: the review should consider whether any further deemed-to-satisfy provisions for way finding can be incorporated into the Premises Standards.
- Emergency egress: the review should consider whether any further deemed-to-satisfy provisions for emergency egress can be incorporated into the Premises Standards.
- Public transport buildings: the review should assess the operation of the Premises Standards in conjunction with the Transport Standards.

**Recommendation 19**

7.78 The Committee recommends that:

- the Premises Standards provide commencement and completion dates for the review process;
- the completion date for the review be within five years of the commencement of the Premises Standards;
- the Premises Standards set out the issues to be considered by the review and that these issues include:
  - ⇒ the small building exemption;
  - ⇒ the lessee concession;
  - ⇒ 80<sup>th</sup> and 90<sup>th</sup> percentile wheelchair dimensions;
  - ⇒ locking off lifts;
  - ⇒ accessible toilets;
  - ⇒ swimming pools;
  - ⇒ accessible car parking;
  - ⇒ Class 1b buildings;
  - ⇒ wayfinding;
  - ⇒ emergency egress; and,
  - ⇒ public transport buildings;
- the Premises Standards set out the criteria by which effectiveness of the Standards is to be assessed;
- the Australian Government identify what data will be collected and how it will be collected in each jurisdiction during the first four years;
- baseline data be collected; and
- funding be provided for the review.

7.79 The Committee anticipates that the Premises Standards will be finalised and tabled in Parliament promptly. However, to ensure the momentum that has developed since the Federal election in 2007 is not lost, the Committee reserves the right to re-examine the Premises Standards in 12 months.

## Concluding comments

- 7.80 After 17 years, it is clear that many buildings are still not complying with their obligations under the Disability Discrimination Act to provide non-discriminatory access. This means that people with a disability continue to experience difficulty accessing buildings, and face social and economic disadvantage as a result, including decreased employment prospects and obstacles to participation in the broader community.
- 7.81 In contrast to the complaints based system established under the Disability Discrimination Act, which has largely failed to produce broad change in the built environment, the Premises Standards is a regulatory device of general application. Through incorporation of the Access Code into the Building Code, all new buildings and buildings undergoing significant upgrades, would be required to comply with the provisions of the Premises Standards.
- 7.82 Although there is still some way to go, the Committee supports the Premises Standards as a significant milestone on the path to equal access. The benefits of the Premises Standards would be widespread, immediate and real. The Committee also expects the Premises Standards to provide intangible benefits such as dignity, social inclusion and respect.
- 7.83 The Committee notes that underpinning this report and its recommendations are certain fundamental concepts, including dignity, equality, certainty and cost-effectiveness. The Committee is of the view that the Premises Standards would provide certainty to building owners, managers and designers about how they can design, construct and certify buildings in a way that meets the requirements of the Disability Discrimination Act. Equally, the Committee considers that the Premises Standards would greatly improve access to buildings for people with a disability, reducing both literal and figurative obstacles to participation in the social, economic, and political life of the community.
- 7.84 Where it has recommended change, the Committee has been careful to consider the cost-effectiveness of its recommendation, however, it is expected that more detailed estimations would be necessary following this report. The Committee supports a balanced approach to weighing up the costs and benefits, keeping in mind the difficulties involved in calculating the benefits for a device like the Premises Standards.
- 7.85 The Committee is acutely aware that the Premises Standards have a long history. It has taken many years to reach this point and the Premises Standards are still in draft form. The Committee is of the view that the

finalisation of the Premises Standards should be considered a priority. Where the Committee has recommended changes to the Premises Standards, it urges the Government to draft these amendments promptly so that finalised Premises Standards can be introduced to Parliament as soon as possible.

