



Committee Secretary
House of Representatives Standing Committee on
Legal and Constitutional Affairs
PO Box 6021
Parliament House
CANBERRA ACT 2600

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Dear Sir or Madam

Submission to the Draft Disability (Access to Premises – Buildings) Standards 2009 - Questions on Notice

The NSW Disability Discrimination Legal Centre (NSW DDLC) appeared at the House of Representatives Standing Committee Inquiry into Legal and Constitutional Affairs Public Hearing into the *Draft Disability (Access to Premises – Buildings) Standards 2009 (the Standards)* on 25 March 2009.

On that day we took six questions on notice and what follows is our response to those questions.

Are the Disability Standards for Public Transport 2002 (the Transport Standards) and the Disability Standards for Education 2005 (Education Standards) in the Key Performance Indicators for the Director Generals for Transport and Education?

Unfortunately, despite our best attempts, we have been unable to elicit responses from either the departments on these issues. A perusal of the websites of each department indicates to us that they are not key performance indicators.

Is there any data available in NSW on the effectiveness of the Transport Standards and Education Standards?

There is some available data on the effectiveness of the Transport Standards in NSW. For example, Table 3.2 in the Allen Consultancy Group's Report on the Review of the Disability Standards for Public Transport ('the Report') indicates that in NSW in 2008, 32% of CityRail stations were wheelchair accessible and 93% of CountryLink stations were wheelchair accessible.¹ However, the absence of base-line data from 2002 means that it was not possible to make a quantitative assessment

¹ Allen Consultancy Group, *Report on the Review of the Disability Standards for Public Transport* (2008), p30

of the impact of the effectiveness of the Standards. Instead, progress in certain areas of the Standards could only be gauged from individual reporting.² There were a number of problems associated with the collection of data, including a lack of consistency in the data reported across different regions of Australia, limitations in quantity and quality of data provided by the private sector and variations in the quality of data reported by different levels of government.³

What is the overseas experience of the 80th percentile compared to the 90th percentile?

We refer to the oral evidence of John Moxon and Mark Relf from Physical Disability Australia on 25 March 2009 and in particular their reference to the report: *International Best Practices in Universal Design: A Global Review*, March 2006, Canadian Human Rights Commission which indicates that Sweden, Ireland, Singapore, Mexico and some particular areas of Canada have moved, or are moving, to adopting the 90th percentile.

What sort of data and by whom should it be collected?

What is the role for organisations such as DDLC?

On further reflection, and through discussion with the Access to Premises Disability Sector Working Group, coordinated by the Australian Federation of Disability Organisations (AFDO), DDLC NSW is of the opinion that these are complex questions which need further analysis, particularly given the divergence between states in relation to the development process. In order to ensure that an adequate review and monitoring process is developed, DDLC NSW proposes that this question be considered by the Disability Access Group. This should not impede the passage of the Draft Standards, as the review and monitoring processes could be dealt with by way of Regulations.

² For example, at page 73 of the Report, the drafters note that there is limited data on the accessibility of information and signage as progress in this area is rarely reported

³ For example, it was stated in one submission that the difficulties of data collection currently confines NSW to reporting on vehicle accessibility only. Ibid at p. 80

Explain the operation of Local Government Development Plans?

Please see a memo on this topic at Attachment A. Please note, as stated at the public hearing, this is not an area of law within our expertise. However, we hope this provides the Committee with some background on this issue.

Is DDLC content with what is in the submission in relation to the exemptions outlined in section D3.4?

Upon further reflection, DDLC NSW wishes to revise its response in relation to Clause D3.4, which deals with the areas of the building that are not required to be accessible to a person with a disability.

We assume that the reason behind inclusion of D3.4 clauses (a)-(e) is to address safety concerns, and we note that this is a valid reason.

However, this blanket approach is based on blanket assumptions – that certain areas will be dangerous for all persons with any type of disability. It neglects to recognise diversity in the layout of these premises, ranges of ability in people with disability and in the adjustments that can be made for a person with a disability.

DDLC NSW advocates for the adoption of a purposive approach to exemptions. The question that should be asked is would that particular area pose a clear health and safety risk for people with disability. We note that the question of unjustifiable hardship is probably the most appropriate place to deal with such a question.

Recommendation- That Section D3.4 (a)-(e) be deleted and an additional circumstance , ‘that the particular area would pose a clear health and safety risk for people with disability’, be taken into account when considering whether compliance would impose concept an ‘unjustifiable hardship’ in Part 4.1 (3).

Yours Sincerely,

Fiona Given

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Attachment A

Local Government Development Plans in NSW

In NSW, local governments (by the authority of state legislation, *Local Government Act 1993 NSW*) are required to prepare a range of statutory planning documents that are legally binding with regards to building, planning and environment. At the local level, these include planning schemes, by-laws, codes and regulations within which the operational rules and criteria for development are set out. In regards to environmental planning (governed by the *Environmental Planning and Assessment Act 1989 NSW*), the NSW Department of Planning ensures that all environmental planning instruments, including those used for local environment plans, are legal documents that regulate land use and development⁴.

The powers of Local Government:

With regards to building, perhaps the most important role of local council is contained in the general requirement for building approval. Building work is not permitted to be undertaken without the prior approval of the relevant authority (local council). The regulations or local laws may make provision for building standards, specified bodies to be consulted or give approval in specified circumstances, exemptions and, more generally, such other things as are necessary or convenient for the operation of the principal Acts⁵.

In New South Wales activities requiring approval are set out in the legislation and in local policies created by councils: see *Local Government Act 1993* ss 68(1), 158-167 (local policies). Such approval will be evidenced by the grant of an approval, permit, development authority or licence, as the case may be⁶.

Planning and Environment

The plan-making system in NSW is set out in Part 3 of the *Environmental Planning and Assessment Act 1979*. The Act provides for members of the public to participate in planning decisions that will shape their community's future.

Local environmental plans prepared by councils, guide planning decisions for local government areas. Development control plans, prepared in accordance with the *Environmental Planning and Assessment Act*, are also used to help achieve the objectives of the local plan by providing specific, comprehensive

⁴ Legislation and Planning Instruments – Planning Instruments www.planning.nsw.gov.au

⁵ *Halsbury's Law of Australia* – “Local Government – General Powers: Building”

⁶ *Halsbury's Law of Australia* – “Local Government – General Powers: Building”

requirements for certain types of development or locations e.g. for urban design, and heritage precincts and properties⁷.

In all States, the objectives of the planning system are stated in the planning legislation.

The duties and powers of planning authorities are generally to implement the objectives of the relevant planning legislation.

The schemata of planning systems allows for forward planning — through legislative provisions for the creation of planning instruments, schemes and policies — and control of individual development — through legislative provisions controlling the issue of consents and approvals to proceed with development and provisions that may require the assessment of various aspects of the impact of a development⁸.

The Commonwealth, States, Territories and the Australian Local Government Association are parties to the Intergovernmental Agreement on the Environment 1992 (the 'Agreement'), which allocates responsibility for various aspects of the regulation of planning and land use between the three tiers of government. The Agreement makes provision for resource assessment, land use decisions and approval processes. Development and administration of the policy and legislative and administrative frameworks to determine the permissibility of land use, resource use or development proposals is the responsibility of the States and local government. A State may refer its land and resource use planning system and its development approval process to the Commonwealth for a preliminary view as to whether its system or process can be accredited as accommodating Commonwealth interests. Where the Commonwealth has accredited a system or process within a State, the Commonwealth will give full faith and credit to the results of that system or process when exercising Commonwealth responsibilities⁹.

In New South Wales, development on land may only be carried out in accordance with the provisions of any applicable environmental planning instrument. Failure to comply is an offence. An environmental planning instrument may provide that, for the purpose of enabling development to be carried out, a specified regulatory instrument must not apply to that development¹⁰. Contravention or failure to comply with an environmental

⁷ Legislation and Planning Instruments – Planning Instruments www.planning.nsw.gov.au

⁸ LexisNexis Sources – “Planning Law: Objectives of Planning System”

⁹ LexisNexis Sources – “Planning Law: Responsibility for Land Use Planning”

¹⁰ LexisNexis Sources – “Planning Law: Planning Schemes and Land Use”

planning instrument may be redressed through civil proceedings¹¹. Proceedings can be brought by the individual, on behalf of another or by a body corporate.¹²

¹¹ *Environment Planning and Assessment Act 1979 (NSW)*, s123(1)

¹² *Environment Planning and Assessment Act 1979 (NSW)*, s123(2)