



Submission No 93

Cairns Community Legal Centre Inc

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The Secretary
Committee on Legal and Constitutional Affairs
House of Representatives
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Parliament House
CANBERRA ACT 2600

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SUBMISSION ON DRAFT DISABILITY (ACCESS TO PREMISES – BUILDING) STANDARDS

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Introduction

Background to the Disability Discrimination Legal Service ('DDLS')

1. The DDLS is a legal service operated by the Cairns Community Legal Centre Inc ('CCLC'). The CCLC is a non-profit, community based organisation run by volunteers and paid workers with Commonwealth and State Government funding.
2. The DDLS provides legal advice and case work which relates to disability discrimination complaints under the *Disability Discrimination Act 1992* ('DDA') and the *Anti-Discrimination Act 1991* ('ADA').
3. Community education and awareness-raising activities as well as law reform work are also an important aspect of the DDLS.

Our interest in the review

4. Over the years we have received a number of enquiries and requests for assistance in matters relating to access issues. We also have a keen interest in contributing to making new and amending legislation meet the objects and purpose for which it was to be implemented.

Our submission

5. Our submission's main focus is the appropriateness and effectiveness of the Disability (Access to Premises – Buildings) Standards ('Premises Standards') in achieving their objects.
6. We are confident that there will be sufficient submissions from organisation representing people with disabilities to address whether individual aspects of Premises Standards will ensure access in particular circumstances. We only add our particular comments in this regard where it may add to others' submissions.
7. We also comment on the appropriateness and effectiveness of the proposed Model Process to Administer Building Access for People with Disability ('The Protocol') and suggest an alternative mechanism.

Legal view

8. Our approach is to take a legal view of how the subordinate legislation (which the Premises Standards is) would be used in furthering the objects of the DDA. Though some may describe our approach to the Premises Standards as pedantic, structure and wording used in legislation is vital to its proper interpretation in order to achieve the purpose for which it is enacted.
9. When ability to proceed with civil action can depend on the Courts' interpretation of whether the use of the word "and" in a particular provision is cumulative or selective, it is imperative that the legislation say exactly what the framers mean. Provisions should be included or left out deliberately, not through oversight.
10. Relying on a review (to be conducted **five years** after commencement of the new legislation) to address any deficiencies does not serve justice. The community is better served by drafting the legislation as accurately as possible in the first instance.

11. In reviewing the draft Premises Standards, we kept in mind that the need for the Premises Standards arose from the gap between the level of access provided for through building regulations, particularly the Building Code of Australia ('BCA'), and that which was required so as not to be liable for unlawful discrimination, pursuant to the DDA.
12. The BCA already has performance requirements and provisions relating to access for people with disabilities. Its provisions, though comprehensive, currently do not ensure full compliance with the DDA.
13. The imperative for change came from the lack of detail and certainty in disability discrimination legislation, not the building regulations.
14. If agreement could be reached on *extending* the current BCA provisions relating to access so that it became fully compliant with the DDA, Disability Standards could be formulated which reflected that expanded range of access provisions. Consistency would be achieved between the two documents, and compliance with the BCA (and therefore the Premises Standards) would guarantee compliance with the DDA, thereby achieving the objects of the DDA.
15. Compliance with the BCA (and therefore with the DDA) would remove grounds for complaints of disability discrimination in areas covered by the Premises Standards. Any areas not covered (for example by exemptions or commencement date of the Premises Standards) would still require aggrieved persons to use the current complaints process (complaint to the Australian Human Rights Commission ('AHRC') and referral to the Federal Courts) to seek resolution of their complaints.
16. We therefore focus on the *future application* of the Premises Standards in *disability discrimination matters*. We also pay special attention to whether the Premises Standards as drafted erode any rights currently protected by existing building regulations. It is counterproductive to have new legislation (Premises Standards) diminish the very regulations it seeks to expand (the BCA).

Objects

17. The objects of the DDA are:
 - 17.1. to eliminate, as far as possible, discrimination against persons on the ground of disability in *specific listed areas*; and
 - 17.2. to ensure, as far as practicable, that persons with disabilities have the same rights to equality before the law as the rest of the community; and
 - 17.3. to promote recognition and acceptance within the community of the principle that persons with disabilities have the same fundamental rights as the rest of the community.
18. Premises Standards, as **subordinate legislation to the DDA**, are **subject to the objects of the DDA** (not the BCA).
19. We note that the first disability standards formulated pursuant to section 31 DDA, the Disability Standards for Accessible Public Transport 2002 ('Transport Standards'), acknowledges that the DDA seeks to eliminate discrimination, 'as far as possible', against people with disabilities. The stated purpose of the Transport Standards is to enable public transport operators and providers to remove discrimination from public transport services.
20. The more recent disability standards, the Disability Standards for Education ('Education Standards'), restates the objects of the DDA, specifically relating them to the area of education and training.
21. We consider that the community is poorly served by having objects of Premises Standards focused on ensuring that access is 'reasonably achievable' and 'cost-effective'. The BCA, (extracts of which form the basis and bulk of the Premises Standards), which has objectives relating to health, safety, amenity

and sustainability, does **not** consider or even contain such terms. Why, then, should the Premises Standards? Such issues should not form part of the Premises Standards at all.

22. We **recommend** that the Committee follow the principles pertaining to subordinate legislation (and the examples set by the existing disability standards) and **adopt the three objects of the DDA, including reference to the specific area** as set out in s31 DDA:

22.1.1. 'access to or the use of any building, by persons with a disability, that the public or a section of the public is entitled or allowed to enter or use (whether for payment or not).'

23. Though the Premises Standards will give certainty to building certifiers, developers and managers, we do not consider it appropriate to include that certainty as an object of the Premises Standards. It would be inconsistent with the purpose of the subordinate legislation.

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| <p>1. We recommend that the Committee adopt the three objects of the DDA for the Premises Standards and include reference to: 'access to or the use of any building, by persons with a disability, that the public or a section of the public is entitled or allowed to enter or use (whether for payment or not).'</p> |
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Structure

24. Under the DDA, the Attorney-General may make Disability Standards to *specify rights and responsibilities* about equal access and opportunity *for people with a disability*, in more detail and with more certainty than the DDA itself provides.
25. We disagree that the first aim of the Premises Standards should be to provide the *building and design industry* with detailed information about how they can design and construct their buildings so as to meet their obligations under the DDA. The BCA already provides *industry* with technical information on all aspects of building design and construction. Since agreement has already been reached that the access requirements of the Premises Standards would be reflected in the revised BCA, it follows therefore, that compliance with the BCA will ensure compliance with the DDA.
26. There is no reason for the Premises Standards to be developed in the same style and structure as the BCA. This simply duplicates an already complex, difficult to navigate document. It would be sufficient for the Premises Standards to include two tables of cross-references: between sections of the Premises Standards and corresponding sections of the BCA, and vice versa.
27. Therefore, **we recommend** that the Premises Standards should be **re-styled and re-structured** so that all people (especially those who feel aggrieved by discriminatory conditions) can have ready access to information on rights and obligation under the DDA.

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| <p>3. We recommend that the Premises Standards be re-styled and re-structured so that all people (especially people with disabilities) can have ready access to information on rights and obligation under the DDA.</p> |
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28. The Premises Standard should include:

- 28.1. legal rights or entitlements (to assist people to understand, and comply with, the standards set out in obligation provisions);
- 28.2. a description of the legal obligations, or responsibilities, with which the relevant persons must comply (reflected in the performance requirements in the BCA); and

- 28.3. a description of measures which, if followed, will be evidence of compliance with the legal obligations (reflected in the 'deemed-to-satisfy' provisions in the BCA).
29. The Premises Standards should clearly state the **central right** being protected:
- 29.1. *'that persons with a disability have the right to **safe, equitable and dignified access** to a building, and to the services and facilities within that building'*
30. The specific areas covered by the right would be:
- 30.1. pathway from property boundary to building entrances
- 30.2. entrances and exits
- 30.3. continuous path of travel within buildings and to associated buildings
- 30.4. car parking
- 30.5. communication and way-finding
- 30.6. lifts
- 30.7. sanitary and other facilities
- 30.8. swimming pools
31. The document should be complete and contain all the information required to assess whether a building's construction is compliant with the DDA (and Premises Standards). It should **not** direct the reader to locate and review sections in the BCA and the Australian Standards publications, AS 1428.1 and AS 1428.2, **unless** they were **freely available** to the public.

Scope of standards

Class 2 buildings

32. We disagree with the exclusion of Class 2 buildings from application of the Premises Standards when there are sound reasons for their inclusion. We outline these reasons below.

Case law

33. In *C v A* [2005] QADT 14 the Tribunal found that the *Anti-Discrimination Act 1991* ('ADA') (Queensland's equivalent to the DDA) applies to the provision of access to and from individual apartments within buildings to common property facilities and maintenance of the access ways *per se*. The Tribunal required the body corporate to install proximity devices to allow the complainant access to the building, to her unit and to recreational facilities located on common property.
34. The Tribunal noted that Queensland has seen a substantial rise in people living in community title and like schemes. Schemes vary from entirely residential, through letting to tenants on full-time or part-time basis, to letting to tenants on a 'holiday let' basis for part of the year. The Tribunal found that the difference between such schemes (day to day) and a motel, hotel or flats properly so-called, is difficult to discern.
35. The Tribunal held that:
- It was **not right in principle** to approach the construction of the ADA so as to regard **application of its provisions** to community title schemes only upon analysis of the **use** to which **individual units** in any particular scheme at any particular time might be put, or the **description** afforded that accommodation by the people who use same (emphasis added).*

36. The access provisions of the DDA similarly apply to access to and from individual apartments within Class 2 buildings to common property facilities, and maintenance of access ways. Therefore, a Class 2 building operating (or capable of being operated) as a Class 3 Hotel/Motel should be required to comply with the same access provisions as a Class 3 building, regardless of whether the accommodation qualified as a 'unit', 'apartment' or 'dwelling' in original building approval applications.

Local example

37. We have a local example of 51 'apartments' in a single, four level building (designated as Class 2 in building approval application) which were advertised as 'Hotel Motel' even before construction was completed. There is no current requirement that any of those apartments are accessible.

38. Furthermore, since the Premises Standards ensure access to *multiple dwellings* in Class 1b structures, access to *multiple dwellings* in Class 2 buildings should be provided to the same standard. Actual requirements would depend on total number of dwellings.

Adaptable housing

39. While owners of Class 1a single dwellings have the legal right to apply for approval to make any structural alterations so as to provide access from their property boundaries to and within their homes, owners of units in Class 2 buildings do not. They have to rely on the developers' good will in providing for appropriate access in the design and construction, without recourse to upgrading the access themselves at a later stage.

40. Even if the body corporate later undertook to pay for any alterations required to upgrade access to common property areas, the Regulation Impact Statement ('RIS') acknowledges that generally it is less expensive to undertake construction work on a new building than it is to retrofit an existing building.

41. For the above reasons **we recommend** that the committee **include Class 2 buildings** in those *required to be accessible*.

4. We recommend that the committee include Class 2 buildings in those <i>required to be accessible</i> .
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Class 4 part of building

42. The same reasoning above leads us to disagree with the exclusion of a dwelling, being part of Class 5, 6, 7, 8 or 9 buildings, from the application of the Premises Standards.

43. DDA requires that the dwelling has access to and from common property. The resident has no option of upgrading access in their own right. It is our position that if the main building is required to be accessible, any dwelling in that building must also be accessible, to its own entrance.

44. Therefore, any exclusion of Class 4 dwellings from application of the Premises Standards should be limited to the internal parts of the dwelling only.

45. **We recommend** that the committee **include Class 4 dwellings** in those *required to be accessible* to the extent of accessing common property.

5. We recommend that the committee include Class 4 dwellings in those <i>required to be accessible</i> to the extent of accessing common property.
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Change of use without change of Class

46. We have concerns regarding ensuring public access in situations where there has been a major change of use of the building, but the building classification remains unchanged. If an internal fit out is all that is required (without any structural alterations requiring building approval), the Premises Standards, as drafted, would not apply.
47. We consider that where Class of building remains unchanged but the facilities provided therein are substantially different, any internal fit out to provide for those new facilities (and service a different client base) should attract the jurisdiction of the Premises Standards.
48. The premises Standards may have to include a definition or example of what would be considered a significant change of use.

6. **We recommend** that the committee **include provisions that the Premises Standards** should also apply to any building or part of building which undergoes a **significant change of use** without a change of Classification.

Exceptions and concessions

Unjustifiable hardship

Not to certify continuing discrimination

49. It is well established by the AHRC that exemptions should not be used to certify that discrimination may continue on the basis of unjustifiable hardship. Exemptions which seek to permanently avoid legal obligations under the DDA and the proposed Premises Standards therefore should not be granted.

Inconsistency: Premises Standards v BCA and Building Act

50. The goal of the BCA is to enable the achievement of nationally consistent, *minimum* necessary standards of relevant health, safety, amenity and sustainability objectives efficiently. It is applied so that the regulation generates net benefits to society, and the competitive effects of the regulation have been considered and the regulation is no more restrictive than necessary in the public interest¹.
51. In Queensland, the *Building Act 1975* ('Building Act') requires that **any building work complies with the BCA** through compliance with all relevant performance requirements under the BCA². This can be by compliance with the deemed to satisfy provisions, or formulation of alternative solutions which are at least *equivalent* to such provisions³. Other States' building regulations require the same compliance with the performance requirements of the BCA.
52. **Nowhere** in the BCA or in the Building Act is unjustifiable hardship considered or allowed to exempt compliance with relevant provisions of the BCA, not even in the alternative solutions provisions. In the past, applications for modification citing unjustifiable hardship have been refused where it was assessed as not being in the public interest to approve such applications.
53. It is our submission that ensuring that people with disabilities have the right to **safe, equitable and dignified access** to a building, and to the services and facilities within that building, **is** in the public interest, as evidenced by the existing performance requirements in the BCA, the enactment of the

¹ BCA p7

² Section 14(2) *Building Act 1975*

³ Section 14 (4) *Building Act 1975*

DDA and the formulation of the Premises Standards. On that basis we expect the revised BCA to accommodate any *increases in access requirements* without the whole BCA being subject to unjustifiable hardship provisions which are not currently included.

54. Since it has been agreed that access requirements of the Premises Standards would be reflected in the revised BCA, we take that to mean that Schedule 1 Access Code for Buildings ('Access Code'), which was prepared by the Australian Building Codes Board, in the Premises Standards would also appear in corresponding sections of the revised BCA.
55. The provisions in the Premises Standards relating to unjustifiable hardship are **not** located in the Access Code. None of the literature supplied for this inquiry leads us to believe that those provisions are intended to be included in the BCA. We are of the opinion that inclusion of such provisions in the BCA generally is inconsistent with its goals and would create massive uncertainty and upheaval in the building approval processes used by State administrations.
56. Our understanding of the literature is that the only time unjustifiable hardship provisions would be considered is by the proposed Access Panel (established by State administrations to *advise* certifiers and make *recommendations only*) when assessing *alternative solutions*. However, the BCA and Building Act will still require solutions that are at least equivalent to the relevant requirement without any consideration of unjustifiable hardship.
57. We can see no way for this inconsistency to be overcome in the current draft if the proposed unjustifiable hardship provisions are retained.
58. The existing BCA requires compliance with performance requirements without considering unjustifiable hardship. There are **no additional performance requirements** contained in the Premises Standards (though there are glaring omissions and a clumsy attempt to combine a couple of the existing requirements). Therefore there is **no reason for the unjustifiable hardship provisions to be included** in the Premises Standards at all.
59. Including unjustifiable hardship provisions in the BCA but restricting their application to the new sections which *extend* the coverage of current access requirements (specifically to comply with the DDA) would create confusion and make the administration of building regulations unworkable.
60. Similarly, allowing unjustifiable hardship provisions only to be considered by the Access Panel when assessing alternative solutions involving *extensions* of the current access requirements would create confusion and result in lack of certainty which the Premises Standards seek to provide.

Interpretation of section 23 DDA

61. Another concern we have with the unjustifiable hardship provisions in the Premises Standards is the *repeated misinterpretation* of section 23(2) DDA.
62. That section relates to premises which is *designed or constructed* so as to be inaccessible to a person with a disability. We understand that to mean that the building is otherwise compliant with State building regulations and has been approved by State authorities, but is claimed to be in breach of the DDA (resulting from the current inconsistency between the BCA and the DDA).
63. Where any *alteration* to that premises to provide access so as to make it *compliant with the DDA* would impose unjustifiable hardship, then *no unlawful discrimination* could be made out.
64. Section 23 DDA does **not** endorse the use of unjustifiable hardship to claim exemption from State building regulations. Unjustifiable hardship **is not** a defence in civil matters involving breaches of the BCA and Building Act.

Courts to determine unjustifiable hardship

65. Since it is accepted that only Courts can make a determination regarding unjustifiable hardship, it is neither appropriate nor proper for certifiers or access consultants (who have no legal standing), or an Access Panel (which only make recommendations and advises) to make such determinations.
66. For all the above listed reasons, **we recommend** that the committee **removes the unjustifiable hardship provisions** from the Premises Standards.

7. **We recommend** that the committee **removes the unjustifiable hardship provisions** in their **entirety** from the Premises Standards.

Draft provisions in section 4.1

67. If the Committee wants to consider the individual provisions, we offer our comments on specific sections below.
68. (3) (f) Exceptional technical factors and geographic factors are properly to be considered in alternative solutions, not in unjustifiable hardships. Though we may well ask how other BCA provisions relating to health, amenity and safety could be met in the same circumstances, but provisions specifically relating to disability access cannot?
69. (3) (g) Lack of resources (including financial) cannot be used to justify non-compliance with BCA provisions. If relevant performance requirements cannot be complied with (through deemed-to-satisfy provisions or alternative solutions) then the project will not be approved. Additionally, why should such considerations be relevant to disability access when they are not to other performance requirements in the BCA?
70. (3) (j) What possible detriment (other than financial which has already been addressed) could anyone (building developer, certifier, manager or occupant) suffer from compliance with the Premises Standards when they are designed to ensure *safe, equitable and dignified access* to buildings and the services and facilities within?
71. (3) (k) Heritage values can still be safeguarded while satisfying the BCA through elegant and good design (see 'Improving Access to Heritage Buildings – A practical guide to meeting the needs of people with disabilities' by Eric Martin). These values are already catered for in alternative solutions and do not need to be included in unjustifiable hardship. They are different concepts in any event and should not be linked in this way.
72. (3) (m) Pursuant to the Building Act, building assessment work in Queensland **must** be carried out by a building certifier (local Council employee or a private certifier), who either grants or refuses the building development approval applied for. There is no 'good faith effort' in this process.
- 72.1. If 'access consultants' are to be relied on for their 'expert judgement' in assessing alternative solutions, the Premises Standards will need to define what evidence is required for the consultant to be accepted as an expert:
- 72.1.1. evidence of membership with an appropriate organisation or association (e.g. Association of Consultants for Access, Australia);
- 72.1.2. a CV to illustrate the scope and depth of experience and/or qualifications; and
- 72.1.3. evidence of Professional Indemnity Insurance.
73. (3) (n) Since Action Plans are required to have clear timelines and implementation strategies to eliminate *existing* discrimination in an active way, and to improve services to *existing* consumers or customers, they are not at all relevant to new buildings. In addition, they should not be relevant (or

used to avoid compliance with access provisions) in new parts of buildings. Any alteration sufficient to require building approval should in fact be designed to overcome the very conditions giving rise to discrimination in the original construction, thereby fulfilling commitments in the Action Plan to eliminate discrimination in that particular part of the building. Action Plans should **not** be used to justify *perpetuating discrimination* (by non-compliance with performance requirements).

74. (3) (o) Assessment methods for alternative solutions in the BCA do not include mere consultations with interested or affected parties. Though such consultations may be undertaken (and even prove helpful) to arrive at an alternative solution, they are not relevant to *assessing* whether that solution *complies with the performance requirements*. Additionally, it is common experience that simply conducting consultations does not necessarily resolve access problems, either by not consulting with appropriate affected people, or by giving greater weight to commercial and aesthetic concerns than to access concerns of people with disabilities.
75. If, despite the above arguments, the Committee decides to retain any unjustifiable hardship provisions, the remaining provisions should **not** apply to new buildings at all, and only in specified, exceptional circumstances to new parts of existing buildings (for example: where structural alterations to multiple floors is required to accommodate increased lift floor dimensions).

8. We **recommend** that if any **unjustifiable hardship provisions** are retained in the final Premises Standards, they should **not** apply to **new buildings** at all, and only in specified, exceptional circumstances to new parts of existing buildings (for example: where structural alterations to multiple floors is required to accommodate increased lift floor dimensions).

Lessees

76. Section 2.1 Premises Standards requires that where alterations or extension to an existing building ('new part') are sufficient to warrant an application for approval for its construction, any other part of that building must be upgraded as necessary to provide a continuous accessible path of travel from the principal pedestrian entrance to the new part.
77. Lessees generally are not required to lodge applications for approval of internal fit outs. If construction work is required as part of the fit out project (thus qualifying as new part of a building and attracting application of the Premises Standards), the lessee will require the landlord's approval for the alterations, and an application for construction approval (by either the landlord or the lessee) will have to be lodged.
78. We do not consider it appropriate that application of the Premises Standards should depend on who takes responsibility for that approval process. This would encourage landlords to require lessees to undertake the approval process so as to avoid their own responsibilities to comply with the Premises Standards (and therefore the BCA) by providing the continuous accessible path of travel from the principal public entrance.
79. Therefore **we recommend** that the **concession** relating to lessees in section 4.3 be **removed**.

9. We **recommend** that the **concession** relating to lessees in section 4.3 be **removed**.

Schedule 1 Access Code for Buildings ('Access Code')

80. As discussed above in the Part titled Structure, we recommend that the style and structure of the Premises Standards (including the Access Code) be redesigned to improve access to information in

the document for all people, particularly those with disabilities. Two tables of cross-references in a Schedule to the Premises Standards would be sufficient to line up the corresponding provisions.

81. In the meantime, we submit comments on the various sections as drafted.

Definitions

82. The definition of *accessway* **should also contain** what **must not** be included in the path of travel as detailed in existing BCA section D3.3(b):

82.1.1. A path of travel required to be accessible must not include a *stairway, turnstile, revolving door, escalator or other impediment* which would prevent a person in a wheelchair using it.

10. **We recommend** that the definition of *accessway* contains a requirement that the path of travel must not include a *stairway, turnstile, revolving door, escalator or other impediment* which would prevent a person in a wheelchair using it.

83. The **definition of storey** in the BCA **should be included** in full in the Premises Standards rather than to direct the reader to consult another document (the BCA) which is not freely available.

11. **We recommend** that the definition of storey be amended as follows:

Storey means a space within a building which is situated between one floor level and the floor level next above, or if there is no floor above, the ceiling or roof above, but not—

(a) a space that contains only—

(i) a lift shaft, stairway or meter room; or

(ii) a bathroom, shower room, laundry, water closet, or other sanitary compartment; or

(iii) accommodation intended for not more than 3 vehicles; or

(iv) a combination of the above; or

(b) a mezzanine.

Part D Access and Egress

Performance requirements

84. The five performance requirements *headings* do not identify to which particular aspect of access or egress each applies (e.g. access, exits, evacuation etc.). **We recommend** that the headings be **updated** to correct this omission.

12. **We recommend** that the headings of the individual performance requirements be **amended** to identify the aspect of access or egress to which it applies.

85. Performance requirements are critical to application of BCA in building design and construction, either through compliance with deemed-to-satisfy provisions or through alternative solutions.

86. It is of great concern that the Premises Standards appears to reduce the effectiveness of *existing* performance requirements in the BCA, which affect **all** people. It appears that in seeking to standardise access provisions for people with disabilities, access provisions for all people have been diminished in the process.

87. BCA DP1 requires that access must be provided, to the degree necessary, to enable –

- 87.1. safe; and
 - 87.2. equitable and dignified,
movement of people to and within a building
88. BCA DP7 requires that accessways must be provided, as far as is reasonable, to and within a building which-
- 88.1. have features to enable people with disabilities to safely, equitably and with dignity-
 - 88.1.1. approach the building from the road boundary and from any from any carparking spaces associated with the building; and
 - 88.1.2. access work and public spaces, accommodation and facilities for personal hygiene; and
 - 88.2. are identified at appropriate locations and are easy to find; and
 - 88.3. enable a person in a wheelchair to manoeuvre.
89. Premises Standards DP1 **totally ignores** BCA's first requirement to provide **safe, equitable and dignified access**, as well as the further requirement for accessways to have **features** to enable **safe, equitable and dignified access**, and which enable **wheelchair users to manoeuvre**.
90. Furthermore, we question why access only from any *accessible* carparking space must be provided in the Premises Standards (catering for those with mobility disabilities), while ignoring the requirements of people with other disabilities, such a vision impairment. The BCA does not make any such exclusion.
91. If Premises Standards DP1 is allowed to overwrite BCA DP1 and DP7, this will result in a **significant overall reduction of rights** for all building occupants.
92. BCA Part D3 Access for People with Disabilities states that compliance with the deemed-to-satisfy provisions (including D3.1 to D3.8) will satisfy performance requirements DP1 to DP9. This means that all nine performance requirements are relevant to access for people with disabilities.
93. In addition, since the only other two parts in BCA Section D relate to provision for escape and construction of exits, not one of the nine performance requirements could be interpreted as **not** relating to access for people with disabilities.
94. BCA DP2 requires that for people to move safely to and within a building, it must have -
- 94.1. walking surfaces with safe gradients; and
 - 94.2. any doors installed to avoid the risk of occupants -
 - 94.2.1. having their egress impeded; or
 - 94.2.2. being trapped in the building; and
 - 94.3. any stairways and ramps with -
 - 94.3.1. slip-resistant walking surfaces on -
 - 94.3.1.1. ramps; and
 - 94.3.1.2. stairways treads or near the edge of the nosing; and
 - 94.3.2. suitable handrails where necessary to assist and provide stability to people using the stairway or ramp; and
 - 94.3.3. suitable landings to avoid undue fatigue; and
 - 94.3.4. landings where a door opens from or onto the stairway or ramp sp that the door does not create an obstruction; and

94.3.5. in the case of a stairway, suitable safe passage in relation to the nature, volume and frequency of likely usage.

95. We note with **dismay** that this entire performance requirement has been **left out** of the Premises Standards. Its omission will mean that redress in a significant proportion of access matters will still only be available through the current complaints mechanism.

96. Therefore **we recommend that all existing performance requirements relating to access and egress in the BCA be included** in the Premises Standards.

13. We **recommend that all 9 existing performance requirements relating to access and egress in the BCA be included** in the Premises Standards.

Class 4 dwellings

97. Following on from our recommendation in paragraph 45 above regarding inclusion of Class 4 dwellings in those required to be accessible, **we recommend that performance requirements apply equally to Class 4** dwellings, with any exclusion being limited to internal parts of the dwelling.

14. We **recommend that performance requirements apply equally to Class 4** dwellings, with any exclusion being limited to internal parts of the dwelling.

Grouping of performance requirements

98. If the Premises Standards are redrafted to improve access to information in the document for all people, we suggest that all performance requirements (relating to access and egress, lifts and sanitary and other facilities) are contained in the one Part of the Access Code. The individual part of the Access Code (for example, that containing provisions relating to lifts) can designate which performance requirement its sections will be deemed-to-satisfy.

Part D3 Access for people with a disability

D3.1 General building access requirements

Table D3.1

99. Though building classifications in Premises Standards Section A4.1 correspond exactly to BCA Section A3.2 (with the addition of a new classification, relating to 4 or more single dwellings located on one allotment and used for short-term holiday accommodation, in Class 1b), the descriptions in the Class of building column in Table D3.1 do not match the previously listed classifications in certain aspects, and are therefore **inconsistent** with those classifications and with BCA Table D3.2.

100. Class 3 building or group of buildings which provide accommodation for more than 10 persons, other than in sole-occupancy units (for example, hostel or backpacker accommodation) have been **left out** of the Premises Standards Table D3.1. BCA Table D3.2 requires that access is provided to a set number of *beds*.

101. We note however, Premises Standards Table D3.5 relating to carparking spaces, **does** take into account the percentage of accessible bedrooms (in addition to sole-occupancy units) in Class 3 buildings.

102. Similarly, in Class 9c buildings, **no requirement** is included in Premises Standards Table D3.1 where accommodation is provided other than in sole-occupancy units.

103. Requirements for Class 10a have been changed in a confusing way which actually **reduces** rights for people with disabilities. BCA Table D3.2 requires access *to and within buildings* containing any of the following:
- 103.1. Sanitary facilities, showers, hand basins, change-room facilities or the like.
 - 103.2. Unique service or feature, such as a public shelter or the like, which is located in an accessible area.
104. Premises Standards Table D3.1 seems to try to combine the two, resulting in:
- 104.1. the loss of reference to showers, hand basins and the like;
 - 104.2. only requiring access to buildings (containing sanitary or change room facilities or shelter) located in accessible areas; and
 - 104.3. requiring access to and within sanitary facilities that are already accessible.
105. It does not actually require that one sanitary facility be accessible.

15. We **recommend** that **Table D3.1 be corrected** to be consistent with building classifications in the Premises Standards and with existing provisions in the BCA.

D3.2 Access to buildings

106. This section appears to relate to *external* access to buildings which are required to be accessible, though this is not made clear in the heading or in the body of the section.
107. It would assist if a **definition** of 'main points of pedestrian entry' was included in the Access Code. We have an actual situation of a large, single building development between two parallel streets where the developer argued that neither of the two entrances on one street was considered a main point of entry, resulting in neither entrance from that street being accessible. A definition in the Access Code would remove the need for Court interpretation of the term.

16. We **recommend** that the Access Code include definitions for 'main points of entry' and 'pedestrian link'.

108. We also question why the Access Code should specify that access is to be provided from main points of *pedestrian* entry at the allotment boundary? What happens if the developer decides to only provide vehicular access from the allotment boundary because complying with accessway provisions would incur extra cost? The existing BCA D3.2 requires access from the allotment boundary at the *main points of entry*. Limiting the provision to *pedestrian* entry would **reduce the rights currently in the BCA**. We **recommend** that the reference to *pedestrian* be **removed** from D3.2(1)(b).

17. We **recommend** that the reference to *pedestrian* be **removed** from D3.2(1)(b).

109. It would also assist to have the provision concerning a 'pedestrian link' clarified. The BCA currently requires that access **must** be provided from any adjacent and associated accessible building on the allotment. The Premises Standards was to require access between associated buildings, even if not on the same allotment. However, the Access Code as written does not actually state this and **needs to be clarified**.

19. We **recommend** that the Access Code clarify provisions regarding access to associated buildings.

110. The access provisions where more than one entrance to a building is provided need to be clarified.
111. We understand that the intent is to ensure that if a person with mobility impairment approaches an entrance which is not accessible, they do not have to travel too great a distance to enter through an alternative entrance which **is** accessible.
112. The wording in D3.2(2)(b) should be changed to: 'an accessible public entrance must be located within 50m of an entrance which is not accessible', with **added requirements** that:
- 112.1.1. suitable signage be provided at the entrance which is not accessible directing people to the nearest accessible entrance;
 - 112.1.2. a continuous accessible path of travel be provided between two such entrances; and
 - 112.1.3. where a single public entrance is located more than 50 m from any other public entrance, **it must** be accessible.

20. We **recommend** that the Access Code clarify provisions regarding multiple entrances and include requirements that:

- 20.1. an accessible public entrance must be located within 50m of an entrance which is not accessible;
- 20.2. suitable signage be provided at the entrance which is not accessible directing people to the nearest accessible entrance;
- 20.3. a continuous accessible path of travel be provided between two such entrances; and
- 20.4. where a single public entrance is located more than 50 m from any other public entrance, **it must** be accessible.

113. In the provision relating to multiple doorways, the expression 'not less than one' should be changed to 'at least one'.
114. We note that BCA D3.2(c) requires that external access **must** be in accordance with AS 1428.1. The Access Code has **left out** this requirement which results in a **reduction of rights currently in the BCA**.

D3.3 Parts of buildings to be accessible

115. We note that BCA D3.3(c) requires a building or part of a building required to be accessible, to have access, finishes and fittings, including passageways, ramps, step ramps or kerb ramps, signs, doorways and other parts of the building that **must** comply with the provisions of AS 1428.1. That document contains many more provisions than those individually specified in the Access Code.
116. This omission from the Premises Standards results in a **reduction of rights** (including those relating to doorways and circulation spaces) currently in the BCA.

21. We **recommend** that the Access Code include provisions currently in the BCA requiring compliance with AS 1428.1

D3.4 Exemptions

117. We understand that the exemption pertaining to Class 5,6,7b and 8 buildings containing not more than three storeys was a compromise between ensuring access to all public areas and the proportional cost of installing lifts in 'small' buildings, to enable wheelchair access to upper floors.

118. If the exemption in section D3.4(f) of the Access Code is to be retained, **we recommend** that the exemption **only** apply to provisions related to wheelchair access. The exemption should not apply to other parts of the Access Code with access provisions relating to other disabilities (such as vision and hearing impairment).

22. We **recommend** that the exemption pertaining to Class 5, 6, 7, or 8 buildings containing not more than three storeys, with upper floor areas of not more than 200m², should **only** apply to provisions related to wheelchair access.

D3.8 Tactile indicators

119. This heading needs to make clear that these provisions relate to **tactile ground surface indicators** ("TGSIs"). This will avoid confusion with other provisions relating to tactile signage in D3.6 and Part D4.

D3.10 Swimming pools

120. These provisions **require clarification**.
121. 'Not less than one' should be changed to 'at least one' *type* of accessible water entry/exit (to improve grammar and consistency with Part D5).
122. We note that Premises Standards Table D3.1 requires access to and into swimming pools with a total perimeter greater than **40 m**, and that section D3.10(2) gives four means (types) of accessible entry/exit to be provided. However, D3.10(3) refers to swimming pools with a perimeter of more than **70 m**. It seems to specify that the sling-style swimming pool lift is not to be used where the swimming pool has a perimeter of more than **70 m**. There is no explanation on why (if actually meant in this way) this method is not to be used for larger pools.

23. We **recommend** that the provisions relating to pool size and types of accessible water entry/exit be clarified.

Part H2 Public transport buildings

123. The many references to AS 1428.1 and AS 1428.2 need to be checked for accuracy of numbering and relevance. The numbers of equivalent sections do not match those in the draft revised AS 1428.1 which has been used in other parts of the Access Code. The existing provisions of AS 1428.2 appear to have been incorporated into the draft revised AS 1428.1 and its continued use may now be superfluous.

Effectiveness of the Protocol

124. As discussed above, the BCA and State building regulations do not accept unjustifiable hardship as reason to avoid compliance with performance requirements. We have already recommended above that the unjustifiable hardship provisions should be removed from the Premises Standards.
125. Since the Protocol aims to set out a process which administrations can incorporate unjustifiable hardship considerations into the existing building approval process, we do not support the establishment of an Access Panel for this purpose.
126. 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 DDA.

127. We disagree (based on experience) with the statements made in the RIS (page 32) that non-compliance with BCA access provisions is *effectively prevented*, or that the requirements are *fully enforced*, through the operation of the building approvals process. There is no avenue in Queensland for persons, who allege a breach of provisions in the BCA relating to access for people with disabilities, to have effective action taken to correct those breaches. The current complaints process using the DDA is too drawn out and the costs implications of pursuing the matter to a Tribunal or Federal Court are too daunting in most circumstances.

128. Consider the following case study:

An application for a *material change of use* is lodged with the local Council. It is for a single building development consisting of a drive-through bottle shop, a tavern, and 51 holiday apartments (Class 2 building) operated as a Hotel Motel, located on a single allotment between two parallel streets, more than 100 m from a cross street. Though the principal public entrance to the tavern is *accessed* from Street 1, the proposed tavern is to be located along the property boundary line of Street 2.

The plans show one public entrance to the tavern from each street. The entrance from Street 2 has an internal stairway and a lift (as well as an outside ramp) due to the topography of the allotment and the carparking underneath the tavern.

Council seeks community input regarding the application.

Based on community fears regarding alcohol-affected patrons exiting the tavern onto Street 2 where a children's playground is located, Council approves the material change of use application on condition that no public access from the tavern will be provided to Street 2. Plans are amended so that all patrons must enter and exit via Street 1. In an appeal, based on separate issues, Council's decision to approve the material change of use application is upheld.

A private certifier is contracted to assess and approve *construction plans* for the development (which the Appeal decision required to be *generally in accordance with* plans submitted in the material change of use application).

In order to comply with safe evacuation performance requirements and exit travel distance provisions, **two** stairways from the tavern to Street 2 are included in the plans. There is no provision for a lift.

During construction, the developer decides (contrary to Council's approval for material change of use) to provide **pedestrian access to** the tavern from Street 2 by way of both stairways included for safe evacuation, without installing a lift. In response to an access complaint after completion of that part of the project, the developer claims that both entrances do not qualify as 'main points of entry' (contrary to the certifier's interpretation of the amended use of the stairways) and therefore, both entrances are not required to be accessible.

129. Due to costs concerns, the unresolved complaint is not referred to the Tribunal.

Suggested alternative to Access Panel

130. We do not support the establishment of an Access Panel to simply advise on unjustifiable hardship. This will not assist to resolve complaints alleging disability discrimination.

131. Any complaint must establish discrimination before it can be considered. If the Premises Standards do apply, a complainant alleging a breach of those standards (and therefore the BCA) needs access to appropriately qualified professionals to determine actual breach. How are facilitators at the AHRC qualified to determine if the Premises Standard has been complied with (and therefore no

discrimination can be made out) if an alleged breach is disputed? This step must be settled before a decision can be made to proceed with the complaint.

132. We **do support** the standardisation of a process that **can enforce compliance** with the updated BCA (and therefore the DDA).

133. We consider that any process would have to be able to:

133.1. determine whether a building solution (including alternative solutions) **complies** with the BCA;

133.2. assess any request for a **modification** of the application of BCA provisions (due to technical, financial or other reasons);

133.3. **investigate** alleged breaches of BCA provisions; and

133.4. take **corrective** (order remedial measures) **and disciplinary actions** in the matter.

134. We have researched the operation of the Building Commission in Victoria, particularly the operation of its Building Appeals Board ('BAB') in the compliance and modifications service it provides.

135. Because the Premises Standards cover new buildings and new parts of buildings, these two areas are particularly relevant to this inquiry.

136. The Victorian BAB has 28 members comprising of:

136.1. building surveyors;

136.2. structural, electrical, mechanical, civil and fire engineers;

136.3. commercial and domestic builders;

136.4. occupational therapists;

136.5. architects;

136.6. lawyers;

136.7. planners;

136.8. access consultants; and

136.9. project managers

137. We **recommend** that an equivalent **BAB be set up in all other States** and its powers upgraded/increased as needed to empower it to fulfil all functions listed above in paragraph 131.

24. We **recommend** that a Building Appeals Board be established in each State with powers to:

24.1. determine whether a building solution (including alternative solutions) **complies** with the BCA;

24.2. assess any request for a **modification** of the application of BCA provisions (due to technical, financial or other reasons);

24.3. **investigate** alleged breaches of BCA provisions; and

24.4. take **corrective** (order remedial measures) **and disciplinary actions** in the matter.

138. The BAB can decide whether a design or element of a building complies with relevant legislation and regulations. An alternative solution assessed as compliant with the BCA would then comply with the DDA.

139. In circumstances where it is felt that a provision of the Premises Standard (and BCA) should not apply in relation to a building, a request for a modification can be made to the BAB. It is at this point that *some* of the matters listed in draft Premises Standard section 4.1 Unjustifiable hardship, *may* be appropriately considered.
140. In line with Victorian BAB guidelines, a modification would only be granted where the BAB is satisfied that, in the particular circumstances:
- 140.1. the provision is inappropriate;
 - 140.2. a modification would be reasonable; and
 - 140.3. the modification would not be detrimental to the public interest.
141. The applications for compliance and modification would be assessed as part of the building approval process, and a binding decision made *prior* to, and forming the basis of, final approval of construction of the building.
142. The investigative and corrective functions of the BAB would effectively settle any complaint of disability discrimination where the Premises Standards applied, avoiding the current process of complaint to State and Federal Commissions, and referral to Tribunals and Courts. The Victorian BAB generally takes four weeks to determine properly completed modification applications. This clearly improves the timeliness of the current complaints system.
143. The disciplinary function of the BAB would deter those responsible (architects, surveyors, builders etc.) from committing blatant breaches of the BCA (and Premises Standards). We suggest that a range of measures be available to the BAB, including but not limited to fines and suspensions.
144. The compliance service could also be used to assist in the complaints process under the DDA for those areas not covered by the Premises Standards. Even though the Premises Standards may not apply (due to the commencement date of the subordinate legislation) the BAB could still be requested to make a determination regarding compliance with the *revised* BCA. This could then be used to certify whether the design or element of the building complied with the DDA, thus informing interested parties as to whether discrimination should be found.

Unjustifiable impact on sector or group

Existing statistics

145. In order to get some perspective on possible demand, we reviewed the presentation by Kara Chun, Victorian BAB, at the national conference of the Association of Consultants in Access, Australia Inc ('ACAA') in Melbourne 15 November 2007.
146. According to Victorian Building Commission data, of a total of 3,562 applications for modification lodged with the BAB, only 66 related to access provisions (**less than 2%** of the total):
- 146.1. 40 concerned access to buildings - the BAB approved 60% of those applications (outright or with conditions) and refused 37%;
 - 146.2. 20 concerned sanitary facilities for people with disabilities - the BAB approved 45% (outright or with conditions) and refused 50%;
 - 146.3. 6 concerned car parking spaces for people with disabilities - the Bab approved 67% (outright or with conditions) and refused 33%.
147. This confirms our understanding that the bulk of building solutions currently comply with the deemed-to-satisfy provisions or alternative solutions allowed in the BCA. Very few applications for

modifications to access provisions based on technical, aesthetic, financial or other reasons are submitted.

148. We do not expect the implementation of Premises Standards to generate any significant increase in the number of applications for modifications.

Overview of changes to BCA

149. The RIS identified that coverage of access requirements under the BCA will be *extended* in two main areas: Class 1b buildings used for short-term holiday accommodation, and swimming pools. We would reasonably expect such buildings to constitute only a minor percentage of total building approvals, and those generating application for modifications of BCA provisions to be even smaller.

150. The RIS then identified a group of changes to the BCA in which an *existing* access requirement is *increased* in a *quantitative* manner only. These included increases in the proportion of rooms to be accessible in Class 3 buildings, the number of accessible building entrances, the number of accessible parking spaces and the number of wheelchair spaces in auditoria.

150.1. Based on the guidelines for approving applications for modifications noted above in paragraph 138, we do not consider that quantitative increases in existing requirements would be sufficient to generate any significant number of applications or warrant approval for modifications.

151. The RIS further identified a third group of changes to the BCA in which an *existing* access requirement is *increased* in *qualitative terms*. These changes enhance the *type* of access provided, rather than the quantity of an accessible facility, such as extensions of access within Class 5, 6, 7, and 8 buildings, passing and turning spaces for wheelchairs, lifting devices and limitations on use of ramps.

151.1. Again, we do not expect these changes to generate a significant workload for the BAB.

152. As for architects, planners, surveyors and builders, who deal with a BCA that is continually upgraded, the work generated by the changes (reflected in the Premises Standards) would be only a small proportion of their total work covering all the other provisions in the BCA. We would expect the Premises Standards to create no more work than any other policy changes have done in the past and will again in the future.

153. We would expect that changes to fire safety provisions in the BCA as a direct result of the recent fire storms in Victoria would have a far greater impact on all sectors of the community than the formulation of Premises Standards.

Conclusion

154. We are confident that there will be sufficient submissions to the Committee to address individual aspects of the provisions in the Premises Standards and whether they improve access for people with disabilities.

155. In our submission we addressed how the Premises Standards (which will be subordinate to the DDA, not the BCA) will be expected to operate. We made recommendations for amendments, inclusions and deletions so that the Premises Standards will serve the purpose for which it has been formulated, without diminishing rights already protected in existing building regulations.

156. We also put forward an alternative Protocol to provide a mechanism for dealing with alleged breaches of provisions in the Premises Standards.

157. We commend our comments for your consideration. Should you require any clarification or further information regarding this particular submission made by the Centre please do not hesitate to contact Sue Tomasich of our office.

Summary of Recommendations

1. We **recommend** that the Committee **adopt the three objects of the DDA** for the Premises Standards and include reference to: 'access to or the use of any building, by persons with a disability, that the public or a section of the public is entitled or allowed to enter or use (whether for payment or not)'.
2. We **recommend** that the Premises Standards be **re-styled and re-structured** so that all people (especially people with disabilities) can have ready access to information on rights and obligation under the DDA.
3. We **recommend** that the committee **include Class 2 buildings** in those *required to be accessible*.
4. We **recommend** that the committee **include Class 4 dwellings** in those *required to be accessible* to the extent of accessing common property.
5. We **recommend** that the committee **include provisions that the Premises Standards** should also apply to any building or part of building which undergoes a significant change of use without a change of Classification.
6. We **recommend** that the committee **removes the unjustifiable hardship provisions** in their entirety from the Premises Standards.
7. We **recommend** that if any **unjustifiable hardship provisions** are retained in the final Premises Standards, they should **not** apply to **new buildings** at all, and only in specified, exceptional circumstances to new parts of existing buildings (for example: where structural alterations to multiple floors is required to accommodate increased lift floor dimensions).
8. We **recommend** that the **concession** relating to lessees in section 4.3 be **removed**.
9. We **recommend** that the definition of *accessway* contains a requirement that the path of travel must not include a *stairway, turnstile, revolving door, escalator or other impediment* which would prevent a person in a wheelchair using it.
10. We **recommend** that the definition of storey be amended as follows:

Storey means a space within a building which is situated between one floor level and the floor level next above, or if there is no floor above, the ceiling or roof above, but not—

- (a) a space that contains only—
 - (i) a lift shaft, stairway or meter room; or
 - (ii) a bathroom, shower room, laundry, water closet, or other sanitary compartment; or
 - (iii) accommodation intended for not more than 3 vehicles; or
 - (iv) a combination of the above; or
- (b) a mezzanine.

11. We **recommend** that the headings of the individual performance requirements be **amended** to identify the aspect of access or egress to which it applies.
12. We **recommend** that **all 9 existing performance requirements relating to access and egress in the BCA be included** in the Premises Standards.

13. We **recommend** that **performance requirements apply equally to Class 4** dwellings, with any exclusion being limited to internal parts of the dwelling.
14. We **recommend** that **Table D3.1 be corrected** to be consistent with building classifications in the Premises Standards and with existing provisions in the BCA.
15. We **recommend** that the Access Code include definitions for 'main points of entry' and 'pedestrian link'.
16. We **recommend** that the reference to *pedestrian* be **removed** from D3.2(1)(b).
17. We **recommend** that the Access Code clarify provisions regarding access to associated buildings.
18. We **recommend** that the Access Code clarify provisions regarding multiple entrances and include requirements that:
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19. We **recommend** that the Access Code include provisions currently in the BCA requiring compliance with AS 1428.1
20. We **recommend** that the exemption pertaining to Class 5, 6, 7, or 8 buildings containing not more than three storeys, with upper floor areas of not more than 200m², should **only** apply to provisions related to wheelchair access.
21. We **recommend** that the provisions relating to pool size and types of accessible water entry/exit be clarified.
22. We **recommend** that a Building Appeals Board be established in each State with powers to:
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