

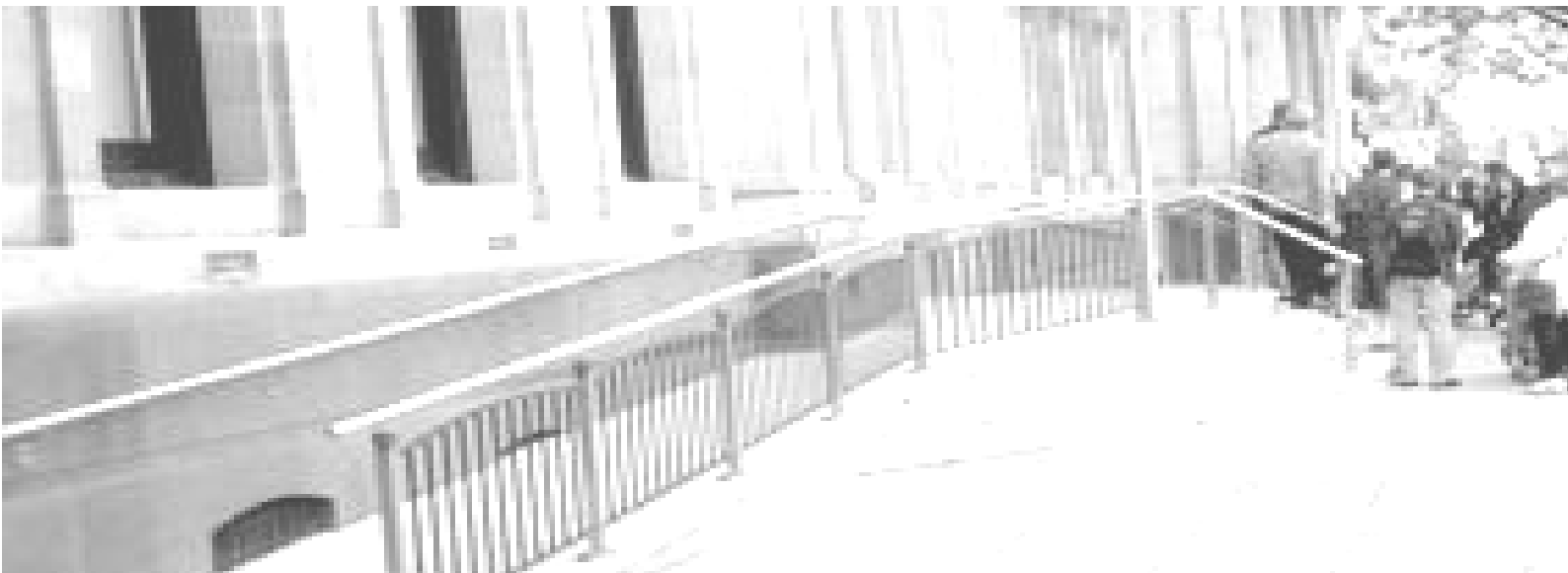
REMOVING THE OBSTACLES

Do heritage laws limit the capacity of arts organisations to provide physical access for people with a disability?

Is there a need for legislative reform?

What is best practice for arts organisations located in heritage buildings to provide access for people with a disability?

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EXECUTIVE SUMMARY

CHAPTER 1

- For many arts organisations located in heritage buildings, increasing physical access to their venue is considered to be in conflict with the purpose of preserving heritage assets.
- This project aims to enable arts organisations located in heritage buildings to increase access for audiences, participants and arts professionals with a disability by examining three questions: Do heritage laws limit the capacity of arts organisations to provide physical access for people with a disability? Is there a need for legislative reform? What is the best practice for arts organisations located in heritage buildings to provide access to people with a disability?
- Heritage-listed buildings are protected by heritage laws at Federal, state and territory levels. A building that is not listed, but considered “historically significant”, nevertheless may still be subject to certain restrictions (this discussion is outside the scope of this project).

CHAPTER 2

- Heritage laws, whether at Federal or state level do *not* protect heritage places from **any action or development** work done. It will only be a contravention of heritage legislation if an organisation carries out action or development on a heritage listed building, which is likely to have a significant impact on heritage value, without seeking approval from the associated Minister.
- The Federal Disability Discrimination Act 1992 (hereafter referred to as ‘the DDA’) makes it unlawful to discriminate on the grounds of disability in providing access to or the use of premises that the public can enter or use.
- The Federal Disability Discrimination Act 1992 does not require access to be provided to the premises if it would impose an *unjustifiable hardship* on the person who would have to provide the access.
- Although section 11 of the DDA specifies the relevant circumstances needed to be taken into account when determining what constitutes *unjustifiable hardship*, it does not make any reference to heritage places.
- There is a lack of case precedent in which *unjustifiable hardship* is raised as a defence in respect of heritage conservation. There has also been a lack of case precedent in which the Heritage Act is used as a defence for not providing access for people with a disability. Furthermore, there are few cases determining whether heritage laws conflict with the DDA.

- However, both heritage and anti-discrimination legislation have the potential to limit the provision of physical access for people with a disability by arts organisations located in heritage buildings.
- Heritage and disability legislation can co-exist such that physical access is provided for people with a disability while not impacting significantly on the heritage value of the venue.

CHAPTER 3

- Advocating the possibilities for law reform aims to enable arts organisations located in heritage buildings to improve provisions of physical access for people with a disability.

A lack of consistency

- There are apparent inconsistencies between the requirements imposed by State and Territory building laws (including the Building Codes of Australia (BCA) and Australian Standards: Design for access and mobility) and responsibilities under the DDA with regards to the provision of access for people with a disability.
- A breach of the BCA and/or Australian Standards will not necessarily result in unlawful discrimination under the DDA. Conversely compliance with the BCA and/or Australian Standards will not in itself qualify as a defence to discrimination under the DDA.
- It is therefore difficult for arts organisations to understand what they are legally required to do in terms of providing access for people with a disability.
- The “Disability Standards for Access to Premises” (Premises Standards), was an attempt to overcome these inconsistencies, aiming to revise the BCA and setting out specific accessibility requirements for developers, owners and operators of premises.
- Part 4 s4.1 is an exemption to compliance with requirements of the Premises Standards if such compliance would impose unjustifiable hardship on the person. The significance of any heritage value attaching to the building that is reasonably likely to be affected by compliance with the requirement will be taken into account when determining unjustifiable hardship.

Current reliance on individual complaints and individual outcomes

- The DDA is complaints-based (as opposed to compliance-based) legislation. This places the burden on the person with the disability to lodge a complaint through the Human Rights and Equal Opportunity Commission (HREOC) if there is a lack of access to the premises. A more pro-active approach would place the burden on the owner of the premises to provide adequate access.

- This is a passive and reactive approach which relies on the individual lodging a complaint before access is to be provided to a premises with inadequate access.
- Positive changes can come about through the conciliation process and access can be provided without resorting to litigation. However, despite this, many cases are still unresolved, terminated or dismissed. In such cases, the provision of access for people with a disability is uncertain, limited or non-existent.
- As a result of the changes made to the DDA in April 2000 by the Human Rights Legislation Amendment Act 1999, matters not resolved in investigation and conciliation by HREOC are no longer referred for Commission hearing but are able to be taken directly to the Federal Court.

The US Approach

- The federal laws in the U.S. have created a streamlined approach to enforcing accessibility in historic qualified buildings.
- The Americans with Disabilities Act 1990 (ADA) mandates compliance with ADA standards and guidelines developed by their compliance board. These standards and guidelines have clear procedures and requirements with regards to historic qualified buildings or facilities. The minimum standards for access with regards to historic qualified buildings or facilities are mandatory, unless there are proven exceptions.
- The U.S. laws provide a proactive approach to accessibility for people with disabilities since the responsibility to provide physical access rests on organisations, not the individual.

The UK Approach

- The relevant piece of anti-discrimination legislation in the UK is the Disability Discrimination Act 1995 ("the DDA (UK)"). However, the Disability Discrimination Act 2005 ("the 2005 Act") made substantial amendments to the DDA (UK).
- How the *National Heritage Act 1983* (the main piece of UK heritage legislation) and the DDA (UK) interact, is yet to be determined. The DDA (UK) has no specific technical compliance document as it is intended that the duties will evolve as the courts determine cases. Although the DDA (UK) is civil rights legislation, it *does not include standards for accessible building design*. The Building Regulations 2002 supervise aspects of building construction and renovations.
- Although the provision of access in the UK appears to be widespread, the legislative scheme is confusing. There is little relevant case law on the issues post the 1995 Disability

Discrimination Act (U.K.) and how this relates to the Approved Document M of the Building Regulations. It is advised that Australia not adopt the UK approach as a possible avenue for law reform.

CHAPTER 4

- The case study of best practice aims to provide access solutions and practical advice on how to develop a framework in which the requirements of each property can be assessed and a balance between accessibility and historic preservation found.
- This secondary research material is aimed at assisting arts organisations provide the best access possible to their buildings and services. This research also provides arts organisations located in heritage buildings with guidance in regards to future access, research, planning and advocacy. Advice combines international guidelines on access which sets out strategies for planning to provide general access, practical ways of providing access to different facilities and alternative/minimum standards that access should aim to be provided.

RECOMMENDATIONS

Recommendation 1

Many restrictions apply to buildings that are considered “historically significant”. Therefore, further research is needed to clarify how these buildings are defined and protected under relevant legislation.

Recommendation 2

Heritage legislation, either federal or state, does not prima facie make any action or development work undertaken on heritage buildings unlawful. Arts organisations should not see heritage law as a prima facie barrier in providing physical access for people with a disability.

Recommendation 3

The defence of “unjustifiable hardship” which applies throughout the DDA needs to be defined with more precision under section 11, or possibly section 23 of the DDA. The issue of whether the ‘heritage’ status of a building leads automatically to the raising of the ‘unjustifiable hardship’ defence must be clearly resolved. Note in Chapter 3 that the Draft Premises Standards suggest the heritage value of a site may be enough to invoke the ‘unjustifiable hardship’ defence.

Recommendation 4

The defence of “unjustifiable hardship” is yet to be defined in courts as to whether the heritage status of a building leads automatically to the raising of the defence. Arts organisations located in heritage buildings should not extravagantly rely on the defence of unjustifiable hardship to refuse provision of physical access to people with a disability.

Recommendation 5

Arts organisations located in heritage buildings should make their best effort to provide equitable physical access for people with a disability because:

- i) under the DDA, it is unlawful to discriminate on the grounds of disability in providing access to or the use of premises that the public can enter or use;
- ii) heritage laws do not prohibit every action or development work undertaken in heritage places.

Recommendation 6

In order to increase physical access, arts organisations located in heritage buildings should obtain an understanding of the legal situation which exists between disability discrimination laws and heritage conservation laws. Although there are limitations, co-existence of both laws is still possible (refer to Chapter 4 & 5).

Recommendation 7

There are State and Territory acts equivalent to the Federal DDA. In New South Wales for example, part 2B of the Anti-Discrimination Act 1977 (NSW) deals with discrimination on the ground of disability. However, the NSW legislation (in comparison to the Federal Legislation) is general in nature and does not have a section designated to 'access to premises.' Further research should be undertaken to investigate whether there are equivalent remedies under State and Territory legislation.

Recommendation 8

There is a need for the simplification of the existing laws. There needs to be clear links between the relevant pieces of legislation at federal and state levels (with regards to heritage, disability and environmental planning legislation) and the Building Codes and Standards

Recommendation 9

If the Premises Standard is to be successfully implemented the Draft needs changes. The Draft Premises Standard needs to be modified to reduce "heritage" as a factor in determining "unjustifiable hardship." There must be room for negotiation and the provision of access.

Recommendation 10

For the BCA and Premises Standards to be fully effective, they must apply to existing buildings that are not undergoing renovations.

Recommendation 11

Further research should be undertaken to determine the role of the Access Panels proposed to be established under the new Premises Standards. The Access Panel would be most effective if it acts to ensure buildings comply with the new Premises Standards and advocates on behalf of complainants regarding breaches of these Standards (possibly a body similar to that of the Australian Competition and Consumer Commission (ACCC)).

Recommendation 12

The merits of a more proactive approach needs to be further examined – such as the approach adopted in the United States of America (discussed below) where the burden is not placed on the person with disability, but the owner of the premises. The provision of access to premises in the United States is mandated under the Americans with Disabilities Act 1990.

Recommendation 13

The study of the U.S. approach should be highlighted as a model for future law reform in Australia. It provides a more proactive approach to resolve the issues regarding the provision of access for people with a disability and the need to preserve heritage sites.

Recommendation 14

Further research needs to be undertaken into the current state of the UK laws in relation to the provision of access to heritage buildings for people with a disability.

Recommendation 15

An examination of case law needs to be undertaken when cases on this issue come to light – as yet there are no cases on the issue.

Recommendation 16

Further research into the effect of activism, advocacy and lobbying in the UK needs to be effected.

Recommendation 17

The issue of funding in the UK and where the funding for the provision of access comes from needs to be researched – whether the government funds large scale projects that aim to provide access to premises for people with a disability.

Recommendation 18

The guidelines for implementing accessibility modifications provided in the following chapters do not include all the specific details defined within regulations such as the Building Code of Australia, or Australian Standards. As a result arts organisations located in heritage buildings who want to follow this guideline should research further into these codes and practices, especially AS1428.1¹, to ensure they are stringently complied with.

Recommendation 19

Furthermore, owing to the fact that accessibility work may at times involve projects which are quite complex, it is recommended that in these cases, consultations with experts in the fields of historic preservation and accessibility take place before proceeding with permanent physical changes to historic properties.

¹ Australian Standard – Design for access and mobility (AS 1428.1 – 2001), *Part 1: General Requirements for access – New Building Work*, Building Code of Australia – Primary referenced Standard.

Recommendation 20

Further research needs to be undertaken into 'information presentation and interpretation' in relation to access to heritage buildings and services, for people with a disability.

Selection of the best means of interpretation must be on a case by case basis however there are a number of key principles that may be examined to guide in increasing access through means other than physical. These include:

- Staff training
- Signage
- Models of areas inaccessible
- Video/Audiovisual means
- Displayed information

Recommendation 21

As an aid in taking such considerations into account and ensuring that Discrimination Disability legislation and Heritage Conservation legislation are able to co-exist, forming an accessibility advisory committee is suggested. This group should consist of people who can assist in reaching informed decisions because they have expertise in different areas, such as disability accessibility issues, designers, building administration, architecture, and historians. Such a group could be formed early in the process to assist in both the planning and implementation of projects which aim to increase access to arts organizations.

TABLE OF CONTENTS

Chapter 1: Introduction and Definitions.....	13
1.1 Terms of reference	13
1.2 Aim of this research.....	14
1.3 Description of the proposed task.....	15
1.4 Definitions.....	16
1.4.1 What is a heritage building?.....	16
1.4.2 What does disability mean?.....	17
1.4.3 What is disability discrimination?.....	17
Chapter 2: Do heritage laws limit the capacity of arts organisations to provide physical access for people with a disability?.....	18
2.1 Heritage Laws (overview)	18
2.2 Disability Discrimination Act (overview)	20
2.3 Access and the Disability Discrimination Act.....	21
2.4 Unjustifiable hardship.....	21
2.5 Case Law on the issue of unjustifiable hardship.....	22
2.6 Case Law on access to heritage buildings.....	24
2.7 Conclusion.....	25
Chapter 3: Is there a need for legislative reform?.....	27
3.1 Confusion of the current legal situation.....	27
3.2 Building Laws, Codes and Standards.....	28
3.2.1 Building Codes.....	28
3.2.2 Australian Standards.....	30
3.2.3 The interaction of the BCA, Australian Standards and the DDA.....	30
3.2.4 Disability Standards for Access to Premises.....	32
3.2.5 Conclusion.....	34
3.3 Current Reliance on Individual Complaints and Individual Outcomes.....	36
3.4 Study of the United States Laws and Standards.....	40
3.5 Study of the United Kingdom – Laws, Guidelines and Standards.....	43
Chapter 4: What is the best practice for arts organisations located in heritage buildings to provide access for people with a disability?	46
4.1 Planning Accessibility Modifications.....	47
4.2 Guidelines to Building Access.....	50
4.3 Alternative minimum standards of access.....	55
4.4 Summary of Principles.....	56
4.5 Conclusion.....	57

CHAPTER 1: INTRODUCTION AND DEFINITIONS

1.1 TERMS OF REFERENCE

“Removing the obstacles” is a project initiated by Accessible Arts, working in partnership with the Arts Law Centre of Australia and Arts Access Australia. The purpose of this project is to enable arts organisations located in heritage buildings to increase access for audiences, participants and arts professionals with a disability.

This report was researched and written as the first stage of this project by Courtney Weller, Tajan Baba and Carmen Siu through the Faculty of Humanities & Social Sciences, University of Technology, Sydney, and UTS Shopfront Community Program.

Accessible Arts is an organisation aiming to promote full inclusion, access and cultural opportunities in the arts for people with disabilities. Amongst various services that Accessible Arts provides, audience development forms an important part. It provides consultancy services to arts organisations on how to make their venue and services more suitable for people with disabilities and to disability organisations to assist them with problems on issues relating to accessibility.

The Arts Law Centre of Australia is the national community legal centre for the arts. It provides practical, specialist legal services and resources (including advocacy, publications and education) to artists across all art forms, and the cultural sector. Arts Law is a not for profit company limited by guarantee, whose vision is to “foster a society which promotes justice for artists and values their creative contribution.”²

This project relates to the functions of both Arts Law and Accessible Arts (audience development in particular) they both provide information to organisations in the disability and the arts sectors. This report will augment their provision of information and bring some clarity to the issues at hand.

² Arts Law (2007C) *Arts Law Centre of Australia Online* ‘Policy & Research – Who we are’. Accessed Online at: <http://www.artslaw.com.au/PolicyAndResearch/howweare.asp>

1.2 AIM OF THIS RESEARCH

For many arts organisations located in heritage buildings, increasing physical access to their venue is considered to be in conflict with the purpose of preserving heritage assets. Australia's Federal Anti Discrimination Legislation legally requires buildings to provide physical access to buildings for people with disabilities; yet there is also a legal requirement in heritage legislation to conserve heritage buildings so that historical and cultural significance may also be preserved.

To date, there has been a lack of research about confusion and potential conflicts in this area. There is also a lack of general understanding of the issues by arts and disability organisations.

This report examines three questions:

Do heritage laws limit the capacity of arts organisations to provide physical access for people with a disability?

Is there a need for legislative reform?

What is the best practice for arts organisations located in heritage buildings to provide physical access to people with a disability?

In answering these questions, the researchers aim to provide information and advice to arts organisations (located in heritage buildings) about what they are legally required to do in regards to providing physical access to people with disability and information to arts and disability advocacy organisations who are interested in possible areas of law reform. The best practice case study will also provide a model of how arts organisations located in heritage buildings have addressed access issues. As a result, this project aims to enable arts organisations located in heritage buildings to increase access for audiences, participants and arts professionals with a disability.

1.3 DESCRIPTION OF THE PROPOSED TASK

In order to achieve these aims, the project involves two major components:

Legal research (Chapters 2 & 3) on disability discrimination laws, Heritage Conservation laws and other relevant areas such as State and Territory building laws, Local Government Estate and Planning decisions

The legal research critically examines the legal situation where there appears to be a conflict between disability discrimination and heritage conservation on both the National and also the International level. This research reviews Australian legislation relevant to heritage buildings and that of disability and the right to access both at State and Federal Levels.

An examination of the case law was also undertaken, to see how the conflict (if any) between the heritage and disability legislation has been resolved. The examination of International law – in particular, US and UK laws which were identified as most relevant – should provide insight into possible avenues of law reform to be pursued in Australia.

The United States of America and the United Kingdom were chosen as the international case studies owing to the fact that the provision of access for people with a disability in these countries is believed to be more common place and widespread, than that in Australia.

Case Study (Chapters 4 & 5) of Best-Practice and innovative design that has been incorporated into heritage building hosting arts organisations and their contribution to both access and aesthetics of these protected buildings.

The case study of Sydney's Museum of Contemporary Arts looks at an arts organisation which has overcome the barriers of heritage legislation to integrate access to their venue. It aims to provide practical examples of how legislation has in the past and currently affects the work of arts organisations but more importantly how these barriers have been overcome.

While we recognise that further examples of best practice case studies exist both nationally and internationally, it is beyond the scope and time frame of this project to identify or conduct additional case studies.

1.4 DEFINITIONS

The major publication in this area of study is by The Australian Heritage Commission (now the Australian Heritage Council). In its paper “Improving Access to Heritage Buildings,”³ the Commission reaffirms the importance of heritage places in communicating Australia’s history and culture to present and future generations, yet also maintains that heritage places should be accessible to everyone, including people with a disability.

Before going into discussion about the legal situation surrounding the issues, it is important to have an understanding of major terms used in this report.

1.4.1 WHAT IS A HERITAGE BUILDING?

A building which may be considered as a heritage building is divided into three categories depending on its level of heritage significance.⁴

1. A non-heritage building is one that is regarded by the community as having low historical significance.
2. A heritage building is regarded as having some aspects that are considered important or significant by the community.
3. A heritage-listed building has been assessed by a national, State or Territory heritage authority as having aspects that are so important or significant that it is considered essential to preserve it.

Heritage-listed buildings are protected by heritage laws at the federal, state and territory levels (please refer to Chapter 2 on discussions of these laws). A building that is not listed, but considered “historically significant”, nevertheless may still be subject to certain restrictions.

Recommendation 1: *As evident in the case study of the Museum of Contemporary Arts (Chapter 5), many restrictions still apply to buildings that are considered “historically significant”. Therefore, further research is needed to clarify how these buildings are defined and protected under relevant legislation.*

³ Martin, E. *Improving Access to Heritage Buildings*, Chapter 1, Council of National Trusts and the Australian Heritage Commission, Canberra, 1999

⁴ Rennie, S, Croker, A, Raymond, L, *Just because it’s old: museums and galleries in heritage buildings*, Museum and Galleries Foundation of NSW, NSW Heritage Office, 2004.

1.4.2 WHAT DOES 'DISABILITY' MEAN, IN RELATION TO A PERSON?

The definition of 'disability' under s4 the *Disability Discrimination Act 1992*⁵ is broad and includes:

- Total or partial loss of the of the person's bodily or mental functions; or
- Total or partial loss of a part of the body; or
- The presence in the body of organisms causing disease or illness; or
- The presence in the body of organisms capable of causing disease or illness; or
- The malfunction, malformation or disfigurement of a part of the person's body; or
- A disorder or malfunction that results in the person learning differently from a person without the disorder or malfunction; or
- A disorder, illness or disease that affects a person's thought processes, perceptions of reality, emotions, or judgement or that results in disturbed behaviour.

The definition in the DDA also recognises that a disability can be temporary and includes a disability that not only presently exists, but which has previously existed, or may exist in the future or are imputed to a person.

1.4.3 WHAT IS DISABILITY DISCRIMINATION?

For the purposes of the DDA, a person (discriminator) is considered to have discriminated against another person (aggrieved person) on the grounds of a disability, if the discriminator treats, or proposes to treat, the aggrieved person less favourably than the discriminator would treat a person without a disability.⁶ This applies where the comparative circumstances are the same or not materially different.

So, in plain English, if a person with a disability is treated differently to a person without a disability because of their disability, then this would classify as disability discrimination. A person may also be the victim of indirect disability discrimination where they are not able to comply with circumstances required of them by the discriminator, in circumstances that are unreasonable.

⁵ Disability Discrimination Act 1992 (Cth), hereafter the "DDA"

⁶ Disability Discrimination Act 1992 (Cth) s5

CHAPTER 2: DO HERITAGE LAWS LIMIT THE CAPACITY OF ARTS ORGANISATIONS TO PROVIDE PHYSICAL ACCESS FOR PEOPLE WITH A DISABILITY?

2.1 HERITAGE LAWS (OVERVIEW)

There are several Acts that govern the way heritage places are protected. Under the Federal regime, the major legislative instrument is the *Environment Protection and Biodiversity Conservation Act 1999*⁷. Since September 2003, the Federal Parliament has passed a number of pieces of legislation, which reflect the intention to undertake a new regime to better identify, conserve and protect places of national heritage. This legislation makes amendments to the EPBC Act. They include:

- Environment and Heritage Legislation Amendment Act (No.1) 2003
- Australian Heritage Council Act 2003
- Australian Heritage Council (Consequential and Transitional Provisions) Act 2003

The new regime gives people (including individuals, the community and governments) the opportunity to nominate places with heritage value to the National Heritage List and the Commonwealth Heritage List. The heritage values of places on these two lists, together with six other matters of national environmental significance⁸ are protected under the EPBC Act. The EPBC Act, following the amendments, makes it unlawful for a person to take an action that **has, will have or is likely to have a significant impact** on the National Heritage values of a National Heritage place⁹ without an approval by the constitutional corporation, Commonwealth Agency, Commonwealth or the Australian Government Minister for the Environment and Water Resources (“the Minister”)¹⁰.

Under the EPBC Act, when an action is referred to the Minister, the Minister will make a decision as to whether the action is likely to have a significant impact on a matter of national environmental significance; if so, then the action requires approval under the EPBC Act. If the Minister decides against significant impact, then the action does not require approval under the

⁷ Environment Protection and Biodiversity Conservation Act 1999 (Cth) (hereafter *the EPBC Act*).

⁸ Include nationally-threatened animal and plant species and ecological communities that are listed under the EPBC Act; Australia’s World Heritage properties; Ramsar Wetlands of international importance; migratory animal species that are listed under the EPBC Act; Commonwealth marine areas; nuclear actions: Division 1 of the EPBC Act

⁹ Environment Protection and Biodiversity Conservation Act 1999 s15B

¹⁰ Environment Protection and Biodiversity Conservation Act 1999 s15B(8).

Act¹¹. By doing so, the new regime aims to control actions that have, will have or are likely to have a significant impact on heritage places. The Act therefore does not prima facie prohibit **any action** from being undertaken on heritage 'places'.

Similarly in State and Territory legislation, for example the *Queensland Heritage Act 1992*, historical places are protected through their inclusion in the Queensland Heritage Register. Once a place is listed on the register, a development application needs to be made for any significant development work to be undertaken¹². The development application must be refused if the effect of approving the development would be to destroy or substantially reduce the cultural heritage significance of a registered place; and the council is satisfied that there is a prudent and feasible alternative to carrying out the development¹³. However, if the development is of a 'minor' nature, the person can seek an exemption to the development application.

The *Heritage Act 1977* (NSW) specifically sets out actions which can not be undertaken on a heritage place (or building, work, relic, removable object, precinct, or land), where an interim heritage order applies or where it is listed on the State Heritage Register, without obtaining approval granted by the Minister for Planning.¹⁴ Section 57 of the Act prescribes a list of these prohibited actions, which includes demolishing the building or work, carrying out any development in relation to the land on which the building or work is situated, alter the building or work, and so on.¹⁵ When dealing with the application, the Minister is to take into consideration the extent to which the development or work done would affect the historical significance of any items of the environmental heritage.

It is clear that heritage legislation, whether at Federal or state level, does protect heritage places from **any action or development** work done. It will only be a contravention of heritage legislation if an organisation carries out an action or development on a heritage listed building without seeking approval from the associated Minister.

Rather, this legislation establishes a control mechanism, through application and determination processes, to monitor actions or development works done on heritage listed buildings for the purpose of heritage conservation. For development or action on a heritage building to be refused, the action or development has to have a significant impact¹⁶ on the National Heritage values of a National Heritage place.

¹¹ Environment Protection and Biodiversity Conservation Act 1999 s75

¹² Queensland Heritage Act 1992 s33

¹³ Queensland Heritage Act 1992 s33(2)

¹⁴ Minister responsible for heritage in NSW to date

¹⁵ Heritage Act 1977 (NSW) s57

¹⁶ Environment Protection and Biodiversity Conservation Act 1999, s 15B. Note: each of the states and territories has their own 'tests'. For example, in Queensland, s 33 of the Queensland Heritage Act 1992 requires that the action be detrimental if no action at all is to be allowed

Recommendation 2: *Heritage legislation, either federal or state, does not prima facie make any action or development work undertaken on heritage buildings unlawful. Arts organisations should not see heritage law as a prima facie barrier in providing physical access for people with a disability.*

2.2 DISABILITY DISCRIMINATION ACT (OVERVIEW)

The Federal Disability Discrimination Act 1992 (“the DDA”) (the Act) aims to eliminate the discrimination against persons on the ground of disability,¹⁷ and ensure, as far as practicable, that persons with disabilities have the same rights to equality before the law as the rest of the community.¹⁸ A further objective of the DDA is 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.”¹⁹

The DDA encourages everyone to be involved in implementing the Act and to share in the overall benefits to the community and the economy that flow from participation by the widest range of people.

The DDA is a complaints based law. The enforcement of its provisions requires people who consider themselves discriminated against or harassed, because of their disability, to lodge a complaint to the Human Rights and Equal Opportunities Commission (HREOC). The HREOC is a statutory body set up to conduct public inquiries, negotiate disability guidelines and standards, support organisations to develop Disability Action Plans and run community education programs. Once a complaint has been lodged, HREOC will commence an investigation process for complaints which falls under the scope of the DDA. A Conciliation process will then be negotiated between the complainant and the respondent, aiming to reach an agreement. If an agreement cannot be reached, the complaint will be heard by the Federal Court/ Federal Magistrates Service.²⁰

¹⁷ Disability Discrimination Act 1992 (Cth) s3(a)

¹⁸ Disability Discrimination Act 1992 (Cth) s3(b)

¹⁹ Disability Discrimination Act 1992 (Cth) s3(c)

²⁰ Human Rights and Equal Opportunities Commission, *Information for Complaints*, accessed online http://www.hreoc.gov.au/complaints_information/complainants.html

2.3 ACCESS AND THE DISABILITY DISCRIMINATION ACT

Under section 23 of the DDA, it is unlawful to discriminate on the grounds of disability in providing access to or the use of premises that the public can enter or use.

A person must not be discriminated against because of the person's disability, or the disability of any associate:

- by denying access to or use of public premises²¹;
- in the terms or conditions for entry or use of such premises;
- in the means of access to such premises;
- by denying the use of public facilities in such premises;
- in the terms or conditions for use of such facilities;
- by being required to leave such premises or cease to use such facilities.

2.4 UNJUSTIFIABLE HARDSHIP

However, the DDA does not require access to be provided to the premises if it would impose an *unjustifiable hardship* on the person who would have to provide the access. In determining what constitutes unjustifiable hardship for the purposes of the DDA, section 11 states that “all relevant circumstances of the particular case are to be taken into account” including:

- (a) the nature of the benefit or detriment likely to accrue or be suffered by any persons concerned; and
- (b) the effect of the disability of a person concerned; and
- (c) the financial circumstances and the estimated amount of expenditure required to be made by the person claiming unjustifiable hardship; and
- (d) in the case of the provision of services, or the making available of facilities—an action plan given to the Commission under section 64.²²

Although section 11 specifies the relevant circumstances needed to be taken into account when determining what constitutes *unjustifiable hardship*, it does not make any reference to heritage places. The proper view is that any heritage building or premises have to provide access and are subject to the DDA.²³ It is also viewed that registration or listing of a heritage place on the

²¹ Disability Discrimination Act 1992 (Cth) s23(1)(a)

²² s64 of the Disability Discrimination Act 1992 (Cth) states: A service provider may give a copy of its action plan or any amendments to the plan to the Commission.

²³ Martin, E, *Access to Heritage Buildings for People with Disabilities*, Australian Heritage Commission, 1998; The Disability Discrimination Commissioner, *Advisory Notes on Access to Premises*, Human Rights & Equal Opportunity Commission, 1997, ed March 1998, par 8.4. Accessed online: http://www.hreoc.gov.au/disability_rights/standards/Access_to_premises/premises_advisory.html

Register of National Estates, or the need to comply with heritage conservation orders, do not automatically amount to an exemption from compliance to DDA.²⁴

It is however, true to say that, in the event of a complaint to be decided by the Commissioner (before the 2000 Amendment), the effect of any alterations or additions on heritage value of the place would be taken into account in consideration of an *unjustifiable hardship* exemption. Yet, these complaint cases do not form a case precedent and it is still up to the Federal Court or Federal Magistrates Court to determine what constitutes *unjustifiable hardship*.

2.5 CASE LAW ON THE ISSUE OF UNJUSTIFIABLE HARDSHIP

Unfortunately, there are a lack of cases in the Federal Court and Federal Magistrates Court in which heritage is raised as a defence of *unjustifiable hardship*. As a result, there is a lack of precedent in Australian Courts establishing whether heritage places or heritage values may amount to *unjustifiable hardship*.

Nonetheless, the term *unjustifiable hardship* is defined in the Court in various instances, for examples, that it

- connotes more than just hardship²⁵;
- may in some circumstances justify financial burden²⁶

In *Access for All Alliance Inc v Hervey Bay City Council*²⁷, the Court held that the financial burden of the Council must be considered in the context of DDA's objects. In this case, the fact that the Council merely had no "spare" money to meet the requirements was held not enough to justify the unlawful act since the Council can acquire more funding to accommodate the needs of local residents.²⁸

An important case involving the issue of providing access to premises for people with a disability is *Cooper v Holiday Coast Cinema Centres Pty Ltd*²⁹. The complaint concerned the provision of access for people who used wheelchairs to a cinema complex owned by the respondent.

²⁴ The Disability Discrimination Commissioner, *Advisory Notes on Access to Premises*, Human Rights & Equal Opportunity Commission, 1997, ed March 1998, par 8.4. Accessed online:

http://www.hreoc.gov.au/disability_rights/standards/Access_to_premises/premises_advisory.html

²⁵ *Finney v Hills Grammar School* (1999) HREOCA 14 at 52; *Hills Grammer School v HREOC & Ors* (2000) 100 FCR 306; *Francey & Anor v Hilton Hotels* (1997) EOC 92-903 at 77,453; *Access for all Alliance Inc v Harvey Bay City Council* [2004] FMCA 915, par 84.

²⁶ *Francey & Anor v Hilton Hotels* (1997) EOC 92-903 at 77,453

²⁷ [2004] FMCA 915

²⁸ Id at par 84-92

²⁹ Unreported, HREOC, 29 August 1997

In the first instance, the complainant lodged a complaint against the cinema company, and hence the *Cooper v Holiday Coast Cinema Centres Pty Ltd*. The question of unjustifiable hardship was determined. The respondent argued that it was legally impossible to install platform stairlifts in the complex because of unjustifiable hardship and also that it would cause unjustifiable financial hardship to the respondent.

In this case, the Commissioner made two observations on s11(a) and s11(c) of the DDA. In regards to s11(a), the Commissioner decided that the hardship suffered by the complainants, their families and other persons with disabilities who might be using respondent's cinema, must be taken into account. In regards to s11(c), the Commissioner looked at financial hardship which may be suffered by shareholders of the company, its employees and also its customers. The Commissioner decided that the total expenditure was not a significant amount to qualify as unjustifiable hardship.

For arts organisations located in heritage buildings a similar claim of *unjustifiable hardship* in respect of financial burden might well be raised. However, these cases do not demonstrate that heritage significance will or will not constitute a ground for finding of *unjustifiable hardship*. It is therefore difficult to demonstrate whether the *unjustifiable hardship* exception will accommodate heritage significance, and hence create a barrier for arts organisations (located in heritage buildings) to provide physical access to people with a disability.

Recommendation 3 *The defence of “unjustifiable hardship” which applies throughout the DDA needs to be defined with more precision under section 11, or possibly section 23 of the DDA. The issue of whether the ‘heritage’ status of a building leads automatically to the raising of the ‘unjustifiable hardship’ defence must be clearly resolved. Note in Chapter 3 that the Draft Premises Standards suggest the heritage value of a site may be enough to invoke the ‘unjustifiable hardship’ defence.*

Recommendation 4 *The defence of “unjustifiable hardship” is yet to be defined in courts as to whether the heritage status of a building leads automatically to the raising of the defence. Arts organisations located in heritage buildings should not extravagantly rely on the defence of unjustifiable hardship to refuse provision of physical access to people with a disability.*

2.6 CASE LAW ON ACCESS TO HERITAGE BUILDINGS

Councils also have a critical role to play in ensuring that the DDA is complied with.³⁰ Thus it is worthwhile to explore cases which involve both the issue of planning and development of heritage buildings and access for people with a disability.

In regards to case law decided on access to heritage buildings, no cases have used heritage legislation as a defence not to provide physical access for people with a disability. Rather, a lot of these cases are decided in the NSW Land and Environment Court and often building access for people with disability is not a central issue in the development plan. Hence providing access for people with a disability is often a side issue which does not necessarily impact upon heritage conservation. Nevertheless, these decisions have shown that there are solutions that are able to serve both ends, i.e. heritage conservation and providing access.

For example, in *BT Goldsmith Planning Services Pty Ltd v Ashfield Municipal Council*³¹ a development application to alter and add to an existing dwelling house to use the ground floor as a childcare centre was refused by the Ashfield Council. One of the grounds for refusal was that the proposed childcare centre failed to provide disabled access as required by ss5.3.1 and 5.3.4 of the Part C 1, Access, Adaptability and Mobility of the DCP, Part D3.2 of BCA and Australian Standard AS1428.1. Another reason also being that the proposed commercial use of the property within a residential area detracted from the character and heritage significance of the Haberfield Heritage Conservation Area and was incompatible with the purpose of “separation of land uses.” In regards to wheelchair accessibility, the applicant proposed to build a ramp access to the porch and a wheelchair accessible path to go from the disabled car space to the front footpath. The court also held that the commercial use of the land would not significantly detract from the significance of the heritage conservation area. Consequently, the court found no reason to refuse the application.

Also, in *Royal Park protection Group Inc v Melbourne CC*³², the development sought to be undertaken in a heritage area, which had one of its purposes to improve disability access to the car park and bus drop-off/pick-up area. The development involved removing trees, relocation of the unsealed bus parking area to an existing sealed car park area and various other instalments. The Tribunal considered the significance of the heritage area and decided that the proposed work to improve disability access will “enhance the appearance of the heritage area’. The development was therefore approved on the ground that it is considered appropriate to “upgrade it in a contemporary way to serve the general community”.³³

³⁰ HREOC, *What responsibilities do local government authorities have under the Disability Discrimination Act 1992 when considering development approval applications?* Revised 8 May 2001, accessed online http://www.hreoc.gov.au/disability_rights/faq/Local_govt/local.htm

³¹ [2007] NSWLEC 532

³² [2007] VACT 1380

³³ [2007] VACT 1380 at para 38-39

2.7 CONCLUSION

The above findings demonstrate that the 'conflict' does exist between disability discrimination laws and heritage laws. This matter is not resolved in the courts either. There has been a lack of case precedent in which *unjustifiable hardship* is raised as a defence in respect of heritage conservation. There has also been a lack of case precedent in which the Heritage Act is used as a defence for not providing access for people with a disability. It is therefore true to say that the situation is **yet to be resolved** by the court.

Although heritage laws do not aim to preserve absolutely everything so as to render any action or development work undertaken on heritage places to be unlawful, it does not mean that there is no issue with regards to the two laws. In fact, both pieces of legislation have created potentials to limit arts organisations to provide physical access for people with a disability, if

1. the action or development work will result in **significant impact on heritage value**³⁴ of the place and approval from relevant authority is not sought under heritage laws; or
2. *unjustifiable hardship* is sought as a defence for not providing access for people with a disability, whether in respect of financial burden or for the purpose of heritage conservation.

However, each situation must be approached on a case-by-case basis. In other words, in cases where provision for access requires demolition of the heritage site, or alteration to the extent that the heritage value will no doubt be reduced, heritage legislation will clearly limit arts organisations to provide access. On the other hand, there are cases where compliance of the two pieces of legislation can be negotiable, for example the cases decided in the NSW Land and Environment Court as explained earlier. In these circumstances, the different legislation can **co-exist**. Chapter 4 & 5 will explain how co-existence of the legislation can be achieved practically whereby arts organisations adhere to best practices. Chapter 3 will further address the issues associated with co-existence.

In summary, a thorough understanding the legal situation between disability discrimination and heritage conservation laws will be crucial for arts organisations (located in heritage buildings) to increase their provision of physical access for audiences, participants and arts professionals with a disability.

³⁴ Or words to similar effect, depending on the wordings of State or Territory legislation

Summary

- *There is a lack of case precedents determining whether heritage law conflicts with the DDA. However, both heritage and anti-discrimination legislation has the potential to limit the provision of physical access for people with a disability by arts organisations located in heritage buildings.*
- *These limitations are to the extent which action or development work done on a heritage building will result in significant impact on heritage value (or words to the similar effect) or unjustifiable hardship is sought as a defence to not providing access.*
- *The legislations can co-exist such that physical access is provided for people with a disability while not impacting significantly on the heritage value of the venue.*

Recommendation 5 *Arts organisations located in heritage buildings should make their best effort to provide equitable physical access for people with a disability because i) under the DDA, it is unlawful to discriminate on the grounds of disability in providing access to or the use of premises that the public can enter or use; ii) heritage laws do not prohibit every action or development work undertaken in heritage places.*

Recommendation 6: *In order to increase physical access, arts organisations located in heritage buildings should obtain an understanding of the legal situation which exists between disability discrimination laws and heritage conservation laws. Although there are limitations, co-existence of both laws is still possible (refer to Chapter 4 & 5).*

Recommendation 7 *There are State and Territory acts equivalent to the Federal DDA. In New South Wales for example, part 2B of the Anti-Discrimination Act 1977 (NSW) deals with discrimination on the ground of disability. However, the NSW legislation (in comparison to the Federal Legislation) is general in nature and does not have a section designated to 'access to premises.' Further research should be undertaken to investigate whether there are equivalent remedies under State and Territory legislation.*

CHAPTER 3: IS THERE A NEED FOR LEGISLATIVE REFORM?

There is a need for law reform in the area of the provision of physical access in heritage buildings for people with a disability. Advocating the possibilities for law reform aims to enable arts organisations located in heritage buildings to improve provisions of physical access for people with a disability.

Although there are arguments against law reform (namely that the problem is mainly a social and political problem, not a legal one and the current laws allow flexibility and dialogue), law reform is needed to amend and simplify the existing laws. Clarification and simplification in the interests of justice are the ultimate goals.

The reason for law reform is clear. The current legal situation:

- i) is confusing and complex, and
- ii) places too much of a burden on the claimant (the person with the disability).

These two reasons for law reform will be dealt with in turn below.

3.1 CONFUSION OF THE CURRENT LEGAL SITUATION

The current legal situation does not provide arts organisations located in heritage buildings with clear guidance as to what they are legally required to do in terms of providing physical access for people with a disability. To be able to easily understand their legal (and social) obligations and responsibilities, our laws require cross referencing between disability legislation, heritage legislation and Environmental Planning legislation. Furthermore, an understanding of the Building Codes of Australian (BCA) and the Australian Standards for access and mobility (AS 1428) is also necessary in order to fully comply with the statutory requirements.

As stated, there is much cross-referencing required between the various pieces of legislation, *but this is not noted clearly in the DDA or heritage legislation*. To understand their legal requirements, arts organisations are obliged to compare more than two federal and state acts (depending upon which jurisdiction the building is listed under) and be legally literate enough to interpret the acts and understand their interactions.

Arts organisations also need to have an appreciation for the terms “will have a significant impact” on National Heritage Values of the National Heritage place or what “substantially reduce

the cultural heritage significance” would mean under various federal and state laws.³⁵ Moreover, arts organisations need to grasp what “unjustifiable hardship” means under s 11 of the DDA (discussed above).

The legal view is that the DDA will override Commonwealth, State or Territory heritage legislation. The exception being that if implementing proposed changes to provide physical access can be shown to constitute unjustifiable hardship. As indicated before, the Court has yet to decide whether heritage significance will constitute unjustifiable hardship. Therefore, arts organisations located in heritage buildings are often uncertain of the rights and duties under the Federal Disability Discrimination Act.

3.2 BUILDING LAWS, CODES AND STANDARDS

The current legal situation (discussed above) is further complicated by building laws, codes and standards. Significant inconsistencies between the DDA and building laws and standards are evident in numerous complaint cases lodged through the Human Rights and Equal Opportunity Commission (HREOC). With these inconsistencies between the requirements imposed by State and Territory building laws and responsibilities required by the DDA, there is no easy way of ensuring that a building complies with the DDA.

The two major sources of building laws and standards are:

1. Building Codes of Australia (BCA); and
2. Australian Standard: Design for access and mobility (AS 1428)

3.2.1 BUILDING CODES

The Building Codes of Australia (BCA) provides a set of measurable construction standards to be used in design and construction of new building work. The BCA is developed and maintained by the Australian Building Codes Board (ABCB) on behalf of the Australian government and the State and Territory Governments of Australia. Each State and Territory Government in turn has statutory control over building regulation within their jurisdiction.³⁶

For example, in New South Wales the *Environmental Planning and Assessment Act 1979* (EPAA) contains the legislation applicable to the development of buildings. The EPAA applies

³⁵ See for example Disability Discrimination Act 1992 (Cth) s23

³⁶ Australian Building Code Board, *Access for people with a disability*, Australian Government in the Department of Industry, Tourism and Resources, <http://www.abcb.gov.au/go/whatweredoing/workprogram/projectsae/access/access-for-people-with-a-disability>

the Building Code of Australia (BCA) as the technical requirements to be met in new buildings and new building work.

The BCA is referred to as a “performance based” code, describing satisfactory Performance Requirements that buildings and other structures must meet throughout Australia. Performance Requirements must be satisfied by the design and construction of the building. This may vary depending on the building classification: for example, there may be different requirements depending on whether the building is a hospital, a restaurant or a school.³⁷

Access for people with disabilities is dealt with under Part D3 of the BCA. This sets out general building access requirements.³⁸ There are different access requirements for different classes of buildings.³⁹ Table D3.2 outlines the requirements for access for people with disabilities.⁴⁰ Generally the standard of access required increases as the classification size increases (that is, class 9b has more access requirements than class 3).⁴¹

There are two ways to meet the Performance Requirements. These are referred to as Building Solutions:

- *Deemed-to-Satisfy* provisions provide detailed prescriptive technical requirements within the BCA of how the building is to be constructed and equipped. They include reference to technical details found in Australian Standards such as AS 1428.1, which is currently the main Australian Standard covering access related issues for people with disabilities⁴² (see below).
- An *Alternative Solution* is one that can be proven to meet the Performance Requirements of the BCA by other methods. This hopes to allow for new ways of achieving the required levels of performance. The onus is on the building applicant to show that the Alternative Solution complies with the Performance Requirements.⁴³

³⁷ Small, M. senior policy officer in the disability rights unit at the Australian Human rights and equal opportunity commission, *building regulation and equitable access - an Australian view*, HREOC, http://www.hreoc.gov.au/disability_rights/buildings/standev.htm

³⁸ Building Codes of Australia, Part D3.1

³⁹ For example class 1a being single dwelling; class 3 being residential buildings which is a common place of long term or transient living for a number of unrelated people including hotel/motels, accommodation for the aged, children, or people with disabilities, detention centres; class 6 being a shop or other building for the sale of goods by retail or the supply of services direct to the public, class 9 is a building of public nature – for example a health-care building. With class 10 being a non-habitable building.

⁴⁰ Classes dealt with include class 3, class 5, 6, 7 and 8 (which have the same access requirements), and class 9a (healthcare building), 9b (an assembly building, a school or early childhood centre), 9c (aged care buildings).

⁴¹ Note: class 10 deals with non-habitable buildings or structures. Thus the access requirements for this class are not as strict

⁴² See for example, Part D3.0 – D3.8 of the Building Codes of Australia. See also Small, M., *Building Regulation and equitable access - an Australian view*, HREOC, http://www.hreoc.gov.au/disability_rights/buildings/standev.htm

⁴³ See for example, Part D3.6 of the Building Codes of Australia. See also Small, M., *Building Regulation and equitable access - an Australian view*, HREOC, http://www.hreoc.gov.au/disability_rights/buildings/standev.htm

3.2.2 AUSTRALIAN STANDARDS

The Australian Standards provides the minimum design requirements for new building work, to enable access for people with disabilities and form part of a series which are comprised of the following:

- 1428 Design for access and mobility
- 1428.1 Part 1: General requirements for access – New Buildings
- 1428.2 Part 2: Enhanced and additional requirements – Buildings and facilities
- 1428.3 Part 3: Requirements for children and adolescents with physical disabilities
- 1428.4 Part 5: Tactile ground surface indicators for orientation of people with vision impairment

The intention was to make the Standards a practical reference for designers, particularly with regard to problem areas such as sanitary facilities and doorways. Due to the plethora of situations that need to be addressed when designing buildings and facilities, it was seen as “necessary for the Standards to provide a range of data so that the requirements for access can be met and to also allow for flexibility in design where limitations are imposed by other building conditions.”⁴⁴

These Standards covering disability access are far more comprehensive than those provided in Part D3 of the Building Codes of Australia.

3.2.3 THE INTERACTION OF THE BCA, AUSTRALIAN STANDARDS AND THE DDA

The relevance of BCA and the Australian Standards to the DDA is best illustrated by the Federal Court in *Access for All Alliance Inc v Hervey Bay City Council*⁴⁵, citing a submission made by the HREOC Commissioner, that—

“Neither the BCA nor the Australian Standards have any legal status under the DDA.”⁴⁶

As a result, a breach of the BCA and/or Australian Standards will not necessarily result in an unlawful discrimination under the DDA. Conversely compliance with BCA and/or Australian Standards will not in itself qualifies as a defence of discrimination under the DDA.⁴⁷

⁴⁴ Australian Standard – Design for access and mobility (AS 1428.1 – 2001), *Part 1: General Requirements for access – New Building Work*, Building Code of Australia – Primary referenced Standard, Preface

⁴⁵ [2004] FMCA 915

⁴⁶ Id at para 13

⁴⁷ Ibid.

In fact, there are inconsistencies between the BCA and the Australian Standards and the DDA, which concern the following:

1. The BCA and the Australian Standards are limited in scope. They cover the basic construction of the shell of a building and essential services such as sanitary facilities, lifts and safety features whereas the DDA extends to equitable access, building environment and use of the building by the public;⁴⁸
2. The level of access required by the BCA is, in many areas, insufficient to meet responsibilities under the DDA. The DDA only provides the intent and objectives but does not indicate the technical details of what is required if a building is to be made accessible. On the other hand, the BCA's current technical requirements are not considered to meet the intent and objectives of the DDA;⁴⁹
3. Compliance with the BCA and Australian Standards does not guarantee access for all persons with disabilities, which is in contrary to the rationale of DDA. The Federal Magistrates Court made reference to a submission written by the Commissioner at the Human Rights and Equal Opportunities Commission, highlights that the Australian Standards were designed to suit the physical access needs of at least 80% of the most able in the disability group most affected;⁵⁰
4. The BCA is only applied to existing buildings that are undergoing renovations or alterations. For an existing building where no building work is being proposed, that building is *not subject to the BCA*. This means that the provision of access for people with a disability will only be enforced on an existing building when it is undergoing some form of alteration or renovation. This means that access provisions in all buildings across NSW will foreseeably take a very long time. Conversely, the responsibility under the DDA is required regardless of whether it is new or existing buildings or whether it is undergoing renovation work.

⁴⁸N.a. *Comment on raised tactile and Braille signage and way finding information in buildings*, Submissions to HREOC, HREOC, revised on Dec 2003, [Accessed online http://www.hreoc.gov.au/disability_rights/buildings/tactile.htm]

⁴⁹ Ibid.

⁵⁰ *Access for All Alliance Inc v Hervey Bay City Council* [2004] FMCA 915 at para 13

3.2.4 DISABILITY STANDARDS FOR ACCESS TO PREMISES' (PREMISES STANDARDS)

An amendment to the DDA in 2000, allowing the Attorney-General to formulate "Disability Standards for Access to Premises" (Premises Standards), was an attempt to overcome these inconsistencies. The 2000 Premises Standard was described in a 2006 HREOC article,⁵¹ as referencing "the revised BCA and set[ting] out specific accessibility requirements for developers, owners and operators of premises" and will be sufficient to satisfy the objectives of the DDA.⁵²

The new, draft Premises Standard was released in 2004. Although it is foreseeable that the new Premises Standards might resolve some problems, there are still shortcomings in satisfying some of the objectives of the DDA.

For example, the Premises Standards will only apply to new buildings and existing buildings that are being renovated or upgraded. Moreover, it will only cover areas that are currently covered by the BCA, including areas such as access to and within sanitary facilities, paths of travel in buildings, lifts, ramps hearing augmentation systems and signs. Parts of the built environment not currently covered by the BCA's access provisions will not fall into the scope of the new Premises Standards either. These include parts of the buildings such as: furniture and fittings; emergency egress and warning systems; parts of the built environment outside of buildings such as parks, street furniture and pathways; and management, maintenance and staff service directly related to the use of access to the premises.⁵³

Another example is that the current BCA exists to allow certain discretion in its application. This discretion will continue to apply. For example, the new Premises Standard will still mirror the BCA *Deemed-to Satisfy Provision* to allow innovative design or *Alternative Solutions*; the Premises Standard will continue to allow for defences of *unjustifiable hardship* in relation to whether or not a requirement of the standard should be met. This means that the Premises Standard will face the same problem of interpreting *Alternative Solutions* and *unjustifiable hardship*.

The Board is intending to set up a Protocol and Access Panels to ensure effective application of the new Premises Standards⁵⁴, and a mechanism to address legitimate questions regarding *Alternative Solutions* and *unjustifiable hardship*. However, the decisions of the Panels will not be legally binding. Thus enforceability of responsibilities required by the DDA continues to rely on the complaint system (as described below).

⁵¹ Small, M, *Building Regulation and equitable access- an Australian view*, HREOC, revised Jan 2006, Accessed online http://www.hreoc.gov.au/disability_rights/buildings/access_to_premises.html

⁵² Ibid.

⁵³ Ibid.

⁵⁴ Australian Building Codes Board (2004) *DDA Disability Standard on Access to premises: The Protocol. A Process to Administer Building Access for People with a Disability*, p9

In regards to heritage buildings, Part 4 s4.1 of the draft Premises Standards reads:

- (2) These Standards do not render it unlawful for a person to fail to comply with a requirement of these Standards if, and to the extent that, compliance would impose unjustifiable hardship on the person.
- (3) However, these Standards apply to the maximum extent not involving unjustifiable hardship.
- (4) In determining whether compliance with a requirement of these Standards would impose unjustifiable hardship on a person in relation to a building, all relevant circumstances of the particular case are to be taken into account including...
 - (d) the significance of any heritage value attaching to the building, or a part of the building, that is reasonably likely to be affected by compliance with the requirement.

The new, draft Premises Standards – by including “heritage value attaching to a building” as a consideration for *unjustifiable hardship* – creates a shield for not providing access for people with a disability. Moreover, the term “reasonably likely to be affected” is not properly defined in the Draft Premises Standard. What is “reasonably likely” to affect “the significance of any heritage value” may be construed in a way to cover any alterations or building works undertaken on a heritage building. Clearly, s4.1(2)(d), if implemented, will automatically enable heritage significance to be considered for claiming *unjustifiable hardship* defence. If construing the term “reasonably likely to be affected” broadly, arts organisations located in heritage buildings will be able to easily refuse provision of physical access (for people with a disability) by claiming *unjustifiable hardship*.

However, the implementation of the new Premises Standards will go some way to alleviating some of the confusion and uncertainty that currently exists. However, the Premises Standards do not do enough to protect the rights of people with a disability accessing premises – especially those that have heritage significance. If the Premises Standard is to enable access outcomes, the draft should be re-examined.

Unfortunately, since April 2004 when the draft Premises Standard was released for public consultation, there has been almost no public information about the progress of the Premises Standard.⁵⁵ The results of the Building Access Policy Committee’s consideration of public comment have been considered by the Board and advice, including a Regulation Impact Statement that estimates the costs and benefits likely to accrue from the proposal, has been provided to the Federal Minister for Industry, Tourism and Resources and the Federal Attorney-General for their consideration.⁵⁶

⁵⁵The opinion expressed in Access to premises Campaign Kit- Campaign Kit p. 3

⁵⁶ Australian Building Codes Board, *Access for People with a disability* [Accessed online: <http://www.abcb.gov.au/go/whatweredoing/workprogram/projectsae/access/access-for-people-with-a-disability>] [Updated 9 October 2007]

At this stage, the Building Access Policy Committee has also referred the Draft Premises Standard and submissions to the Attorney General. It appears that release of the Premises Standard has all but stalled. If arts organisations located in heritage buildings are to successfully provide access for people with a disability, the Draft Premises Standard needs to be modified to reduce “heritage” as a factor in determining “unjustifiable hardship.” The Premises Standard must then be implemented.

3.2.5 CONCLUSION

For now, arts organisations have to refer to DDA and the relevant Heritage legislation as well as the Building Codes of Australia (BCA), the Australian Standards for Access and Mobility (AS1428 Parts 1-4) and the relevant Environmental Planning legislation in the relevant state in order to know what they are required to do. The difficulties in doing so are evident, and it is best described by the following quote in a submission to HREOC on the provision of access:

“The difficulty faced by people with disabilities and building owners and operators is that anti-discrimination law is not written in a way that gives a clear indication of what has to be done to avoid discrimination. As a consequence defining what access means has been reliant on individual complaints and individual outcomes which may or may not meet the needs of other people with similar disabilities.”⁵⁷

The following section 4.3 will outline the problems associated with “reliance on individual complaints and individual outcomes” in meeting the access needs of people with a disability.

Summary

- *The current legal situation is confusing and requires much cross-referencing of legislation, Building Codes and Standards*
- *The BCA doesn't only applies to new buildings and existing buildings that are being renovated or upgraded*
- *The Draft Premises Standards doesn't apply to existing buildings (they only apply to new buildings and existing buildings that are being renovated)*
- *Under the Draft Premises Standards 'Heritage value' becomes a factor in determining unjustifiable hardship (which can be used as an argument against the provision of access)*
- *Even when the Australian Standards: Design for access and Mobility (AS 1428) are incorporated into the revised BCA, the issue of heritage is still not addressed*

⁵⁷ N.A. *Comment on raised tactile and Braille signage and wayfinding information in buildings*, Submissions to HREOC, HREOC, revised on Dec 2003, accessed online http://www.hreoc.gov.au/disability_rights/buildings/tactile.htm

Recommendation 8 *There is a need for the simplification of the existing laws. There needs to be clear links between the relevant pieces of legislation at federal and state levels (with regards to heritage, disability and environmental planning legislation) and the Building Codes and Standards*

Recommendation 9 *If the Premises Standard is to be successfully implemented the Draft needs changes. The Draft Premises Standard needs to be modified to reduce “heritage” as a factor in determining “unjustifiable hardship.” There must be room for negotiation and the provision of access.*

Recommendation 10 *For the BCA and Premises Standards to be fully effective, they must apply to existing buildings that are not undergoing renovations.*

Recommendation 11 *Further research should be undertaken to determine the role of the Access Panels proposed to be established under the new Premises Standards. The Access Panel would be most effective if it acts to ensure buildings comply with the new Premises Standards and advocates on behalf of complainants regarding breaches of these Standards (possibly a body similar to that of the Australian Competition and Consumer Commission (ACCC)).*

3.3 CURRENT RELIANCE ON INDIVIDUAL COMPLAINTS AND INDIVIDUAL OUTCOMES

Understanding the Conciliation process

As explained earlier, the Disability Discrimination Act 1992 (DDA) is a complaints based law. It requires people who consider themselves discriminated against to lodge a complaint. Previous to 2000, lodged complaints were heard by the Human Rights and Equal Opportunities Commission (HREOC). However in April 2000 when changes made by the Human Rights Legislation Amendment Act 1999 took effect, matters not resolved in investigation and conciliation by HREOC are no longer referred for Commission hearing but are able to be taken directly to the Federal Court.⁵⁸

Nonetheless, a substantial proportion of complaints under the DDA are resolved by the parties deciding to settle the matter by conciliation, with the assistance of HREOC, but “without the Commission or the courts having to formally decide that unlawful discrimination has occurred or what the remedy should be.”⁵⁹ This allowance for flexibility is one of the strengths of the current regime.

However, in the majority of cases conciliation agreements are not published directly or in full; the exception being where parties have arranged for this to happen as part of the settlement complaint.⁶⁰ As noted by HREOC:

“In many cases conciliation agreements are made on condition that liability for unlawful discrimination is not admitted. A respondent may have had a possible defence on unjustifiable hardship or other grounds but decided not to settle the matter. Conciliation outcomes do not necessarily provide firm precedents for what outcomes would be in other cases.”⁶¹

The fact that HREOC cases do not form legal precedents is both an advantage and disadvantage of the conciliation, complaint based process. While it allows for negotiation and takes into account the individual and sometimes unique aspects of individual cases, it creates a great deal of uncertainty for the complainant.

⁵⁸ Human Rights and Equal Opportunity Commission (HEREOC), *Court Decisions*, [Accessed online: http://www.hreoc.gov.au/disability_rights/decisions/court/court.html] [Updated November 2007]

⁵⁹ HREOC, *Conciliated settlements* [Available online: http://www.hreoc.gov.au/disability_rights/decisions/conciliation.html] [Updated January 2007]

⁶⁰ Ibid.

⁶¹ Ibid.

However, the following examples of “conciliated outcomes” from the Human Rights and Equal Opportunity Commission illustrate how access can be negotiated without the need to resort to litigation.⁶² This is one of the strengths of the current complaint based system – it allows for conciliation and settlement without the need of the Courts.

The first example from 2004 concerned a woman who used a wheelchair. The woman complained that she had been unable to access a Sydney coffee shop as both entrances had steps. The respondent stated that there were barriers to providing access as the premises had heritage value, but agreed to raise the matter with the Australian Heritage Commission (which provides information on upgrading heritage premises for access). The complaint was settled with an agreement to provide ramp access at one of the entrances.⁶³

The second example occurred in 1998. A man who used a wheelchair complained that a recently renovated restaurant did not have adequate access. The restaurant owner indicated that the building had heritage listing, and that local government planning processes had given approval for the renovated premises without compliance with the disability access requirements of the Building Code. This was on the basis that modifications to the front entrance to render it accessible would be inconsistent with heritage requirements. Furthermore, the restaurant owner claimed that there was insufficient space to achieve equal access, given narrow doorways and the fact that installation of a side door ramp access would take up car parking space so as to breach local government requirements. The matter was settled after a conciliation conference. The restaurant owner agreed to seek approval for modifications to provide side door ramped access and the provision of a disability car parking space.⁶⁴

The third example, also from 1998 concerned a woman with a physical disability who complained that she was unable to use a local Commonwealth Government service provision office. This was due to the steps at the entrance and inside the premises and the heavy front doors. Due to the heritage nature of the building concerned, the respondent noted that ramp access must be arranged with heritage authority. Ramp access was provided eventually but the respondent claimed it was impossible to replace the existing doors because of their heritage significance but proposed to modify them to ensure easier access. The matter was ultimately settled when heritage approval for automatic doors was obtained after it was finally asked for.⁶⁵

These three cases highlight how positive changes can come about through the conciliation process. In each of the above cases access for people with a disability was eventually provided. Even though the above parties did not have to resort to litigation, the conciliation process itself

⁶² HREOC, *Conciliated outcomes: Access to Premises* [Available online: http://www.hreoc.gov.au/disability_rights/decisions/conciliation/access_conciliation.html [Updated 10 January 2007]. Note: The summaries of Conciliated Outcomes with regards to *access to heritage premises* are listed on the HREOC website, with a reminder that conciliated settlements are usually made without admission of liability and may not provide firm precedents for the outcome in other cases.

⁶³ Ibid

⁶⁴ Ibid

⁶⁵ Ibid

can be long and drawn out, even if a settlement does eventuate. In fact, many cases are unresolved, terminated or dismissed. In such cases, the provision of access for people with a disability is uncertain, limited or non-existent.

Dismissal

Under section 46PH of the Human Rights and Equal Opportunity Commission Act the President may decide to terminate a complaint on grounds including that she is "satisfied that the act complained of is not unlawful, that the complaint is misconceived or lacking in substance or that another more appropriate remedy is reasonably available."⁶⁶

Whilst there are no cases listed specifically pertaining to the termination of a complaint process regarding the provision of access to a heritage building, there are many cases that have been dismissed which involve people with a disability making complaints about access to premises.⁶⁷

Court

There have been no court decisions – whether decisions from the High Court, Federal Court or the Federal Magistrates Court that relate specifically to the provision of access for people with a disability to heritage premises. However, there are examples of decisions which relate to the provision of access for people with a disability – without the premises being one that has heritage significance.

The complaint based process – a passive approach

The complaint based process relies on individuals having a bad experience and lodging a complaint before any provision of access is achieved. This is a very passive approach to providing access. People must go through the entire complaint process in order to negotiate access.

An obvious problem is that in a currently existing building that is not undergoing renovations, providing access for people with a disability is not automatically enforced. If no access exists, someone must lodge a complaint – and not everyone has the time, money, knowledge or resources to lodge a complaint. If people don't put a complaint forward, there is very little chance of anything being done. This approach is passive and reactive.

⁶⁶ HREOC, *Decisions to terminate or decline complaints*, [Accessed online: http://www.hreoc.gov.au/disability_rights/action_plans/effective_plan/effective_plan.html] [Updated: 13 april 2000]

⁶⁷ For example, *Sluggett v Flinders University of South Australia* (or see (http://www.hreoc.gov.au/disability_rights/decisions/comdec/2000/DD000100.htm))

Summary

- *The DDA is complaints-based (as opposed to compliance-based) legislation. This places the burden on the person with the disability – not the owner of premises that doesn't provide adequate access.*
- *This is a passive and reactive approach which relies on the individual complaining before access is to be provided in an inaccessible premises or premises with inadequate access. Moreover, even if complaints being lodged, the provision of access for people with a disability is uncertain, limited or non-existent.*

Recommendation 12: *The merits of a more proactive approach needs to be further examined – such as the approach adopted in the United States of America (discussed below) where the burden is not placed on the person with disability, but the owner of the premises. The provision of access to premises in the United States is mandated under the Americans with Disabilities Act 1990.*

3.4 STUDY OF THE UNITED STATES LAWS AND STANDARDS

The remainder of this Chapter discusses the seeming conflict between disability discrimination and heritage conservation on the International level, namely, the approach taken by the U.S and the U.K. This aims to provide a possible model for law reform in Australia which will enable arts organisations located in heritage buildings to improve their provision of physical access for people with a disability.

Relevant Legislation

There are three key federal accessibility laws used in the United States to achieve accessibility for individuals with disabilities.⁶⁸

1. Architectural Barriers Act of 1968 (“ABA”) (42 U.S.C. §4151 et seq.)
2. Rehabilitation Act of 1973 (“Rehabilitation Act”) (29 U.S.C. §794 for Section 504)
3. The Americans with Disability Act of 1990⁶⁹ (“ADA”) (42 U.S.C §12101 et seq)⁷⁰

The ABA applies to buildings constructed or altered, on behalf of, or for the use of the Federal government that are financed in whole, or in part by a federal loan. It requires cultural organisations that use Federal funds to design, construct or alter buildings to comply with a minimum level of physical accessibility.⁷¹

The Rehabilitation Act on the other hand, applies to public or private organisations that receive direct or indirect federal funding. It prohibits discrimination on the basis of disability in programs, services and activities provided by these organisations.

Despite these two Acts, the ADA is regarded as the most powerful piece of legislation. The ADA expanded the protection of civil rights for individuals with disabilities by extending well beyond federally funded buildings or organisations, as covered by the ABA and Rehabilitation Act, to any organisation that serves the public, regardless of whether they receive federal financial support or whether they are private or public.⁷²

⁶⁸ For complete texts and further information of US federal laws on disability rights, please visit the Disability Section, Civil Rights Division of the US Department of Justice (DOJ) at <http://www.usdoj.gov/crt/secsites.html>

⁶⁹ Full Text of ADA <http://www.usdoj.gov/crt/ada/pubs/ada.htm#Anchor-Sec-34807>

⁷⁰ How US laws are titled? US laws are arranged in different titles in the United States Code (U.S.C.). Under Title 42 The public health and welfare, the ADA is coded in Chapter 126 Equal opportunity for individuals with disabilities, section 12101 to 12213

⁷¹ Design for Accessibility- Cultural Administrator’s handbook chapter 2 Legal overview: the ADA and the Rehabilitation Act p. 16

⁷² Design for Accessibility- Cultural Administrator’s handbook Chapter 2 Legal overview: the ADA and the Rehabilitation Act p. 18

What is the ADA?

The ADA makes provisions to prohibit discrimination on the basis of disability in regards to aspects of employment (title I), state and local government services (title II), public accommodations and services operated by private entities (title III) and commercial facilities, transportation and telecommunications (title IV). Its purpose is to provide a national mandate for the elimination of discrimination against individuals with disabilities; and clear standards addressing such discrimination enforceable by the Federal Government.⁷³

Physical Accessibility and the ADA

Provision of physical accessibility for individuals with disability are mandated under §12132 of title II and §12182 of title III.

§1232 reads:

Subject to the provisions of this subchapter, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

§12182 reads:

No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation.

These provisions require organisations which serve the public to comply with physical accessibility standards, the ADA standards⁷⁴ prescribed by Title III Regulations⁷⁵. In regards to accessibility standards of historic qualified buildings, standards 4.1.7 must be complied with unless one of the exceptions applies.

§12204(c) makes the U.S. Architectural and Transportation Barriers Compliance Board (ATBCB)⁷⁶ responsible for the development of guidelines to facilitate the implementation of ABA and ADA. The ATBCB has published two sets of guidelines which implement the ABA and ADA:

- Uniform Federal Accessibility Standards (UFAS) which applies to federal agencies, public cultural organizations and private organizations receiving direct and indirect federal funds;⁷⁷ and

⁷³ §12101(b)(1) &(2) Purpose

⁷⁴ the ADA standards for Accessible Design <http://www.ada.gov/adastd94.pdf>

⁷⁵ 28 CFR Part 36, revised July 1, 1994)

⁷⁶ §12186 Regulations provides that the Attorney General shall issue standards applicable to §12182 which also needs to be consistent with the ATBCB guidelines issued in accordance with §12204.

⁷⁷ For full text of the guideline, visit the U.S. ATBCB website at <http://www.access-board.gov/ada-aba/final.htm#SITE>

- The ADA Accessibility Guidelines (ADAAG) which applies to private non-profit and for profit organizations

In particular, the guidelines make provisions for standards in regards to alterations made to qualified historic buildings and facilities.

With these statutory standards and ATBCB guidelines, the federal laws have created a streamlined approach to enforcing accessibility in historic qualified buildings.

1. The ADA mandates compliance with ADA standards and guidelines developed by the ATBCB;
2. these standards and guidelines have clear and unequivocal procedures and requirements with regards to historic qualified buildings or facilities. Cultural organizations, regardless of whether they receive federal funding or whether they are public or private, know exactly what standard they have to comply legally.
3. the minimum standards for access with regards to historic qualified buildings or facilities are mandatory, unless there are proven exceptions. For examples, 202.5 of the UFAS specifies that alterations to a qualified historic buildings and facilities must comply with the minimum standards of accessibility set out in Chapter 2 of the UFAS⁷⁸, unless a State Historic Preservation Officer is satisfied that such alteration would threaten or destroy the historic significance of the building or facility.

This provides a proactive approach to accessibility for people with disabilities since the responsibility to provide physical access rests on organisations, not the individual.

Recommendation 13: *The study of the U.S. approach should be highlighted as a model for future law reform in Australia. It provides a more proactive approach to resolve the issues regarding the provision of access for people with a disability and the need to preserve heritage sites.*

⁷⁸ Chapter 2 of the UFAS includes an extensive lists of areas where physical access should be provided, these include accessible routes, parking spaces, toilet facilities, stairways and etc.

3.5 STUDY OF UNITED KINGDOM- LAWS, GUIDELINES AND STANDARDS

The main piece of heritage legislation in the UK is the *National Heritage Act* 1983. Section 32 of the *National Heritage Act*, establishes the Historic Buildings and Monuments Commission for England. The Commission's general functions under section 33 of the Act include: to secure the preservation of ancient monuments and historic buildings situated in England, to promote the preservation and enhancement of the character and appearance of conservation areas situated in England, and to promote the public's enjoyment of ancient monuments and historic buildings situated in England.

The Disability Discrimination Act 2005 ("the 2005 Act") makes substantial amendments to the Disability Discrimination Act 1995 ("the DDA (UK)"). This builds on amendments already made to that Act by other legislation since 1999.

The DDA (UK) as originally enacted, contained provisions making it unlawful to discriminate against a person with a disability in relation to employment, the provision of goods, facilities and services, and the disposal and management of premises. It also contained some provisions relating to education; accessibility of public transport for people with disabilities.⁷⁹ The 2005 Act extends to Great Britain, with section 3 imposing duties on public authorities to promote the equality of opportunity for people with a disability.⁸⁰

How the *National Heritage Act* 1983 and the DDA (UK) interact, is yet to be determined. The DDA (UK) has no specific technical compliance document as it is intended that the duties will evolve as the courts determine cases. With no compliance document it allows the requirements of the DDA to change inline with developments in national best practice guidelines with regards to disability.

Although the DDA (UK) is civil rights legislation, it *does not include standards for accessible building design*. The Building Regulations 2002 (discussed below) supervise aspects of building construction and renovations.

The DDA (UK) uses the terms "disability" and "disabled person". A person has a disability for the purposes of this Act if he has a physical or mental impairment which has a substantial and long-term adverse effect on his ability to carry out normal day-to-day activities.⁸¹ Disability can be

⁷⁹ Explanatory notes to the Disability Discrimination Act 2005 (UK). These notes do not form part of the Act.

⁸⁰ The 2005 Act extends to Great Britain, save for section 9 and section 16, both of which extend only to England and Wales. Section 3 falls partly within the competence of the Scottish Parliament. The 2005 Act does not extend to Northern Ireland: Explanatory notes to the Disability Discrimination Act 2005 (UK)

⁸¹ Section 1 of the Disability Discrimination Act 2005 (UK)

physical, mental, hearing or vision impairment. Access issues are not restricted only to the needs of wheelchair users.⁸²

The Building Regulations (Part M) 'Access to and use of Buildings'

The Building Regulations 2000 apply to England and Wales and were issued under the Building Act 1984. The Building Regulations are supported by approved documents that provide guidance on meeting the requirements of the Building Regulations.⁸³

The new standards established by British Standard 8300:2001 '*Design of buildings and their approaches to meet the needs of disabled people – Code of Practice*' have been incorporated into Part M (2004) of the Building Regulations (2000).⁸⁴ Part M is a minimum standard the requirements apply if:

- A non-domestic building or a dwelling is newly erected;
- An existing non-domestic building or dwelling is extended, or undergoes a material alteration; or
- An existing building or part of an existing building undergoes a material change of use to a hotel or boarding house, institution, public building or shop.⁸⁵

Any departure from the guidance set out in *Approved Document Part M* must be justified by an access statement.⁸⁶

BS 8300 2001 *Design of buildings and their approaches to meet the needs of disabled people – code of practice*

The new British Standard 8300 contains the most up to date practical guidelines on how to make the built environment accessible for people with a disability. However, the problem is that there is no specific mention within the British Standard 8300 or any of the guidance documents as to how this new British Standard will interrelate with the DDA (UK). The 2004 Edition of Approved Document M adopted many of the BS8300 standards. In some cases the standards contained within Approved Document M are higher than those contained within the British Standard.⁸⁷ "It would seem that for those standards that are higher, these are additional standards that should be applied to physical adaptations to work towards meeting design requirements under the DDA (UK)."⁸⁸ However, as one expert argues, the current state in the

⁸² Historic Environment Local Management [HELM] *Easy Access to Historic Buildings*, English Heritage, http://www.helm.org.uk/upload/pdf/Easy%20Access%20to%20Historic%20Buildings_2004.pdf

⁸³ Office of the Deputy Prime Minister, *Building Regulations 2000 – Access to and use of buildings – Approved Document Part M*, p 5

⁸⁴ Office of the Deputy Prime Minister, *Building Regulations 2000 – Access to and use of buildings – Approved Document Part M*, pp 14-15

⁸⁵ Office of the Deputy Prime Minister, *Building Regulations 2000 – Access to and use of buildings – Approved Document Part M*, p 11

⁸⁶ Office of the Deputy Prime Minister, *Building Regulations 2000 – Access to and use of buildings – Approved Document Part M*, p 14-16

⁸⁷ *Ibid* pp 12-13.

⁸⁸ *Ibid* p 13.

UK as regards to the provision of access for people with a disability could be regarded as “controlled chaos.”⁸⁹

Therefore, at this present moment, it is not recommended that the UK approach be adopted in considering the possible avenues of law reform in Australia.

Recommendation 14: *Further research needs to be undertaken into the current state of the UK laws in relation to the provision of access to heritage buildings for people with a disability.*

Recommendation 15: *An examination of case law needs to be undertaken when cases on this issue come to light – as yet there are no cases on the issue.*

Recommendation 16: *Further research into the effect of activism, advocacy and lobbying in the UK needs to be effected.*

Recommendation 17: *The issue of funding in the UK and where the funding for the provision of access comes from needs to be researched – whether the government funds large scale projects that aim to provide access to premises for people with a disability.*

4.6 CONCLUSION

As already mentioned, the DDA is complaints-based legislation which places the burden on the person with the disability to argue for access. The U.S. has approached the seeming conflict between disability discrimination and heritage conservation in a different way. The *Americans with Disabilities Act* places positive burden on owners of premises to provide access for people with a disability, despite whether the premises are historically significant or not. In the U.K. although the provision of access appears to be widespread, the legislative scheme is confusing. There is little relevant case law on the issues post the 1995 Disability Discrimination Act (U.K.) and how this relates to the Approved Document M of the Building Regulations. The U.S. approach seem to provide a better model for law reform in Australia which will enable arts organisations located in heritage buildings to improve their provision of physical access for people with a disability.

⁸⁹ Ibid, p 15.

CHAPTER 4: WHAT IS THE BEST PRACTICE FOR ARTS ORGANISATIONS LOCATED IN HERITAGE BUILDINGS TO PROVIDE ACCESS FOR PEOPLE WITH A DISABILITY?

In line with the proposal that disability discrimination legislation and heritage legislation have the capacity to co-exist, as outlined in Chapter 2, advice is given on how to develop a practical framework in which the requirements of each property, and the needs of its users, can be assessed and an access strategy agreed⁹⁰. The following guidance aims to improve provisions of physical access for people with a disability through combining guidelines of best practice from the Australian Heritage Commission, English Heritage and various United States organisations which provide effective guidance on making historic properties accessible while preserving their historic character.

Although the guidelines deal primarily with proposals affecting heritage listed buildings, the principles and advice embodied will be applicable to all historically significant buildings⁹¹. At the same time, as also highlighted in Chapter 2.7, it is recognised that some cases will exist where access will not be feasible if the heritage asset of a building is to be preserved, these cases however are rare. In most cases, as stated in the Australian Heritage Commission's publication *Improving Access to Heritage Buildings*, innovative thinking and application of the principles outlined in such guidelines will usually provide an acceptable solution⁹².

Adopting a process which combines an understanding of the principles of access and heritage with practical examples will assist managers, users and designers to achieve effective solutions through adopting access plans that are consistent with the special architectural, historic or archaeological interest of the property concerned. The guidelines also depict how independent physical accessibility at historic properties can be achieved with careful planning, consultation, and sensitive design.

Nevertheless what must be realised is that modifications to historic properties to increase accessibility can involve simple or inexpensive amenities to overcome perhaps one entrance step, or may involve small changes to interior features. In particular for public entities like arts organisations, access is not simply limited to making facilities physically accessible. Adhering to program access requirements includes effective communication practices, accessible signage and staff training where perhaps a staff member is designated of to serve as contact for concerns and other aspects of program services that mere physical accessibility does not fulfill.

⁹⁰ Adams, J., Foster, L. (2004). *Easy Access to Historic Buildings*. United Kingdom: English Heritage. Accessed online: <http://www.ahc.gov.au/publications/generalpubs/access/index.html>

⁹¹ *Ibid*

⁹² Martin, E. (2005). *Improving Access to Heritage Buildings: A practical guide to meeting the needs of people with disabilities*. Australia: Australian Heritage Commission. Accessed online: <http://www.ahc.gov.au/publications/generalpubs/access/index.html>

4.1 PLANNING ACCESSIBILITY MODIFICATIONS

There are a number of steps that arts organisations may follow in order to provide the highest level of accessibility while minimizing changes to historic materials and thus protecting the integrity and historic character of historic properties. The United States National Park Services recommends the following three-step approach to identify and implement accessibility modifications in their publication *Making Historic Properties Accessible*⁹³, which can also be applicable in Australia in the following ways:

1. Review the historical significance of the property

If the property has been designated as historic (properties that are listed in, or eligible for listing in the relevant national or state register), the property's file should be reviewed to study its significance. Review of the written documentation should always be supplemented with a physical investigation to identify which character defining features and spaces must be protected whenever any changes are anticipated. If the level of documentation for a property's significance is limited, it may be necessary to have a preservation professional identify specific historic features, materials, and spaces that should be protected.

For most historic properties, the construction materials, the form and style of the property, the principal elevations, the major architectural or landscape features, and the principal public spaces constitute some of the elements that should be preserved. Every effort should be made to minimize damage to the materials and features that convey a property's historical significance when making modifications for accessibility.

Secondary spaces and finishes and features that may be less important to the historic character should also be identified; these may generally be altered without jeopardizing the historical significance of a property. Non-significant spaces, secondary pathways, later additions, previously altered areas, utilitarian spaces, and service areas can usually be modified without threatening or destroying a property's historical significance.

2. Assess the property's existing and required level of accessibility

⁹³ Jester, T., Park, S. (1993). *Making Historic Properties Accessible*. United States of America National Park Services. Accessed online: <http://www.cr.nps.gov/hps/tps/briefs/brief32.htm>

A building survey or assessment will provide a thorough evaluation of a property's accessibility. Simple audits can be completed by property owners using readily available checklists (e.g. *Access to Buildings with Special Requirements* checklist.⁹⁴)

Most surveys identify accessibility barriers in the following areas:

Building and site entrances; surface textures, widths and slopes of walkways; parking; grade changes; size, weight and configuration of doorways; interior corridors and path of travel restrictions; elevators; and public toilets and amenities.

Accessibility specialists can also be hired to assess barriers in more complex properties, especially those with multiple buildings, steep terrain, or interpretive programs. Persons with disabilities can also be particularly helpful in assessing specific barriers.

All applicable accessibility requirements, local codes, State codes and federal laws--should be reviewed carefully before undertaking any accessibility modification. Since many localities have their own accessibility regulations and codes, owners should use the most stringent accessibility requirements when implementing modifications. The Australian Heritage Commissions publication *Improving Access to Heritage Buildings: A practical guide to meeting the needs of people with disabilities*⁹⁵ is the document that should be consulted when complying with the *Australian Standard, Design for access and mobility requirements*.

3. Identify and evaluate accessibility options within a preservation context

Once a property's significant materials and features have been identified, and existing and required levels of accessibility have been established, solutions can be developed. Solutions should provide the greatest amount of accessibility without threatening or destroying those materials and features that make a property significant.

Modifications may usually be phased over time as funds are available, and interim solutions can be considered until more permanent solutions are implemented. A team comprised of persons with disabilities, accessibility and historic preservation professionals, and building inspectors should be consulted as accessibility solutions are developed.

Modifications to improve accessibility should generally be based on the following priorities:

⁹⁴ Part 2.8 of Martin, E. (2005). *Improving Access to Heritage Buildings: A practical guide to meeting the needs of people with disabilities*. Australia: Australian Heritage Commission. Accessed online: <http://www.ahc.gov.au/publications/generalpubs/access/index.html>

⁹⁵ Martin, E. (2005). *Improving Access to Heritage Buildings: A practical guide to meeting the needs of people with disabilities* [online]. Australia: Australian Heritage Commission. Accessed online: <http://www.ahc.gov.au/publications/generalpubs/access/index.html>

- 1) Making the main or a prominent public entrance and primary public spaces accessible, including a path to the entrance;
- 2) Providing access to goods, services, and programs;
- 3) Providing accessible restroom facilities; and,
- 4) Creating access to amenities and secondary spaces.

When new features are incorporated for accessibility, historic materials and features should be retained whenever possible. Accessibility modifications should be in scale with the historic property, visually compatible, and, whenever possible, reversible. Reversible means that if the new feature were removed at a later date, the essential form and integrity of the property would be unimpaired. The design of new features should also be differentiated from the design of the historic property so that the evolution of the property is evident.

In general, when historic properties are altered, they should be made as accessible as possible. However, if an owner or a project team believes that certain modifications would threaten or destroy the significance of the property, the Australian Heritage Commission's guideline *Improving Access to Heritage Buildings* should be consulted to determine whether or not any special accessibility provisions may be used. Special accessibility provisions for historic properties will vary depending on the applicable accessibility requirements.

Recommendation 18: *The guidelines for implementing accessibility modifications provided in the following chapters do not include all the specific details defined within regulations such as the Building Code of Australia, or Australian Standards. As a result arts organisations located in heritage buildings who want to follow this guideline should research further into these codes and practices, especially AS1428.1⁹⁶, to ensure they are stringently complied with.*

Recommendation 19: *Furthermore, owing to the fact that accessibility work may at times involve projects which are quite complex, it is recommended that in these cases, consultations with experts in the fields of historic preservation and accessibility take place before proceeding with permanent physical changes to historic properties.*

⁹⁶ Australian Standard – Design for access and mobility (AS 1428.1 – 2001), *Part 1: General Requirements for access – New Building Work*, Building Code of Australia – Primary referenced Standard.

4.2 GUIDELINES TO BUILDING ACCESS

The following guideline is a summarised version of the Australian Heritage Commission's recommendations provided in *Improving Access to Heritage Buildings: A practical guide to meeting the needs of people with disabilities*⁹⁷

ACCESS TO PRINCIPAL ENTRY

It is important to define the principal public entry. Locate the entry to minimize loss of original elements, such as porch railings, steps and windows, and preserve the overall setting and character of the place.

There are opportunities in larger sites to ensure that the easiest entry for disabled access is the one of general access. Patrons can be directed around a site to any entry in a logical and informative way.

It is discriminatory to expect people with disabilities to enter through a rear or back entry, while others can use the main entry. Nevertheless, an accessible main entry, and a second one, which may be more convenient for some people while maintaining the building's significance, may be considered an acceptable outcome.

The principles of providing access to the principal public entry are:

1. DISTANCE TO ENTRANCE SHOULD BE MINIMIZED.

If parking is a long way from the place, other factors must be considered, such as resting points along the way.

2. ROUTE TO ENTRANCE SHOULD BE CLEARLY DEFINED.

3. PATH TO ENTRANCE SHOULD BE AT A CONVENIENT GRADIENT, WIDTH AND PROVIDE A FIRM SURFACE.

4. OBSTACLES IN ROUTE TO ENTRANCE SHOULD BE MINIMIZED.

The more common obstacles include:

- Overhanging elements or overhead clearances less than 2000mm cause problems for people with vision impairments.
- Level differences and uneven surfaces, even if only 10mm, can frequently create a trip hazard.
- Gates are difficult to open.

⁹⁷ Martin, E. (2005). *Improving Access to Heritage Buildings: A practical guide to meeting the needs of people with disabilities* [online]. Australia: Australian Heritage Commission. Accessed online: <http://www.ahc.gov.au/publications/generalpubs/access/index.html>

5. ENTRY LEVEL MUST BE INDEPENDENTLY ACCESSIBLE.

There is frequently a level difference between the path and the main floor level.

6. ENTRY DOORS MUST BE EASILY OPERABLE, WIDE ENOUGH, AND WITHOUT STEPS.

- handles at an accessible height (less than 1100mm).
- door knockers or bells at an accessible height
- handles that are easily turned. Lever handles are preferred.
- a clear width at least 800mm to permit easy access by wheelchairs
- no obstacles such as mats.

CIRCULATION THROUGHOUT MAIN LEVEL

7. DOORS SHOULD BE WIDE ENOUGH AND EASY TO OPERATE.

Sometimes there is more than one door into a room, with one accessible and the other not. This may mean guiding people through a place by entering through the accessible door, rather than trying to overcome the problem of the narrower door.

8. NO OBSTACLES SHOULD BE PROVIDED.

- These include places where overhead clearances are less than 2000mm. This causes problems for people with vision impairments.
- Where removing obstacles is difficult the solution may lie in identifying the risk to the visitor.
- Areas of concern may be identified by signage, or by tactile indicators. Indicators can be those outlined in AS1428.4⁹⁸, or changes in surface texture.
- Good illumination without glare is necessary to ensure that problem areas can be seen easily.
- Sharp-edged protruding features or encroachments, including counters, objects, low signs, opened windows, stable doors or loose mats can also create obstacles. Most can be avoided by management sensitive to possible obstacles, and removing them or alerting people to their presence.
- Changes of direction where handrails exist can be identified for people with vision impairments by simple means such as a plastic band around the rail.

9. ROUTES SHOULD BE WELL DEFINED AND MADE AS COMFORTABLE AS POSSIBLE.

- Signage to spaces or facilities, or a logical flow for a particular way around a heritage place, should be easily identifiable.

⁹⁸ Australian Standard – Design for access and mobility (AS 1428.1 – 2001), *Part 1: General Requirements for access – New Building Work*, Building Code of Australia – Primary referenced Standard.

- In many places the distance around the place can be extensive. Places to rest are desirable for many ambulant disabled and elderly people.
 - In some places a special device, such as an electric wheelchair, may be used to help physically impaired people move around a large building more easily, or management might supply a narrow wheelchair which could go through the doors of a particular building. These are less desirable generally, as wheelchairs are often made to a personalized design.
10. FINISHES SHOULD BE SUITABLE AND NOT CREATE DIFFICULTIES.
- Finishes often vary; it is important not to create trip hazards by allowing uneven surfaces or small steps. It is also important not to make them too slippery. This causes problems with some walking aids and leather soled shoes.
 - The step between timber and carpet, especially an excessively thick carpet, can be a concern and may require an alerting signal, directing people around the problem, or replacement with a thinner carpet.
 - Heavily polished floor (marble or timber), particularly in areas that may get wet, may require less polish and better management.
11. ALL LEVEL DIFFERENCES SHOULD BE ACCESSIBLE OR OVERCOME.
- The best solution is ramps, either permanent or temporary.
 - In heritage places where groups are guided at certain times, there is the option of installing a temporary ramp when required for people with particular disabilities in the group.
 - Clearly identifying changes in level, having non-slip finishes, and no overhangs that create potential hazards also apply here.
 - A handrail to a step or ramp is desirable to assist people up the ramp/step when there are differences in levels.
 - An internal raised platform and ramps may be a means to enable greater appreciation of high objects on display.

INTERNAL ACCESS TO OTHER FLOORS

12. STAIRS SHOULD BE ASSESSED
- There should be handrails on both sides to cater for people who may have a left or right side disability.
 - Handrails must be firmly fixed and stable.
 - Stairs should not have projecting nosings, as they can present a trip hazard.
 - Open stairs can also be a concern for people with vision impairments. Nosings should be clearly defined, and the whole stair non-slip.
 - It is often difficult to alter existing stairs. They are usually finely detailed, so changing them can affect significance. Alternative lifting devices should be considered.

Options for *lifting devices* can include:

- a. standard lift
- b. platform or porch lift
- c. stair lift
- d. wheelchair stair lift
- e. stand up stair lift
- f. stair climbing device

TOILETS

13. A UNISEX ACCESSIBLE TOILET SHOULD BE PROVIDED.

- A unisex toilet is preferred, as it is then easily accessible to a person and carer if the need arises. In most places one unisex toilet is all that is required.
- It must comply with current codes and be constructed strictly to the Australian Standards.
- It is essential that toilets be designed and constructed to the standards. Standards have been modified after additional research over the years. Toilets need to be reviewed to ensure they meet current codes and standards.
- Toilets can be incorporated in less significant rooms (usually bathrooms that have obviously been modified), store rooms or external rooms, for example, in a separate newer interpretative centre.

PARKING

14. PARKING SHOULD BE PROVIDED AS CLOSE AS POSSIBLE TO THE PRINCIPAL PUBLIC ENTRY.

15. THE ROUTE TO PARKING SHOULD BE CLEARLY SIGNPOSTED AND INDEPENDENTLY AVAILABLE.

Clear signposting is essential if parking spaces are to be found. Often spaces close to buildings are reserved for staff, but there is always the possibility of indicating "Staff or disability permit holders only" or something similar.

16. PARKING SPACES SHOULD BE CLEARLY IDENTIFIED FOR AUTHORIZED PERMIT HOLDERS.

The space should be reasonably flat, large enough and have a firm surface. A sealed surface (concrete or bitumen) is best, but a well compacted or cement stabilized gravel can be suitable.

17. KERB RAMPS SHOULD BE PROVIDED WHERE NECESSARY.

Access is needed from a parking space to the pathway system. This can usually be achieved by a properly constructed kerb ramp, or level access to the path.

OTHER FACILITIES

These include everything that may be provided and used within a heritage building. Such facilities could be:

- reception counter
- telephone
- shops
- café or tea rooms
- drinking fountains
- switches and controls

These all should be accessible to everyone, including people with disabilities.

People in wheelchairs or children prefer facilities at a lower height (max 1100 mm).

Most of these facilities are also new or added to heritage buildings, so it ought to be possible to design them to be accessible. They are usually loose items or freestanding, so their impact on heritage values is minimized. The key factors in their design should be:

18. PROVIDE THEM AT CONVENIENT HEIGHT.

This may mean counters or facilities like drinking fountains provided at two heights: 750mm for wheelchairs and children, 900mm for other people

19. SHOPS AND CAFÉS MUST MAINTAIN ADEQUATE SPACE FOR GENERAL CIRCULATION AND ACCESS TO ALL ITEMS AND SPACES.

20. TELEPHONES SHOULD INCLUDE TELETYPEWRITERS (TTY) OPTIONS FOR PEOPLE WITH HEARING IMPAIRMENTS.

21. OBJECTS ON FLOOR OF SHOPS SHOULD BE MINIMIZED AS THEY PRESENT TRIP HAZARDS.

Recommendation 20: *Further research needs to be undertaken into 'information presentation and interpretation' in relation to access to heritage buildings and services, for people with a disability.*

Selection of the best means of interpretation must be on a case by case basis however there are a number of key principles that may be examined to guide in increasing access through means other than physical. These include:

- Staff training
- Models of areas inaccessible
- Displayed information
- Signage
- Video/Audiovisual means

4.3 ALTERNATIVE MINIMUM STANDARDS OF ACCESS

Nevertheless cases may exist where it may not be feasible to provide physical access to a historic property in a manner that will not threaten or destroy the historic significance of the building. In such cases all efforts should be made to provide alternative methods of access.

An alternative method of access may involve programmatic access. Sometimes this may be the only option for extremely small or unaltered historic properties. Programmatic access for historic properties involves alternative methods of providing services, information, and experiences where physical access cannot be provided.

Programmatic access may be used in examples where installing an elevator could destroy architectural features of historic significance, on the first floor of a historic house museum in order to provide access to the second floor bedrooms. Providing an audio-visual display of the contents of the upstairs rooms in an accessible location would be an alternative way of achieving program accessibility⁹⁹ to an inaccessible floor. Providing interpretive panels from a vista at an inaccessible terraced garden, or creating a tactile model of a historic monument for people with vision impairments¹⁰⁰ are other alternate options which may be adopted.

Chapter 3.4 highlights the benefits of the U.S. federal laws in creating a streamlined approach to enforcing accessibility in historic qualified buildings. The regulations set out in section 36.405(b) of the *Americans with Disabilities Act* (ADA) Accessibility Guidelines for Buildings and Facilities (ADAAG) effectively set out alternative minimum standards which must be met in the United States of America. These standards are nevertheless a great benchmark that should aim to be adhered to globally:

- a. At least *one accessible route* from a site access point to an accessible entrance shall be provided.
- b. At least *one accessible entrance* which is used by the public shall be provided.
- c. If toilets are provided, then at least *one toilet facility* shall be provided along an accessible route. Such toilet facility may be unisex in design.
- d. Accessible routes from an *accessible entrance to all publicly used places* on at least the level of the accessible entrance shall be provided whenever practical.
- e. *Displays and written information, documents, etc.*, should be located where they can be seen by a seated person. Exhibits and signage displayed horizontally (e.g., open books), should be no higher than 44 in (1120 mm) above the floor surface.

⁹⁹ *Americans with Disabilities Act* 1990: Accessibility Guidelines for Buildings and Facilities (ADAAG). Accessed online: <http://www.access-board.gov/adaag/html/adaag.htm>

¹⁰⁰ Jester, T., Park, S. (1993). *Making Historic Properties Accessible*. United States of America: National Park Services. Accessed online: <http://www.cr.nps.gov/hps/tps/briefs/brief32.htm>

4.4 SUMMARY OF PRINCIPLES

The Australian Heritage Commission¹⁰¹ provides a valuable summary of the general principles that can be applied in building access for people with a disability:

General Approach

1. Review the significance of the place and identify the elements of greatest significance.
2. Undertake an access audit to determine the place's existing and required level of accessibility.
3. Evaluate accessibility options within a conservation context.
4. Establish a policy on access and heritage and prepare an action plan.
5. Implement the action plan.

To conserve heritage significance

1. Make alterations sympathetic to the original building.
2. Ensure designs are reversible.
3. Ensure new material is evident on close inspection.
4. Preserve items of higher significance if a compromise is required.

To provide access

1. Make the main or principal public *entrance* accessible where possible.
2. Ensure an accessible *path of travel* to all areas and facilities.
3. Where *toilets* and facilities are provided, ensure that at least one is accessible to disabled users.
4. *Methods of interpretation and communication* should aim to be suitable for all users, and for a range of disabilities.
5. *Comply with Australian Standards* particularly AS1428.1 (see chapter 3.2.2)¹⁰² for details.
6. *Use modern technology* and methods where appropriate if it makes access easier.
7. *Train staff and volunteers* to understand the needs of people with disabilities and the best means of ensuring their appreciation of the place. Training should be a regular occurrence, with special procedures to include new staff and volunteers.

¹⁰¹ Martin, E. (2005). *Improving Access to Heritage Buildings: A practical guide to meeting the needs of people with disabilities*. Australia: Australian Heritage Commission. Accessed online: <http://www.ahc.gov.au/publications/generalpubs/access/index.html>

¹⁰² Australian Standard – Design for access and mobility (AS 1428.1 – 2001), *Part 1: General Requirements for access – New Building Work*, Building Code of Australia – Primary referenced Standard.

4.5 CONCLUSION

Although the accessibility guidelines set out above have been developed to ensure that persons with disabilities are not excluded from society as a result of their disability, in actual fact the guidelines benefit everyone. Improving accessibility helps people with young children in strollers, senior citizens, people with temporary illness or injury and people carrying heavy packages¹⁰³. Improving access also, not only helps arts organisations to meet their legal responsibilities under discrimination law, but it also means that they are able to benefit from a wider audience.

The guidelines means that there are ways where Disability Discrimination legislation and Heritage Conservation legislation can co-exist whereby historical buildings can be adapted so that persons with disabilities can participate in much the same way as persons without disabilities. This includes people who have vision and hearing impairments. As stated in the United States *Ministry of Culture: Note #9: Accessibility and Historic Buildings* paper “Accessibility should not be restricted to issues of wheelchair access. People with other disabilities, such as hearing and vision impairments should also be better accommodated at historic buildings. It makes good business sense to make historic sites more accessible.”¹⁰⁴

In the case of historic buildings, the guidelines set out in the above mentioned paper place the dignity of the person with disabilities first, while preserving the historic appearance of the building. Nevertheless even if the historic appearance of a building may be a primary consideration, both goals can still be realized through the use of creative solutions if arts organisations work with the relevant guidelines with ingenuity and sensitivity. The following (Chapter 5) is an example of best practice of an arts organisation which has worked and continues to work on their accessibility, while striving to maintain the historic significance and integrity of the building.

Recommendation 21: *As an aid in taking such considerations into account and ensuring that Discrimination Disability legislation and Heritage Conservation legislation are able to co-exist, forming an accessibility advisory committee is suggested. This group should consist of people who can assist in reaching informed decisions because they have expertise in different areas, such as disability accessibility issues, designers, building administration, architecture, and historians. Such a group could be formed early in the process to assist in both the planning and implementation of projects which aim to increase access to arts organisations.*

¹⁰³ *Ministry of Culture: Note #9: Accessibility and Historic Buildings*. United states (Ontario). Accessed online: <http://www.culture.gov.on.ca/english/culdiv/heritage/conote9.htm>

¹⁰⁴ *Ibid*