



ANTI DISCRIMINATION
COMMISSION QUEENSLAND

SUBMISSION

**THE HOUSE OF REPRESENTATIVES STANDING
COMMITTEE ON LEGAL AND CONSTITUTIONAL
AFFAIRS**

**INQUIRY INTO THE DRAFT
DISABILITY (ACCESS TO PREMISES
– BUILDINGS) STANDARDS**

13 March 2009

1. INTRODUCTION

1. This submission is made by the Anti-Discrimination Commission Queensland to the House of Representatives Standing Committee on Legal and Constitutional Affairs , in relation to the following aspects of its Inquiry into the draft Disability (Access to Premises – Building) Standards:
 - (a) The interaction between the proposed Standards and the discrimination laws of Queensland; and
 - (b) The effectiveness of the proposed Standards and The Protocol.

1.1 About the Commission

2. The Anti-Discrimination Commission (the Commission) is established under the *Anti-Discrimination Act 1991* (the Queensland ADA). In passing the Queensland ADA, the Queensland Parliament cited its support of the Commonwealth in ratifying a number of international instruments. Those instruments include the Declaration on the Rights of Disabled Persons.
3. The functions of the Commission are broadly two-fold: to promote an understanding and acceptance, and the public discussion of human rights in Queensland; and to manage complaints and endeavour to resolve them through conciliation.
4. One of the roles of the Commission under the Queensland ADA is to promote equality of opportunity for people with impairments.
5. Complaints that are not resolved through conciliation can be referred to the Anti-Discrimination Tribunal for determination.

1.2 Operation of the *Anti-Discrimination Act 1991* in relation to building access

6. The scheme of the Queensland ADA is to prohibit discrimination, both direct and indirect, on certain grounds in certain areas of activity, unless an exemption under the Act applies, and to provide a mechanism for resolving alleged contraventions of the Act.
7. There are 16 prohibited grounds of discrimination, which include *impairment*¹ and association with or relation to a person with an impairment².
8. Discrimination on these grounds is prohibited in all of the 10 areas under the Act namely work, education, goods and services, superannuation, insurance, disposition of land, accommodation, club membership and affairs, administration of State laws and programs and local government.
9. Barriers to access to and within a building could give rise to a complaint of discrimination in any area, but most likely in the areas of work, education, goods and services, accommodation, club membership and affairs, administration of State laws and programs and local government. Complaints relating to access are usually of indirect discrimination.
10. The Queensland ADA provides for exemptions specific to some of the areas under the Act as well as general exemptions that apply to all areas. There is a specific exemption to discrimination on the basis of impairment where special services or facilities are required, in the areas of:
 - (a) work³;
 - (b) education⁴;

¹ Section 7(h) and Schedule, *Anti-Discrimination Act 1991*

² Section 7 (p), *Anti-Discrimination Act 1991*

³ Section 35, *Anti-Discrimination Act 1991*

⁴ Section 44, *Anti-Discrimination Act 1991*

- (c) goods and services⁵;
- (d) accommodation⁶; and
- (e) club membership and affairs⁷.

11. This exemption applies if the supply of special services or facilities would impose *unjustifiable hardship*.

12. *Unjustifiable hardship* is defined in the Queensland ADA in section 5 as follows:

Meaning of unjustifiable hardship

Whether the supply of special services or facilities would impose unjustifiable hardship on a person depends on all the relevant circumstances of the case, including, for example –

- (a) the nature of the special services and facilities; and
- (b) the cost of supplying the special services or facilities and the number of people who would benefit or be disadvantaged; and
- (c) the financial circumstances of the person; and
- (d) the disruption that supplying the special services or facilities might cause; and
- (e) the nature of any benefit or detriment to all people concerned.

This is similar to the way unjustifiable hardship is defined in the Commonwealth *Disability Discrimination Act 1992*⁸.

13. Indirect discrimination also involves consideration as to whether the term imposed (the means of access) is reasonable. The legislation⁹ provides that:

Whether a term is reasonable depends on all the relevant circumstances of the case, including for example –

- (a) the consequences of failing to comply with the term; and
- (b) the cost of alternative terms; and

⁵ Section 51, *Anti-Discrimination Act 1991*

⁶ Section 92, *Anti-Discrimination Act 1991*

⁷ Section 100, *Anti-Discrimination Act 1991*

⁸ Section 11, *Disability Discrimination Act 1992*

⁹ Section 11(2), *Anti-Discrimination Act 1991*

- (c) the financial circumstances of the person who imposes, or proposes to impose, the term.
14. Some Members of the Anti-Discrimination Tribunal have suggested the concept of reasonableness in indirect discrimination covers the same ground as the concept of unjustifiable hardship¹⁰.
15. The Anti-Discrimination Tribunal has stated that compliance with minimum access requirements of the Building Code of Australia (BCA) does not obviate compliance with the higher obligations under the Queensland ADA¹¹. On the other hand, the Anti-Discrimination Tribunal has indicated a local authority may not have power to attach conditions to building approvals to ensure compliance with the Queensland ADA¹².
16. Enforcement of the rights and obligations under the Queensland ADA is by way of complaint by a person or group subjected to an alleged contravention.
17. The current regime comprises minimum requirements detailed in the BCA, and a higher requirement, though not detailed, in the Queensland ADA. Without the higher requirements being detailed and transposed into the building laws, compliance is more ad hoc. Regulation is left to members of the disability community to make and prosecute complaints through the Anti-Discrimination Commission, and if not resolved, through the Anti-Discrimination Tribunal.

1.3 Interaction of the proposed Standards and the *Anti-Discrimination Act 1991*

18. The effect in Queensland of implementation of the Standards under the *Disability Discrimination Act 1992* (C'wlth) will be that compliance with the Standards will amount to compliance with the Queensland ADA. In those circumstances the objective of providing certainty will be achieved.

¹⁰ Member Keim in *Opinion re: Public Transport Union* [1998] QADT 22; and in *Opinion re: Jane and Leroy Hutton* [1999] QADT 19; Member Copelin in *I v O'Rourke & Ors* [2001] QADT 1 at para 11.

¹¹ See for example *Opinion re: Knight Consulting Pty Ltd* [1996] QADT 11

¹² See *Opinion re HUGI and Redland Shire Council* [1996] QADT 17

19. However, the objective of certainty will be limited where:
- (a) The Standards do not apply, for example class 2 buildings and existing buildings not undergoing up-grade or change of use.
 - (b) The Standards apply but there is a departure from compliance. This includes:
 - (i) Alternative Solutions¹³ approved by a Building Control Authority¹⁴;
 - (ii) Modification or exemption approved by a Building Control Authority based on a claim of *unjustifiable hardship*; and
 - (iii) Any other departure from the Standards.
20. There will be uncertainty wherever there is a departure from the Standards. Achieving the objective of certainty will depend on the extent of compliance with the Standards where they apply.
21. Enforcement will remain up to members of the disability community to make complaints to the Anti-Discrimination Commission Queensland, and if not resolved, to seek referral to the Anti-Discrimination Tribunal. It is currently proposed that from December 2009 the functions of the Anti-Discrimination Tribunal will be vested in the Queensland Civil and Administrative Tribunal (QCAT).
22. The draft QCAT legislation indicates that as a general rule each party will pay their own costs. This may assist in alleviating some of the barriers faced by members of the disability community in seeking to enforce their rights to access to premises.
23. Whether or not a departure from the Standards causes unjustifiable hardship under the Queensland ADA is to be decided by QCAT in a referred complaint made under the Queensland ADA.

¹³ A means of satisfying the BCA other than by the Deemed-to-Satisfy provisions – see The Protocol

¹⁴ The person or body responsible for granting a building approval – see The Protocol

24. Complainants will continue to have the option of making a complaint to the Australian Human Rights Commission under the *Disability Discrimination Act 1992* (C'wlth), in which regime unjustifiable hardship is decided by a court.

2. ISSUES FOR QUEENSLAND

2.1 Apartments and flats (class 2 buildings)

25. In Queensland, the Anti-Discrimination Tribunal has held a body corporate for a residential unit complex liable for ensuring access-ways to recreational facilities are accessible to people with mobility impairments¹⁵.
26. Clearly, the Queensland ADA applies to the common areas of community title residential complexes.
27. The draft Standards do not apply to class 2 buildings. If the developers of these residential complexes build them in a way that they are not accessible, the responsibility will rest with the bodies corporate of the complexes. The bodies corporate are comprised of the lot owners in the complex.
28. It is submitted it is therefore preferable to extend the application of the Standards to the common areas of class 2 buildings.

2.2 Gold Coast holiday apartments

29. There are many residential apartment buildings on the Gold Coast constructed as class 2 buildings but ostensibly operating as class 3 buildings, with many of the apartments subject to short-term tenancies. This seems to occur due to the less rigorous safety and accessibility requirements of class 2 buildings.
30. This is further argument to extend the application of the Standards to the common areas of class 2 buildings.

¹⁵ See *C v A* [2005] QADT 14

2.3 Small buildings

31. Queensland is a large decentralised State with significant regional cities. Many commercial buildings in both regional and suburban areas are only 2 or 3 storeys, and it is estimated that many of these would fall in the exemption category, namely having a non-entry storey or storeys of less than 200 square metres.
32. This means that in Queensland, the small building exemption would have a greater impact, with more areas and more people affected by it.
33. This exemption seems to assume unjustifiable hardship in providing full access to the non-entry storeys. This will not necessarily be the case, particularly in light of the extensive use of such buildings in regional and suburban areas.
34. As there is an overarching exemption of unjustifiable hardship, a fairer outcome would be to remove the exemption but the developer/applicant still has option of demonstrating unjustifiable hardship.
35. If the exemption is not removed, it is submitted a blanket exemption from all requirements is unreasonable and perhaps unintended. It is submitted that if the exemption is to remain, it should be limited to wheelchair access, with the other access requirements remaining (for example signage, rails, and tactile indicators).

2.4 Toilets

36. The draft Standards provide a concession to unisex accessible toilets, so that if there is more than one set of toilets on a given level, only half of those sets are required to include a unisex accessible toilet.
37. This concession places an unreasonable burden and restriction on people needing an accessible toilet, particularly in large buildings such as shopping centres and sports and entertainment centres. It will impact on the privacy and

dignity of people who are mobility impaired and their capacity to utilise common public places such as shopping centres.

38. The 2004 draft did not contain this concession. It is submitted this concession should be removed, or at the very least limited in way similar to the limitation of accessible entrances to a building.

3. THE PROTOCOL

39. The Protocol outlines a suggested process for a Building Control Authority (the person or body responsible for granting building approval), where the building proposal does not fully comply with the technical requirements of the BCA (reflecting the Standards). It centres on the establishment of an Access Panel to make recommendations to the Building Control Authority on both Alternative Solutions and a modification or exception based on unjustifiable hardship.
40. There is no binding obligation on a Building Control Authority to:
- (a) Adopt The Protocol
 - (b) Refer a matter to the Access Panel (in the event the Protocol is adopted)
 - (c) Follow the recommendations of the Access Panel (in the event the Protocol is adopted)
 - (d) Refuse to approve a building application that does not comply with the Standards.
41. If the Protocol is adopted in accordance with the Guidance Advice, it has the potential to assist the implementation of the Standards and providing better access to premises.
42. The Commission supports the concept of The Protocol. A review of the definitions is suggested, in particular the definition of Alternative Solution and Building Solution to make it clear that an Alternative Solution includes elements

that do not comply with the technical requirements of the BCA and hence the Standards.

43. It is important for all stakeholders to understand that The Protocol and decisions and approvals of the Building Control Authority do not prevail over the rights to complain under State and Commonwealth discrimination laws.

4. RECOMMENDATIONS

44. The Commission supports the concept of the Standards but has concerns that some of the exemptions and concessions in the draft result in an unacceptably low level of access. In these cases, the effect is to lower the level of discrimination law rather than to raise the level of building law.
45. The application of the Standards and the effect of their implication on existing laws and process is complex. The Commission would like to see an extensive education and training rollout to the community at large, not limited to the building industry.
46. The Commission recommends the following changes to draft Standards:

Recommendation 1:

The Standards to apply to the common areas of class 2 buildings.

Recommendation 2:

Removal of the exemption for small buildings.

Recommendation 3:

If the small building exemption is not removed, then the exemption to be limited to wheelchair access to the non-entry storeys.

Recommendation 4:

Removal of the concession for unisex accessible toilets where there is more than one block of toilets on a level.

Recommendation 5:

Where The Protocol refers, in Article 8, to the unassailable right to complain under the DDA, there should be included reference to the right to also complain under State or Territory discrimination legislation.

Recommendation 6:

Clarification of the definition of Alternative Solution in The Protocol and review of other definitions.

Susan Booth
Anti-Discrimination Commissioner Queensland