Attachment A: Summary and Major Concerns

A draft Disability (Access to Premises – Buildings) Standard which is proposed to be incorporated into the Disability Discrimination Act 1992 has been tabled in the Federal Parliament.

The Committee will make recommendations to Parliament on the draft, including whether any changes need to be made.

The disability community is concerned that the draft Standard does not ensure adequate access – that is, it exempts too many parts of buildings from being required to provide any access and the access that is required is, in some cases, inadequate.

The draft, or a variant of it, is expected to be passed by parliament by the middle of 2009.

If the draft DDA standard for access to premises (buildings) is passed by the federal parliament it will clarify what is required for a building to be considered to be accessible for people with disability.

There are *serious shortcomings* with the current draft standard and the process of commenting on it:

- The draft requires buildings to meet several Australian Standards (including AS1428 parts 1 and 4, and AS2890 part 6), but the latest versions of these Australian Standards are not yet adopted. We are being asked to comment on or even accept a DDA standard without knowing the detail of what it requires. And we are particularly concerned that the new AS1428.1 will not have requirements that accommodate 90% of wheelchair users, as we had expected.
- Home unit blocks (Class 2 buildings) are not covered by the draft standard at all (but they were covered in the 2004 draft). This is exceptionally short-sighted and discriminatory given that many Local Councils and various state government policies and regulations already require access to common areas and adaptable housing. This means that Local Councils might amend their Development Control Plans and allow developers to return to building blocks of home units with no access to common areas and no adaptable units (both are presently required by many local councils).
- The draft requires disability access in small accommodation facilities (like homes converted to B&Bs, purpose built B&Bs, cabins in caravan parks and eco villages) only when there are four (4) or more bedrooms (or cabins). The draft lumps together newly built buildings with converted, existing facilities. Having a threshold of four (4) means almost all B&Bs will be excluded. And exempting new B&Bs, new cabins in caravan parks. and new eco-lodges is considered unnecessary and detrimental to people with disability.
- The number of designated disability parking spaces required is 1 or 2% (depending on the type of facility). This is demonstrably inadequate as the number of disability parking permits on issue represents in the order of 10 to 13% of registered vehicles.
- No access is required to levels of a multi-storey car park which do not have designated disability parking spaces even though, due to the shortage of accessible parking spaces, many people are required to park on other levels of multi-storey carparks. Some people with disability use vehicles with rear access and park in regular spaces. In future, these people will be able to park only on those levels with designated disability spaces. While parking is important to everyone it more critical

to people with disabilities due to the design and location requirements of accessible parking spaces.

- Motels and hotels, and aged care facilities (hostels and nursing homes) must, in addition to having access to common areas, have some accessible bedrooms with en-suite accessible bathrooms. However, there is no guidance as to what is needed in a bedroom to provide adequate access. And the number of bedrooms required to be accessible in aged care facilities (the same as for motels) is most inadequate.
- There is an urgent need for all of the Australian Standards covering lifts (AS1735 all parts) to be reviewed to ensure lifts are accessible and safe. In addition, the draft has no specifications for the size of lift lobbies – which may mean a person may not be able to turn their wheelchair to continue their journey after exiting the lift.
- Fire isolated stairs are exempt from requirements for access features that would assist blind people and people with ambulant disability (such as handrails on both sides of the stairs, no open treads, and TGSIs).
- The draft Premises Standard only requires an accessible shower in a health care building, aged care building, child care centre and accessible motel/hotel rooms, thereby exempting aquatic centres, gymnasiums, fitness clubs, B & B's, caravan parks and the like even though many of these places provide showers for the remainder of the population.
- There is scant regard to wayfinding for people with vision impairment or people who are blind despite considerable research in recent years.
- AS1428.5 Design for access and mobility - Communication for people who are deaf or hearing impaired is reportedly ready to be adopted by Standards Australia but is not referenced in the draft Premises Standard.
- There is no requirement for meeting rooms in aged care facilities to have hearing augmentation.
- Numbers of hearing augmentation receivers is limited to 3.5% of an audience – this needs to be increased to at least 10%.

Attachment 2: Section 20, Monitoring (excerpt from DDLC Submission)

One implication of the individual complaints based model, as provided by the DDA, means that the onus continues to be on an already disadvantaged individual to enforce the breach of the Standards. Predominately for this reason, breaches of both the *Disability Standards for Public Transport 2002* and the *Disability Standards for Education 2005* have not yet been heard in a Court.[1]

The result is that breaches of the Disability Standards rarely result in a respondent ameliorating the breach, rather it is usually resolved by the payment of compensation to the person with disability. This occurs for the following reasons:

- In Australia, alternative dispute resolution in the form of conciliation, is employed at first instance for discrimination complaints. The advantage of alternative dispute resolution is it is a relatively informal process and minimizes the expense to the parties. However, the conciliation process can disadvantage the complainant as there is often a power imbalance between them and the respondent, which is almost always a company or a government agency.
- Even when a complaint is resolved at conciliation, the settlement is only binding between the parties to the complaint. This means that if the respondent fails to fulfill their obligations under the settlement agreement, only the complainant who is party to that settlement agreement can enforce the settlement. There is no enforcement agency and enforcement (usually through the Local Court) is not an easy process and therefore it rarely occurs.
- In general, discrimination law settlements are compensatory in nature only and the amount of compensation awarded tends to be comparatively low to that awarded in other areas of law. There is no punitive element and it is unlikely that the relatively small sum of damages will prevent further discriminatory practice. It is also rare for policy change to be part of the settlement or court finding. In circumstances where a settlement provides for systemic outcomes, such as training or policy changes, conciliated agreements are often confidential which means the outcome cannot be used by other people as precedent to seek improvements more generally. Court decisions are also often applicable to the facts of the case only.
- In circumstances where the conciliation has failed, the complainant may apply to have the allegations heard and determined by the Federal Court or the Federal Magistrates Court. Pursuing action at this level presents financial obstacles for the individual complainant which further disadvantage people with disability, who have higher levels of unemployment and are more likely to be in a position of economic disadvantage.[2] Should the complainant be unsuccessful they will be ordered to pay the legal costs of the respondent. This increases the pressure on the complainant to seek a mediated settlement and reduces the chance that the matter will reach hearing and a judicial decision. This is escalated by the fact that the viability of the case rests not only on proving discrimination but also that measures required to adhere to the Standards would not cause unjustifiable hardship. In addition to the financial costs, barriers to physical access, the psychological costs and the time commitment, more often than not deter complainants, and in particular complainants with disabilities from pursuing litigation. The result is that there is a dearth of

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[1] Please note that *Corcoran v Virgin Blue Airlines Pty Ltd* is currently before the Federal Court and is the first case to consider the Transport Standards. For information about the facts of this case, please see *Corcoran v Virgin Blue Airlines Pty Ltd* [2008] FCA 864, which is a decision in this case in relation to costs capping.

[2] Human Rights and Equal Opportunity Commission, *'Final report of the National Inquiry into Employment and Disability' February 2006*

decided cases and corresponding expertise amongst the judiciary in this area of law, making it even more difficult for practitioners to provide advice on prospects of success to complainants. This again leads to more cases settling and fewer systemic outcomes.

Given the highly technical nature of the Access to Premises Standards and level of expert knowledge required to understand their operation in conjunction with the Australian Standards, we suspect even fewer individuals will bring complaints regarding breaches of the Access to Premises Standards, compared to the other Disability Standards.

AHRC power to bring complaints

In order to address the above issues, it is DDLC'S position that the AHRC Disability Discrimination Commissioner, be granted the power to investigate breaches of the Standards, and bring complaints, where there are cases of broader systemic non-compliance, without requiring an individual complainant. This recommendation was made by the Allen Consulting Group in its Draft Report reviewing the Standards for Accessible Public Transport.[3] It goes without saying that the Australian Human Rights Commission will need to be adequately resourced to do this.

Recommendation 25:

That the Disability Discrimination Commissioner be granted the power to investigate breaches of the Standards, and bring complaints in relation to breaches of the standards, where there are cases of broader systemic non-compliance, without requiring an individual complainant.

Advocacy organisation's power to bring complaints

In order to ensure effective monitoring of the Standards, it is also imperative that advocacy organisations are granted standing to initiate complaints in cases involving breaches of the Standards. Currently, there are barriers to these organisations doing this.

In *Access For All (Harvey Bay) v Harvey Bay City Council,* it was found that the Applicant, an advocacy organisation, did not have standing to commence proceedings in the Federal Court, because it was not itself affected by the relevant conduct, but only had an intellectual interest in the proceeding. [4]

This decision came out of a conflict between the representative complaints provisions in the *Human Rights and Equal Opportunity Act 1986* (***HREOC Act***) and those in the *Federal Court of Australia Act 1976.*

Under section 46P(c) of the HREOC Act a complaint can be made 'by a person or trade union on behalf of one or more other persons aggrieved by the alleged unlawful discrimination.' However, under section 46PO(1) in order to proceed beyond the AHRC to the Federal Court or the Federal Magistrates Court with such a complaint only an individual 'who was an affected person in relation to the complaint' may make a complaint. In order to proceed as a representative complaint, a member of the representative class must commence the proceedings and be able to name at least seven members of the class who consent.

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[3] Allen Consulting Group (2008), *Draft Report Reviewing the Standards for Accessible Public Transport* at p165. (Note the final report has not yet been released.)

[4] [2007] FCA 615

The result is that systemic issues cannot be dealt with through advocacy organisations representing the class of people affected, unless seven members of a class can be identified, or unless it can prove that it itself is affected by the conduct, which, given the barriers noted above, happens very rarely. Advocacy organisations are now reluctant to bring complaints to challenge instances of systemic discrimination due to uncertainty as to whether the organisation will be found to have standing to do so if the matter proceeds beyond the AHRC level. If complaints are not brought in relation to the Standards, they will not be effective in eliminating the barriers faced by people with disability in gaining access to premises.

Amending the *Federal Court of Australia Act* 1976 to make the standing provisions consistent with those in the *HREOC Act* would address this issue.

Further, in light of the technical nature of the Standards, it is recommended that additional funding be granted to disability legal centres and advocacy organisations to enable them to access experts to advise them on the technical aspects of the Standards.

Recommendation 26:

That disability advocacy organisations be guaranteed standing to initiate complaints and intervene in cases involving breaches of the Standards.

Data Collection

DDLC submits that it should be mandatory that building certifiers, building developers and building managers collect and make publically available data demonstrating their compliance with the Standards. This will both encourage compliance with the standards and allow information to be gathered for the five year review which will assist in measuring the effectiveness of the Standards. Furthermore, data collection of this nature is necessary to fulfil Australia's obligations under Article 31 of CRPD, which provides that:

> *States Parties undertake to collect appropriate information, including statistical and research data, to enable them to formulate and implement policies to give effect to the present Convention.*

Recommendation 27:

That data be collected to monitor compliance with the Standards during the first five years of the operation of the Standards.