

The Commissioner
Disability Discrimination Act Inquiry
Productivity Commission
Locked Bag 2
Collins Street East
MELBOURNE VIC 8003

16 April 2003

Dear Commissioner

Please find enclosed Toowoomba City Council's submission to the Productivity Commission's inquiry into the Disability Discrimination Act 1992.

Council's submission relates to the issues regarding the provision of improved access to existing premises, particularly those that have heritage value.

Council is appreciative of the opportunity to make a submission.

Yours faithfully,

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SUBMISSION TO
PRODUCTIVITY COMMISSION INQUIRY INTO THE
DISABILITY DISCRIMINATION ACT

1.0 Introduction

This submission relates to the provisions of the *Disability Discrimination Act* which cover access to existing buildings, particularly those with heritage value.

Toowoomba City Council as an authority which regulates building activity within its boundaries and as an owner of significant public buildings, is, as is the case with other building owners, frustrated with the lack of certainty for compliance with the spirit of the *Disability Discrimination Act* in relation to access to public buildings.

Council's commitment to promoting the objects of the *Disability Discrimination Act* is demonstrated by reference to Council's Corporate Plan, Operational Plan and Customer Service Statement. One of the eight Corporate Plan objectives is "Community Lifestyle and Well-being". A key strategy of this objective is to provide, through consultation, for the needs of youth, the aged and special needs groups within our community. This is achieved by the provision of services and facilities that address key issues in the local community.

Council has an established Access Advisory Committee whose terms of references are:

- To provide input to Council, and through other agencies, about problems faced by all areas of the community in obtaining access (physical, societal, recreation and employment), and
- To provide input into Council on development issues and Council projects in terms of their impact on access and the implications of the *Disability Discrimination Act* (1992).

2.0 Source of Frustration

2.1 Whilst the frustration felt by those that operate and manage existing premises in attempting to improve access to those premises for all members of the community is real, it pales in comparison to the frustration experienced by members of the community with a disability in accessing premises where access is only available to able-bodied members of the community.

In many existing buildings and in particular Heritage listed buildings, it is not technically feasible to retrofit access and mobility provisions that comply fully with Australian Standards. What can be achieved is often a compromise that provides improved access for persons with a disability. This is particularly the case in Heritage listed buildings where heritage values and equitable access are often in competition.

2.2 Advisory Notes on Access to Premises

2.2.1 Section 67(1)(k) of the *Disability Discrimination Act* (1992) allows the Disability Discrimination Commissioner to develop Advisory Notes which are issued by the Human Rights and Equal Opportunities Commission (HREOC). Advisory notes available on the Web provide little, if any, assistance to the owners and operators of existing buildings.

2.2.2 The Advisory Notes on Access to Premises at s7.1 “The Relationship between the Disability Discrimination Act (DDA) and the Building Code of Australia (BCA)”, in the last paragraph states –

“Even though a revised BCA will be more consistent with the DDA, compliance with a new BCA will not automatically provide protection from a successful complaint.”

2.3 Building Code of Australia/Australian Standards

2.3.1 The BCA applies to new buildings and those buildings undergoing significant refurbishment and alteration. Often improvements are minor and do not require BCA approval. The BCA requires that building works comply with the relevant Australian Standards.

The Australian Standard that covers access to premises is AS1428.1-2001 Design for Access and Mobility Part 1: General Requirements for Access – New Building Work.

2.3.2 In Clause 1 (Scope) of the Standard, it states –

*“This Standard specifies the design requirements applicable to **new** building work.”*

2.3.3 Under Note 3 of the same clause, it states –

*“3. This standard **may** also be applied for provisions of access to existing buildings.”*

2.3.4 Clause 2 (Application), in particular Clause 2.1 (Building Code of Australia), it states –

“Compliance with this Standard will, in general, satisfy the requirements of the BCA in terms of the provision of access to buildings for people with disabilities; however this does not in any way preclude the use of any alternative method that can be shown to satisfy those requirements.”

2.4 Uncertainty and Questions

The uncertainty that prevails for owners and operators of existing public buildings in attempting to provide improved access to their facilities for all members of the community comes from two basic areas. Firstly, apparent

conflicting advice that is contained in relevant documents, namely Advisory Notes, BCA and Australian Standards. Secondly, the practical application of the DDA relies heavily on complaints. Therefore an owner or operator is not sure whether improvements installed are appropriate until an investigation is carried out into the alleged breach and it is resolved by conciliation or by a hearing in the Federal Court.

Questions for the owners and operators of existing buildings relate to –

- Do improvement works amount to significant refurbishment or alteration?
- If not, then if the approval is not required under the BCA, does work have to comply fully with the Australian Standards?
- The Australian Standard AS1428.1-2001 (refer to 2.3.4 above) states that compliance with the Standard will in general satisfy the BCA. It further goes on to say that it does not preclude the use of alternative methods to satisfy the requirements. Who determines whether an “alternative method” satisfies the BCA requirements? Building Authority, Disability Discrimination Commission, HREOC, or Federal Court?

3.0 Comment and Suggestions

- 3.1 Given that one of the objects of the *Disability Discrimination Act* 1992 is to eliminate as far as possible, discrimination against persons on the ground of disability, in amongst other areas, in the access to premises, Council believes there should be no reason why in **new** facilities that full access for all members of the community should not be provided. However, with many existing buildings, particularly those with heritage value which were designed and built in eras where disabled access was not considered and as such are not readily adaptable to provide access and mobility provisions that apply to new buildings, some review of the DDA and its supporting documentation may be needed to remove the uncertainty that exists for owners and operators of existing buildings who have a genuine desire to improve access for all members of the community.
- 3.2 How can the uncertainty be removed? One suggestion relates to a possible expansion of the Temporary Exemption provisions under Section 55 of the *Disability Discrimination Act* 1992 to exempt owners and operators of existing premises from **full** compliance with the Access and Mobility provisions that apply to new buildings provided the improvements installed are deemed appropriate given the technical and topographical constraints of the particular site or building.
- 3.3 To achieve practical effect of the suggested expansion of the exemption provisions, thought would need to be given to -
- What process would be put in place that would lead to a decision that **proposed** improvement work would be deemed to be appropriate, and
 - What period would apply to any temporary exemption so that a review could be made to determine whether technological advances are available to further improve access.

3.4 If an owner or operator of an existing building installs improvements (which do not fully comply with current Australian Standards) to provide access for, say, the mobility impaired, and is then subjected to a complaint, a defence of “unjustifiable hardship” may be available. What constitutes unjustifiable hardship is a moot point. Matters taken into account include –

- Technical limit
- Topographic restrictions
- Safety, design and construction issues
- Heritage values
- Costs

Recognising that in many cases, given the operating budgets of some organisations, costs often do not support an unjustifiable hardship defence, if taking the other matters into account, a decision which dismisses the claim is made, then it is suggested that it achieves the same result as what would have occurred if the exemption was granted under the suggestion contained in 3.2 above.

3.5 For the approach suggested in 3.2 above, it is assumed that exemptions would be approved by the HREOC. It is recognised that this could have the potential for generating additional work for HREOC but this would be minimised with the production of guidelines which would outline the process to achieve an exemption. It is suggested that exemptions would be on a case by case basis and would apply to individual premises. Proposals for improvements to a premise would need to be vetted and receive the endorsement of local Access Advisory Committees before being submitted to HREOC for consideration of exemption. Further, it is recognised that the input of persons with disabilities must be sought by effective rather than token consultation and in this regard Mr Richard Llewellyn’s comments in his submission to your inquiry dated 12 March 2003 on the make-up of membership of Standard Association Code Development Committees has some parallel on the make-up of Access Advisory Committees.

4. Conclusion

Many owners and operators of existing public buildings have a desire to improve access to their buildings for all members of the community. However, the uncertainty as described in the body of this submission may have the effect of owners and operators to take the “do nothing” option rather than installing access improvements and wait for complaints to either force improvements of, or in some cases the closure of, the facility. It could be argued this latter action effectively amounts to “reverse” discrimination in removing access to the community due to the inability to make changes for a section of the community who may well be satisfied with an achievable level of access.

Council appreciates the opportunity to make a submission to the inquiry and hopes the suggestions contained in the submission will generate debate leading to a possible review which will eliminate frustration due to uncertainty.

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