



**Opening the door for disability access:
submission to the House of Representatives Standing
Committee on Legal and Constitutional Affairs Inquiry into
the draft Disability (Access to Premises – Buildings)
Standards**

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1. Introduction

1.1 The Public Interest Advocacy Centre

The Public Interest Advocacy Centre (PIAC) is an independent, non-profit law and policy organisation that works for a fair, just and democratic society, empowering citizens, consumers and communities by taking strategic action on public interest issues.

PIAC identifies public interest issues and, where possible and appropriate, works co-operatively with other organisations to advocate for individuals and groups affected. PIAC seeks to:

- expose and redress unjust or unsafe practices, deficient laws or policies;
- promote accountable, transparent and responsive government;
- encourage, influence and inform public debate on issues affecting legal and democratic rights;
- promote the development of law that reflects the public interest;
- develop and assist community organisations with a public interest focus to pursue the interests of the communities they represent;
- develop models to respond to unmet legal need; and
- maintain an effective and sustainable organisation.

Established in July 1982 as an initiative of the Law Foundation of New South Wales, with support from the NSW Legal Aid Commission, PIAC was the first, and remains the only broadly based public interest legal centre in Australia. Financial support for PIAC comes primarily from the NSW Public Purpose Fund and the Commonwealth and State Community Legal Services Program. PIAC also receives funding from the NSW Government Department of Water and Energy for its work on utilities, and from Allens Arthur Robinson for its Indigenous Justice Program. PIAC also generates income from project and case grants, seminars, consultancy fees, donations and recovery of costs in legal actions.

1.2 PIAC's expertise in discrimination law and equality

PIAC has a long history of involvement in discrimination law and promotion of equality in Australia. It has represented litigants in a number of significant discrimination cases in Australia including cases involving disability access to premises and public transport.¹ PIAC has also been involved in a broad range of public policy development and review processes in relation to discrimination law and the promotion of equality.² Much of this considers discrimination against and the achievement of equality for people with disability.

¹ For general discrimination cases, see, for example, *Australian Iron & Steel Pty Ltd v Banovic* (1989) 168 CLR 165, involving indirect discrimination in employment against women; *Human Rights and Equal Opportunity Commission v Mt Isa Mines Limited*; *Lou Marks*; *Edward Emmett*; *Jennifer George and Others and National Occupational Health and Safety Commission* [1993] FCA 535 (9 November 1993), involving the imposition of a standard in the mining industry that disproportionately affected women; *Ferneley v The Boxing Authority of New South Wales* [2001] FCA 1740 (10 December 2001), alleging unlawful sex discrimination in regulation of sport. For disability access cases, see, for example, *Hills Grammar School v Human Rights & Equal Opportunity Commission* [2000] FCA 658 (18 May 2000), involving discrimination in education; *Maguire v Sydney Organising Committee for the Olympic Games* [2000] FCA 1112 (3 August 2000), involving discrimination in the provision of information and services; *Grosvenor v Eldridge* [2000] FCA 1574 (19 October 2000), involving disability discrimination in access to retail premises; *Travers v New South Wales* [2000] FCA 1565 (3 November 2000); and *Access For All Alliance (Hervey Bay) Inc v Hervey Bay City Council* [2007] FCA 615 (2 May 2007), involving alleged failure to comply with the *Disability Standards for Accessible Public Transport 2002* (Cth) in relation to the provision of bus stop infrastructure; *Corcoran v Virgin Blue Airlines Pty Ltd* [2008] FCA 864 (17 June 2008), an ongoing case involving allegations of disability discrimination in the provision of airline travel.

² See, for example, Alexis Goodstone and Dr Patricia Ranald, *'Discrimination ... have you got all day?' Indigenous women, discrimination and complaints processes in NSW* (2001); Public Interest Advocacy Centre, *Submission on*

Of particular relevance is PIAC's recent work around the five-year review of the *Disability Standards for Accessible Public Transport 2002* (Cth) (the Public Transport Standards). PIAC worked closely with the NSW Disability Discrimination Legal Centre on a national project to record the experiences of people with disability in relation to airline travel and to then consider those experiences in light of the Public Transport Standards. That project resulted in a report, *Flight closed: the experiences of people with disabilities in domestic airline travel in Australia*³, that was submitted to the five-year review, and a subsequent submission on the draft Review Report, *Flight still closed?*⁴

A key focus of PIAC's broader work is promoting access to justice. Much of PIAC's work in the discrimination and equality area is focused on or involves work to promote access to justice and remove barriers to access that face people alleging unlawful discrimination. This includes, for example, the successful application by PIAC for an order setting a maximum amount of legal costs that can be ordered in current proceedings for unlawful disability discrimination against Virgin Blue Airlines Pty Ltd.⁵ In an earlier matter, discussed in this submission, PIAC's client, Access for All Alliance (Hervey Bay) was unsuccessful in being granted standing its application to the Federal Court in relation to alleged multiple breaches of the Disability Standards for Accessible Public Transport 2002 (Cth).⁶

1.3 The current Inquiry

The House of Representatives Standing Committee on Legal and Constitutional Affairs (the Committee) is, under the terms of reference for its Inquiry into the draft Disability (Access to Premises – Buildings) Standards 2009 (the Draft Premises Standards), to consider and report on the draft Disability (Access to Premises – Buildings) Standards covering:

- the appropriateness and effectiveness of the proposed Premises Standards in achieving their objects;
- the interaction between the Premises Standards and existing regulatory schemes operating in state and territory jurisdictions, including the appropriateness and effectiveness of the proposed Model Process to Administer Building Access for People with Disability;
- whether the Premises Standards will have an unjustifiable impact on any particular sector or group within a sector; and
- any related matters.

PIAC welcomes this opportunity to comment on the Draft Premises Standards. The focus of PIAC's submission is on the compliance promotion and monitoring mechanisms, rather than on the technical detail contained in the Draft Premises Standards or the referenced Australian Standards.

the Australian Human Rights Commission Legislation Bill 2003: Submission to the Senate Legal and Constitutional Committee on the Australian Human Rights Commission Legislation Bill (2003); Robin Banks, *Implementing the Productivity Commission review of the Disability Discrimination Act: submission to the Senate Legal and Constitutional Affairs Committee Inquiry into the Disability Discrimination and Other Human Rights Legislation Amendment Bill* (2009). These and most PIAC publications, including submissions, are available on the Centre's website: <<http://www.piac.asn.au/publications/pubs/dateindex.html>>.

³ Brenda Bailey, *Flight closed: the experiences of people with disabilities in domestic airline travel in Australia* (2007).

⁴ Brenda Bailey, *Flight still closed? Response to the Allen Consulting Group on Review of the Disability Standards for Accessible Public Transport Draft Report* (2008).

⁵ *Corcoran v Virgin Blue Airlines Pty Ltd* [2008] FCA 864 (17 June 2008).

⁶ *Access For All Alliance (Hervey Bay) Inc v Hervey Bay City Council* [2007] FCA 615 (2 May 2007).

2. Executive Summary

2.1 Overview

PIAC welcomes the tabling of the Draft Premises Standards as a significant development towards the better protection and promotion of the rights of people with disability in Australia.

In March 1993, the *Disability Discrimination Act 1992* (Cth) (DDA) came into effect, for the first time creating a federal prohibition on discrimination on the basis of disability in a range of life areas, including access to premises.

On 17 July 2008, Australia ratified the UN *Convention on the Rights of Persons with Disabilities* (the *Disability Convention*).⁷ As a State Party to the *Disability Convention*, Australia is bound by its provisions. Of particular relevance to the current inquiry is Article 9, which requires States Parties to the Convention ‘[t]o enable persons with disabilities to live independently and participate fully in all aspects of life’. Australia’s obligations are discussed in detail below.

Far too often, people with disability are still—some sixteen years after the *Disability Discrimination Act 1992* (Cth) came into effect—precluded from significant areas of life activity simply because of the inaccessibility of physical infrastructure. While some may be willing and able to submit to the indignity and inequity of being physically carried into or assisted to find their way around buildings, for most others this is inappropriate or impossible. The time has long past when people with disability should be forced to rely on the charity or good will of others to participate fully in the life of the community.

These barriers to access mean being precluded from paid employment, from attending arts and cultural events, from sharing the excitement of a live performance of their favourite sporting team, from shopping and from accessing a range of services, such as health, financial and information services.

In order for the Draft Premises Standards to remove these barriers, it must ensure both the technical specifications (or performance equivalency) and the mechanisms for ensuring compliance, monitoring and enforcement are appropriate and effective.

In preparing this submission, PIAC has reflected on its experience in respect of the *Disability Standards for Accessible Public Transport 2002* (Cth) (the Transport Standards) and the recent review of those Transport Standards, which highlighted a serious failure of monitoring and compliance. This failure meant that the review was, in PIAC’s submission, much less able to properly consider what beneficial outcomes have flowed from the promulgation of the Transport Standards.

It is at this stage of the development of the Draft Premises Standards that we must be sure that the compliance, monitoring and enforcement mechanisms are going to be effective, both in terms of actually ensuring that the Draft Premises Standards are implemented by all those involved in the design, approval, construction and refurbishment of regulated premises, and in terms of ensuring that there are measures in place for the review in five years’ time.

⁷ United Nations, General Assembly, A/RES/61/106, Doc.A/61/611 13 December 2006, *Convention on the Rights of Persons with Disabilities*, opened for signature 20 March 2007, I-44910 (entered into force 3 May 2008) (the *Disability Convention*), entry into force for Australia on 16 August 2008, being the 30th day after the deposit with the UN of the document of ratification. The Joint Standing Committee on Treaties has recommended that Australia ratify the *Optional Protocol to the Disability Convention*.

The failure to ensure this appropriateness and effectiveness will result in the continuation of social exclusion of people with disability. This is a serious, continuing and unjustifiable hardship that faces people with disability, their families and friends.

2.2 Summary of recommendations

Recommendation 1: PIAC recommends that the Federal Government work with the Australian Human Rights Commission and the Australian Building Codes Board to develop and implement, on or before the fifth anniversary of the promulgation of the Premises Standards, universal access design standards to apply to developments where two or more Class 1a buildings are proposed.

Recommendation 2: PIAC recommends that the Federal Government work with the Australian Human Rights Commission and the Australian Building Codes Board to develop and implement, as a matter of urgency, standards to require universal access design within sole-occupancy units in Class 2 buildings.

Recommendation 3: PIAC recommends that the Federal Government include, in the Draft Premises Standards, the 2004 draft Premises Standards provisions for accessibility to the common or public areas of Class 2 buildings.

Recommendation 4: PIAC recommends that the Federal Government ensure that the review of the Draft Premises Standards is completed on the fifth anniversary of the commencement of the Standards.

Recommendation 5: PIAC recommends that, in recognition of the need to be pro-active in respect of the implementation of the Draft Premises Standards, urgent action be taken to establish a mechanism for monitoring implementation of and compliance with the Draft Premises Standards to commence at the same time as the Standards commence.

Recommendation 6: PIAC recommends that the Federal Government, in co-operation with State and Territory Governments, require and resource the state and territory Auditors General to be responsible for the ongoing independent review and regular public reporting of compliance with the Draft Premises Standards, including undertaking an annual audit of a sample of BCA-certified new buildings and new building work. That, in the alternative, the governments require state and territory building administrations or local government authorities to perform this function, with additional input from disability access experts.

Recommendation 7: PIAC recommends that the Federal Government require the Australian Building Codes Board to amend the Administrative Protocol to include the following requirements:

- that the Australian Building Codes Board in co-operation with the Australian Human Rights Commission, establish a central, publicly available website to report on the establishment and work of Access Panels;
- that all recommendations of Access Panels be available in accessible formats at no cost through that website and be provided in a manner that enables searches to be conducted across the database of recommendations;
- that all recommendations of Access Panels must include reasons for decisions, in particular:
 - where an Alternative Solution is proposed, the decision should clearly identify how the performance requirement of the Building Code of Australia is achieved through the proposed Alternative Solution;
 - where a variation in full application of the *Building Code of Australia* is recommended on the grounds that the applicant may experience an unjustifiable hardship, the recommendation must set out the basis on which unjustifiable hardship was found and the variation from the *Building Code of Australia* that has been recommended and on what basis that variation was determined to be the best available option;

- that any process for reviewing an Access Panel's operations arising from Article 8 of the Administrative Protocol involve the Australian Human Rights Commission and appropriate disability advocacy organisations.

Recommendation 8: PIAC recommends that the Federal Government develop and, if necessary, fund a mechanism to enable free on-line access to all Australian Standards referenced in the Premises Standards in accessible formats.

Recommendation 9: PIAC recommends that funding be provided to enable the establishment of Premises Standards Expert Brokerage services in either

- (a) at least one disability organisation in each state and territory, with consideration given to how to ensure that the brokerage will be widely publicised and accessible irrespective of disability; or
- (b) each of the national disability-specific peak organisations, with consideration given to how to ensure that the brokerage will be widely publicised and accessible irrespective of location.

Recommendation 10: PIAC recommends that a funding program be established to provide grants of funds to disability sector organisations and people with disability to pay for the services of experts (both building access and legal) to assist in reviewing proposed new buildings and new building works and providing expertise in the various approvals and related processes (including Access Panel processes). That the approvals process for grants directly involve people with disability with appropriate expertise and representatives of the Australian Human Rights Commission.

Recommendation 11: PIAC recommends that the Federal Government develop and implement a mechanism for annual review of amendments to the *Building Code of Australia* and amendments to referenced Australian Standards by the Federal Attorney-General to determine whether or not such amendments represent improvements to access for people with disability and, if so, to table consequential amendments to the Premises Standards.

Recommendation 12: PIAC recommends that where there is an amendment to the *Building Code of Australia* and/or referenced Australian Standards that have not yet been reviewed for consequential amendments to the Premises Standards, and a variation to the *Building Code of Australia* is sought in respect of a particular new building or building works, compliance with the amended *Building Code of Australia* or referenced Australian Standard should be considered as appropriate Alternative Solutions if it is endorsed as an improvement to access for people with disability following consultation between the Australian Building Codes Board and the disability sector.

Recommendation 13: PIAC recommends that all building professionals (those involved in development approval, certification, building design, building, managements, etc) be required to undertake a minimum of one day's approved training on the Premises Standards; the access provisions of the *Building Code of Australia*; the referenced Australian Standards and the underlying purpose of improved access for people with disabilities.

Recommendation 14: PIAC recommends that the Federal Disability Discrimination Commissioner be empowered and resourced to investigate alleged breaches of Disability Standards, and to be the complainant in complaints under the *Human Rights and Equal Opportunity Commission Act 1986* alleging failure to comply with Disability Standards, without requiring an individual complainant.

Recommendation 15: PIAC recommends that the *Human Rights and Equal Opportunity Commission Act 1986* be amended to guarantee standing for disability sector organisations to initiate and pursue complaints alleging failure to comply with the requirements of Disability Standards and intervene in cases involving systemic breaches of Disability Standards.

Recommendation 16: PIAC recommends that an appropriate body be established before or at the time the Draft Premises Standards come into effect to:

- (a) identify and collect the baseline data necessary to inform the five-year review;
- (b) determine key criteria for the five-year review; and
- (c) work with key stakeholders to ensure that data is collected and reported in standardised (and therefore comparable) form across jurisdictions.

3. The need for improvements in access

Despite existing legal prohibitions on discrimination in relation to access to premises (discussed below at 3.1) people with disability still regularly experience barriers in the built environment. This section considers current laws relevant to the Draft Premises Standards and highlights the need for more work to be done to ensure more consistent access and a greater and clearer focus on access requirements.

3.1 Australia's domestic law

Since March 1993, the DDA has made it unlawful to discriminate on the basis of disability in a range of life areas.

While section 23 of the DDA specifically deals with the prohibition of discrimination in relation to premises, other sections are also relevant to consider when reviewing the scope of the Draft Premises Standard. Sections 15 to 21 deal with discrimination in employment and work; section 22 deals with discrimination in education; section 24 deals with discrimination in the provision of goods, services and facilities; section 25 deals with discrimination in accommodation; section 27 deals with discrimination in relation to clubs and incorporated associations; section 28 deals with discrimination in sport; and section 29 deals with discrimination in the administration of Commonwealth laws and programs.

An often-insurmountable barrier to participation in or enjoyment of equitable access to these various aspects of life activity is lack of appropriate physical access to the premises in which the activities take place. While the Human Rights and Equal Opportunity Commission (now Australian Human Rights Commission (AHRC)) in its *2007-08 Annual Report* indicated that of the 2,050 complaints received under the DDA, only 62 (or 3%) were complaints of discrimination in access to premises⁸, it is quite likely that access to the built environment played some role in many of the remaining complaints. For example, the AHRC reports on the outcome of a complaint of discrimination in education made on behalf of a person who is legally blind.⁹ The report indicates that the complaint raised issues of the failure to make reasonable adjustments, including 'improved lighting in corridors and stairwells' and 'white or yellow markings on the stairs'. Without examining the remaining complaints it is not possible to estimate how many other complaints identified as being on grounds other than access to premises have a component relevant to the Draft Premises Standards.

PIAC submits that the level of complaints made formally to the AHRC represents only a very small percentage of the barriers that people with disability experience in the built environment. Many people with disability face multiple incidents of discrimination on a daily basis and simply do not have the capacity or time to complain about all of them. The simple exercise of spending time with a person with a disability going about an ordinary day's activity quickly demonstrates the level of exclusion faced, and in particular the level of exclusion that arises from the built environment.

⁸ Human Rights and Equal Opportunity Commission, *Annual Report 2007-2008* (2008) 72. In the previous year, the number of complaints in this area was 68, representing 4% of total complaints: Human Rights and Equal Opportunity Commission, *Annual Report 2006-2007* (2007) 78. Disability discrimination complaints represent by far the largest number of complaints received by the Commission, being 48% of complaints received in 2007-08; the next largest number were complaints under the *Sex Discrimination Act 1984* (Cth), being 21%: *Annual Report 2007-2008* (2008) 63.

⁹ *Ibid* 53.

3.2 The Building Code of Australia

The current *Building Code of Australia* (BCA) provides for a range of accessibility features for public buildings. However, it is widely recognised that the level of access provided for is not necessarily sufficient to meet responsibilities under the DDA.

3.3 Australia's international obligations

As observed above, Australia lodged its document of ratification of the UN *Convention on the Rights of Persons with Disabilities* on 4 July 2008. As a State Party to the *Disability Convention*, Australia has undertaken¹⁰:

1. ... to ensure and promote the full realization of all human rights and fundamental freedoms for all persons without discrimination of any kind on the basis of disability. This end, State Parties undertake:
 - a) To adopt all appropriate legislative, administrative and other measures for the implementation of the rights recognized in the present Convention;
 - b) ...
 - c) To take into account the protection and promotion of the human rights of persons with disabilities in all policies and programmes;
 - d) ...
 - e) To take all appropriate measures to eliminate discrimination on the basis of disability by any person, organization or private enterprise;
 - f) To undertake or promote research and development of universally designed goods, services, equipment and facilities ... and to promote universal design in the development of standards and guidelines;
- ...
3. In the development and implementation of legislation and policies to implement the present Convention, and in other decision-making processes concerning issues relating to persons with disabilities, States Parties shall closely consult with and actively involve persons with disabilities, including children with disabilities, through representative organizations.
- ...
5. The provisions of the present Convention shall extend to all parts of federal States without any limitations or exceptions.

Of particular relevance to the current inquiry are Article 9 – Accessibility, Article 19 – Living independently and being included in the community and Article 28 – Adequate standard of living and social protection:

Article 9 - Accessibility

1. To enable persons with disabilities to live independently and participate fully in all aspects of life, States Parties shall take appropriate measures to ensure to persons with disabilities access, on an equal basis with others, to the physical environment, to transportation, to information and communications, including information and communications technologies and systems, and to other facilities and services open or provided to the public, both in urban and rural areas. These measures, which shall include the identification and elimination of obstacles and barriers to accessibility, shall apply to, inter alia:
 - a) Buildings, roads, transportation and other indoor and outdoor facilities, including schools, housing, medical facilities and workplaces;

¹⁰ *Disability Convention*, art 4 (entered into force 3 May 2008).

- b) Information, communications and other services, including electronic services and emergency services.
2. States Parties shall also take appropriate measures:
- a) To develop, promulgate and monitor the implementation of minimum standards and guidelines for the accessibility of facilities and services open or provided to the public;
 - b) To ensure that private entities that offer facilities and services which are open or provided to the public take into account all aspects of accessibility for persons with disabilities;
 - c) To provide training for stakeholders on accessibility issues facing persons with disabilities;
 - d) To provide in buildings and other facilities open to the public signage in Braille and in easy to read and understand forms;
 - e) To provide forms of live assistance and intermediaries, including guides, readers and professional sign language interpreters, to facilitate accessibility to buildings and other facilities open to the public;
 - f) To promote other appropriate forms of assistance and support to persons with disabilities to ensure their access to information;
 - g) To promote access for persons with disabilities to new information and communications technologies and systems, including the internet;
 - h) To promote the design, development, production and distribution of accessible information and communications technologies and systems at an early stage, so that these technologies and systems become accessible at minimum cost.

Article 19 – Living independently and being included in the community

States Parties to the present Convention recognize the equal right of all persons with disabilities to live in the community, with choices equal to others, and shall take effective and appropriate measures to facilitate full enjoyment by persons with disabilities of this right and their full inclusion and participation in the community, including by ensuring that:

- a) Persons with disabilities have the opportunity to choose their place of residence and where and with whom they live on an equal basis with others and are not obliged to live in a particular living arrangements;
- b) ...
- c) Community services and facilities for the general population are available on an equal basis to persons with disabilities ...

Article 28 – Adequate standards of living and social protection

- 1. States Parties recognize the right of persons with disabilities to an adequate standard of living for themselves and their families, including adequate food, clothing and housing, and to the continuous improvement of living conditions, and shall take appropriate steps to safeguard and promote the realization of this right without discrimination on the basis of disability.
- 2. States Parties recognize the right of persons with disabilities to social protection ... and shall take appropriate steps to safe guard this right, including measures:
 - ...
 - d) To ensure access by persons with disabilities to public housing programmes;
 - e) To ensure equal access by persons with disabilities to retirement benefits and programmes.

The *Disability Convention* also has articles that deal with the right of equal access in education¹¹, health¹², work and employment¹³, participation in political and public life¹⁴, participation in cultural life, recreation,

¹¹ *Disability Convention*, art 24 (entered into force 3 May 2008).

¹² *Disability Convention*, art 25 (entered into force 3 May 2008).

¹³ *Disability Convention*, art 27 (entered into force 3 May 2008).

leisure and sport¹⁵. The removal or avoidance of physical barriers to the built environment in the form of the premises in which such activities take place are a necessary component of achieving the fulfilment of these rights of people with disability.

As such, the *Disability Convention* reinforces the need for Australia to take action to improve access to premises for people with disability.

4. The scope of the Draft Premises Standards

PIAC is disappointed that the following classes of buildings are excluded from the scope of the Draft Premises Standards: Class 1a and Class 2. PIAC does not seek to delay the promulgation of the Draft Premises Standards; as a result, PIAC urges the Government to ensure that moves to ensure appropriate coverage of all classes of buildings is taken during the first five years of operation of the Standards.

In relation to Class 1a buildings, being single dwellings, PIAC recommends that the Government work with key stakeholders to develop appropriate universal access design standards to be applied to developments where a number of Class 1a buildings are proposed.

In relation to Class 2 buildings, being buildings containing two or more sole-occupancy units (each being a separate dwelling), PIAC recommends that consideration be given as a matter of urgency to developing universal access design standards for the space within the sole-occupancy units. In addition PIAC recommends that the access provisions for common areas of Class 2 buildings, which were in the earlier 2004 draft Premises Standards, be brought back into the current draft. Given the increasing focus of development on Class 2 buildings in Australia's cities and the Federal Government's focus on increasing affordable housing stock, the current lack of access requirements could well result in a reduced percentage of accessible and affordable residential premises as more and more residences are in the form of sole-occupancy units within Class 2 buildings. As such, amendments to the Standards to impose access requirements inside the units of Class 2 buildings should occur well before the five-year review.

Recommendation

PIAC recommends that the Federal Government work with the Australian Human Rights Commission and the Australian Building Codes Board to develop and implement, on or before the fifth anniversary of the promulgation of the Premises Standards, universal access design standards to apply to developments where two or more Class 1a buildings are proposed.

PIAC recommends that the Federal Government work with the Australian Human Rights Commission and the Australian Building Codes Board to develop and implement, as a matter of urgency, standards to require universal access design within sole-occupancy units in Class 2 buildings.

PIAC recommends that the Federal Government include, in the Draft Premises Standards, the 2004 draft Premises Standards provisions for accessibility to the common or public areas of Class 2 buildings.

5. Compliance and monitoring of compliance

PIAC believes that the key benefit to be achieved from Disability Standards made under the DDA is systemic and systematic improvements in access for people with disability. Such improvements are less likely to be achieved unless there is a concerted focus on promoting compliance, effective education about the Standards and ongoing monitoring of compliance.

¹⁴ *Disability Convention*, art 29 (entered into force 3 May 2008).

¹⁵ *Disability Convention*, art 30 (entered into force 3 May 2008).

5.1 Why pro-active monitoring is required?

One of the particular factors relating to the Draft Premises Standards that makes compliance more likely to be achievable is that it is being developed in the context of review and amendment to the existing regulatory framework for building in Australia: the *Building Code of Australia* (BCA). This is quite different from the situation that exists in relation to the Public Transport Standards, which are not linked to any of the various regulatory or licensing frameworks for the different modes of public transport covered by the Public Transport Standards.

In PIAC's view, that lack of linkage to transport regulation and licensing has proven to be a significant detriment to the effective implementation and monitoring of the Public Transport Standards. This was particularly highlighted in the process of the five-year review of the Public Transport Standards, with the consultants identifying a lack of data available for review that could indicate whether or not there had been any significant improvements or otherwise in access to public transport over the five-year period:

There was no base-line data from 2002 to make a quantitative assessment of the impact of the Transport Standards.¹⁶

...

There are several problems associated with the compliance data currently reported, including:

- an absence of baseline data on accessibility against which progress since the introduction of the Transport Standards can be assessed;
- a lack of consistency in the data reported across different regions of Australia;
- limitations in the quantity and quality of data provided by the private sector; and
- variations in the quality of data reported by different levels of government.¹⁷

A further concern in respect of the review of the Public Transport Standards relates to the delay in commencing the review and the lack of clear criteria for review of the effectiveness of those Standards. While the provision in the Public Transport Standards requires the Minister, in consultation with the Federal Attorney-General, to 'review the efficiency and effectiveness of these Standards within 5 years after they take effect; and ... carry out a subsequent review every five years after the initial review'¹⁸, the review was not commenced until after the five years had elapsed. Almost seven years after the commencement of those Standards, the report of the review is not yet finalised or publicly available. PIAC is concerned that the second review, which should occur within 10 years from the date the Standards took effect, will not commence until five years after that report is released. This is completely unsatisfactory and fails to treat the issue of improving access for people with disability to public transport as important and urgent. PIAC is keen to avoid that a similar failure to conduct a timely and effective review the effectiveness of the Draft Premises Standards.

Recommendation

PIAC recommends that the Federal Government ensure that the review of the Draft Premises Standards is completed on the fifth anniversary of the commencement of the Standards.

As well as the difficulties in effectively reviewing the operation of the Standards to determine 'the effectiveness of these Standards in achieving their objects' after five years—as is required under clause 5.1 of the Draft Premises Standards—there are a number of other reasons for promoting more active monitoring and compliance mechanisms than have been previously implemented in respect of Disability Standards under the DDA. These include:

¹⁶ The Allen Consulting Group, *Review of the Disability Standards for Accessible Public Transport: Draft Report* (2008) 72.

¹⁷ Ibid 80. There are repeated references throughout the Draft Review Report to the absence of data in respect of all of the different modes of public transport.

¹⁸ *Disability Standards for Accessible Public Transport 2002* (Cth), cl 34.1.

- because of the highly technical nature of the Draft Premises Standards, it will be extremely difficult for individuals with disabilities to effectively challenge non-compliance;
- the changes to current access requirements that are set out in the Draft Premises Standards represent a significant new set of expectations on the professions (building certifiers, architects and designers, builders, developers and building managers) and pro-active monitoring will indicate the extent to which further professional development (either pre- or post-qualification) is required;
- the building certification process, which is central to the implementation of the BCA (and the Draft Premises Standard), has not to date proven to be particularly effective in ensuring the compliance with existing access requirements as evidenced by the resource produced by the Australian Human Rights Commission, *The good, the bad and the ugly*.¹⁹

In respect of the first of these, any system that relies for its effectiveness on individual complaints is likely to fail.

There are a number of factors extraneous to the issue of compliance or otherwise that will impact on the decision of an affected individual to lodge a complaint under the DDA because of failure to comply with the Standards.

These include the time taken to prepare a complaint and pursue it through the processes at the AHRC and (potentially) through court processes; the risk of an adverse costs order²⁰ if unsuccessful or only successful in part in any court proceedings; other priorities in one's day to day life; the cost of bringing proceedings including the costs of representation by solicitors and barristers and the cost of experts able to give evidence on questions of a technical nature.

In addition, in order to be sufficiently confident to pursue a complaint, an individual with a disability would require a high level of expertise in the Standards, access to all of the relevant documentation about the approvals process and any considerations affecting that process, and access to the BCA-referenced Australian Standards (a matter that is addressed below).

The closest analogous situation is the situation of an individual complainant affected by a failure to comply with the Public Transport Standards. Other than the *Access For All Alliance Bus Stops Case*, there have been no cases that have been finalised that involve allegations of failure to comply with the Public Transport Standards.

PIAC's experience in representing the complainants in that case indicates that the level of resources and expertise required to mount such a case is significant and is well beyond the resources of the vast majority of individuals with disability.

¹⁹ Australian Human Rights Commission, *The good, the bad and the ugly: Design and construction for access* (2006) <http://www.humanrights.gov.au/disability_rights/buildings/good.htm> at 13 March 2009.

²⁰ Under the ordinary costs rule, the unsuccessful party to litigation is ordered to pay the legal costs of the successful party. In the case under the Public Transport Standards, *Access For All Alliance (Hervey Bay) Inc v Hervey Bay City Council* [2007] FCA 615 (2 May 2007) (the *Access For All Alliance Bus Stops Case*), the non-profit incorporated association that was the complainant was ordered to pay the costs of the respondent council. This is set out in the separate decision: *Access For All Alliance (Hervey Bay) Inc v Hervey Bay City Council* [2007] FCA 974 (29 June 2007). In that decision, the court held that the proceedings were not of 'public interest' such as to justify departure from the ordinary rule as to costs. This was despite the case being (a) the first test of the Public Transport Standards to reach a court hearing, (b) brought purely to achieve compliance by a local government authority with its obligations as a public transport provider under the Public Transport Standards, and (c) the complainant seeking no financial compensation for the failure to comply.

Recommendation

PIAC recommends that, in recognition of the need to be pro-active in respect of the implementation of the Draft Premises Standards, urgent action be taken to establish a mechanism for monitoring implementation of and compliance with the Draft Premises Standards to commence at the same time as the Standards commence.

5.2 Options for monitoring compliance

PIAC believes there is a range of possible mechanisms that could be created or amended to enable effective monitoring of the implementation of the Draft Premises Standards (including whether or not the certification process is effective in ensuring compliance that achieves the necessary performance). These include:

- resourcing of the state and territory Auditors General to enable an annual audit of a sample of BCA-certified new buildings or building work;
- establishment of a mechanism within state and territory building administrations to enable an appropriately broad sample compliance audit of certified new buildings and building work;
- requiring and resourcing local government development approval bodies to undertake a BCA compliance audit on a sample of certified new buildings and building work.

Of these, the option of requiring the Auditors General to audit compliance would be preferable for its clear independence from any entity directly involved in the building authorisation and administration processes. In order for it to be effective, it would require appropriate resources to be made available to the Auditors General, including financial resources to administer the audit and to engage people with appropriate technical expertise in the area of disability access and the Standards.

The second option—audit by the state and territory building administrations—has the benefit of utilising existing expertise in relation to the BCA, the approval process and the Australian Standards.

Depending on the arrangements in particular states and territories it may, however, give rise to a conflict where the state or territory government is empowered to approve some types of new buildings or building work. Further, PIAC submits, the existing building administrations would need to engage people with technical expertise in the area of disability access for this second mechanism to be effective.

The third option—audit by the local authority—has the benefit of ensuring that a sample is obtained that involves all local government authorities in Australia. This is more likely to identify problems with particular certifiers or approvals processes unless the earlier options are required to ensure their sample is extensive enough to cover this diversity. Again, it may be necessary for local authorities to bring in specialists with technical expertise in the area of disability access. The other benefit of this third option is that, for many local authorities, there will be local access committees already in place and able to provide disability input to the process.

Sample audits should review buildings within all classes covered by the Draft Premises Standards ensuring that a number of approvals for each class is audited with an attempt to ensure that a cross section of certifiers' work is reviewed.

Recommendation

PIAC recommends that the Federal Government, in co-operation with State and Territory Governments, require and resource the state and territory Auditors General to be responsible for the ongoing independent review and regular public reporting of compliance with the Draft Premises Standards, including undertaking an annual audit of a sample of BCA-certified new buildings and new building work. That, in the alternative,

the governments require state and territory building administrations or local government authorities to perform this function, with additional input from disability access experts.

Another important aspect of the implementation of the Draft Premises Standards, once approved, is the proposed role of Access Panels. Under the Administrative Protocol²¹, Access Panels may be established to provide recommendations in relation to questions of appropriate Alternative Solutions and variation to the full application of the BCA in exceptional circumstances. The effectiveness and appropriateness of that mechanism will be central to the implementation of the new access provisions of the BCA and, consequently, the effectiveness of the Draft Premises Standards. As such, monitoring of the decisions of Access Panels will be critical.

PIAC proposes that, as part of the five-year review, decisions made by Access Panels be reviewed to determine whether or not the Access Panels have appropriately utilised the Administrative Protocol in their decision-making processes. In order to enable ongoing evaluation of the decisions of Access Panels, PIAC also proposes that the Government require the Australian Building Codes Board (ABCB) to amend the Administrative Protocol to ensure effective disclosure of the work of the Access Panels in a timely manner.

Recommendation

PIAC recommends that the Federal Government require the Australian Building Codes Board to amend the Administrative Protocol to include the following requirements:

- *that the Australian Building Codes Board in co-operation with the Australian Human Rights Commission, establish a central, publicly available website to report on the establishment and work of Access Panels;*
- *that all recommendations of Access Panels be available in accessible formats at no cost through that website and be provided in a manner that enables searches to be conducted across the database of recommendations;*
- *that all recommendations of Access Panels must include reasons for decisions, in particular:*
 - *where an Alternative Solution is proposed, the decision should clearly identify how the performance requirement of the Building Code of Australia is achieved through the proposed Alternative Solution;*
 - *where a variation in full application of the Building Code of Australia is recommended on the grounds that the applicant may experience an unjustifiable hardship, the recommendation must set out the basis on which unjustifiable hardship was found and the variation from the Building Code of Australia that has been recommended and on what basis that variation was determined to be the best available option;*
- *that any process for reviewing an Access Panel's operations arising from Article 8 of the Administrative Protocol involve the Australian Human Rights Commission and appropriate disability advocacy organisations.*

5.3 Resourcing the disability sector to participate in compliance monitoring

A key participant in the effective monitoring of compliance with the Draft Premises Standards, once commenced, will be the disability sector. There are many people within the sector who have developed expertise in building access issues and there is wide-spread commitment to ensuring that improved access to premises is achieved through the effective implementation of the Standards.

²¹ Australian Building Codes Board, *A Model Process to Administer Building Access for People with a Disability: The Protocol* (2008).

There is also wide-spread concern that a failure to properly monitor the mechanisms for authorising the construction of new buildings and new building works will result in further barriers to social and economic inclusion for people with disability. Failure to identify problems with the processes of implementation early on will result in problems in access that are expensive to resolve and remove. People with disability and their representative and advocacy organisations are the key stakeholder in ensuring the effective implementation of the Draft Premises Standards.

It should be noted, however, that most disability sector organisations have extremely limited resources and are dealing with a wide range of barriers facing their constituency. For them to be effective in providing input to compliance monitoring, targeted resourcing will be required.

Such resourcing would have the benefit of ensuring problems with compliance are identified early and consequently do not result in expensive retrofitting requirements.

It will also add to the empowerment of people with disability as central to the process of achieving improved access to the building environment. This is consistent with the Government's social inclusion agenda and the current underlying philosophy in the development of a National Disability Strategy.

There are two key resources that the disability sector will need to access:

- the BCA-referenced Australian Standards; and
- expertise on disability access, building construction and design, and building authorisation processes.

Under the current arrangements, there is a significant cost involved in obtaining a copy of each Australian Standard. This cost is multiplied by the number of Australian Standards referenced in the Premises Standards and the proposed amendments to the BCA. Individual people with disability and their representative organisations should have some means of accessing these Australian Standards without this cost burden.

PIAC notes that, unlike professionals in the building industry that require copies for work purposes, people with disability and their representative organisations will not be able to claim such costs as a tax deductible expense. Many will require access on a one-off or irregular basis and to be forced to purchase these documents would be to impose a further demand on already stretched resources.

Recommendation

PIAC recommends that the Federal Government develop and, if necessary, fund a mechanism to enable free on-line access to all Australian Standards referenced in the Premises Standards in accessible formats.

In order to effectively review and (if necessary) challenge proposed building developments, people with disability and their advocates will need to be able to access people with relevant expertise. Without this, people with disability will be at a distinct disadvantage in comparison to building professional and property developers. Such an imbalance in expertise and power would be counter-productive to ensure timely and effective interventions in approvals processes.

PIAC suggests that funding be made available to enable people with disability and disability peak and advocacy organisations to:

- access experts to review Development Applications and certified new buildings building works for compliance and to provide expert reports on potential or actual non-compliance;
- access such experts through a disability-sector based brokerage service with expertise in identified the required expertise and preparing briefs or terms of reference for those experts;
- access legal representation to intervene in building approval processes if necessary.

While the funding for brokerage services would need to be allocated up-front to appropriate disability-sector organisations in each state and territory, the funding for experts and legal representatives could be retained in a central fund and allocated on request through an agreed approval process. Such a process should involve testing the request against appropriate public interest criteria, including for example, whether the proposed new building or building work involves retail, recreational or cultural, educational, transport, or government facilities. Suitably qualified people with disability and representatives of the Australian Human Rights Commission should be directly involved in the decision-making process.

Recommendation

PIAC recommends that funding be provided to enable the establishment of Premises Standards Expert Brokerage services in either

- (a) at least one disability organisation in each state and territory, with consideration given to how to ensure that the brokerage will be widely publicised and accessible irrespective of disability; or*
- (b) each of the national disability-specific peak organisations, with consideration given to how to ensure that the brokerage will be widely publicised and accessible irrespective of location.*

PIAC recommends that a funding program be established to provide grants of funds to disability sector organisations and people with disability to pay for the services of experts (both building access and legal) to assist in reviewing proposed new buildings and new building works and providing expertise in the various approvals and related processes (including Access Panel processes). That the approvals process for grants directly involve people with disability with appropriate expertise and representatives of the Australian Human Rights Commission.

6. Continuing development and education

PIAC anticipates that the ABCB and Standards Australia will continue to work on amendments to the Australian Standards and the BCA that will further improve access to premises for people with disabilities. Such amendments will only have effect under the DDA if the Premises Standards are amended to reflect them.

PIAC submits that a mechanism needs to be developed to enable amendments to the relevant Australian Standards (or development of new Australian Standards) and amendments to the BCA to be reviewed to determine whether or not they represent improvements in access for people with disability and, as such, ought to be reflected in the Premises Standards as a matter of urgency.

Recommendation

PIAC recommends that the Federal Government develop and implement a mechanism for annual review of amendments to the Building Code of Australia and amendments to referenced Australian Standards by the Federal Attorney-General to determine whether or not such amendments represent improvements to access for people with disability and, if so, to table consequential amendments to the Premises Standards.

Amendments to the BCA and the referenced Australian Standards may also be relevant to the deliberations of Access Panels before they have been considered under the annual review and amendment process proposed above. It would be useful for a mechanism to be developed to enable Access Panels to take account of those amendments that will improve access to people with disability.

Recommendation

PIAC recommends that where there is an amendment to the Building Code of Australia and/or referenced Australian Standards that have not yet been reviewed for consequential amendments to the Premises

Standards, and a variation to the Building Code of Australia is sought in respect of a particular new building or building works, compliance with the amended Building Code of Australia or referenced Australian Standard should be considered as appropriate Alternative Solutions if it is endorsed as an improvement to access for people with disability following consultation between the Australian Building Codes Board and the disability sector.

Vital to effective compliance will be information and professional development for all those affected by the promulgation of the Premises Standards. In particular, building professionals should be required to undertake compulsory professional development to ensure they are aware not only of the technical changes to their obligations but also the underlying purpose and objectives of the amendments.

Recommendation

PIAC recommends that all building professionals (those involved in development approval, certification, building design, building, managements, etc) be required to undertake a minimum of one day's approved training on the Premises Standards; the access provisions of the Building Code of Australia; the referenced Australian Standards and the underlying purpose of improved access for people with disabilities.

7. Enforcement

There are three key mechanisms for enforcing the improved access requirements: a complaint under the *Human Rights and Equal Opportunity Commission Act 1986* (Cth) of unlawful discrimination for failure to comply with the requirements of a Disability Standard; a complaint to the relevant professional body, or a complaint to the relevant development approval body.

In all cases it will be important that people with disability, disability organisations and the Australian Human Rights Commission have authority to utilise these mechanisms.

As noted above, relying on individuals with disability to bring legal complaints as the primary mechanism for ensuring compliance is not appropriate. PIAC refers to its comments above and to section 20 on monitoring in the submission of the NSW Disability Discrimination Legal Centre for further discussion of the difficulties that individuals face in the complaints processes and the limits on the individual complaint processes in achieving systemic outcomes.²²

While individual complaints should not be the primary mechanism for ensuring compliance with the Draft Premises Standards, they should remain and be enhanced as a mechanism for challenging non-compliance.

To this end, PIAC submits that mechanisms need to be established to enable the Federal Disability Discrimination Commissioner to have a formal role in challenging non-compliance and for appropriate disability sector organisations to be able to challenge non-compliance on behalf of people with disability.

The current complaint provisions under the *Human Rights and Equal Opportunity Commission Act 1986* (Cth) (HREOCA) effectively preclude organisations from bringing legal actions alleging breaches of a Disability Standard on behalf of their members or constituency. While HREOCA provides for representative complaints to be commenced by an individual or organisation 'on behalf of one or more persons aggrieved by the alleged unlawful discrimination'²³, there is no mechanism for those complaints to then be dealt with in the Federal Court or Federal Magistrates' Court as representative proceedings.

²² Disability Discrimination Legal Centre (NSW), *Submission: Draft Disability (Access to Premises – Buildings) Standards 2009* (2009) 16-19.

²³ *Human Rights and Equal Opportunity Commission Act 1986* (Cth), para 46P(2)(c).

The Federal Magistrates' Court has no representative or class proceedings mechanisms, while the Federal Court enables representative proceedings requiring such proceedings to be brought by an affected individual or individuals on behalf of seven or more similarly affected individuals.²⁴ In such proceedings, the individual complainants face a significant risk of adverse costs orders, particularly when the case is in the nature of a test case.

The creation of effective representative complaint mechanisms and the empowerment of the Federal Disability Discrimination Commissioner to bring complaints alleging failure to comply with a Disability Standard would give greater effect to the intention that a Disability Standard be a systemic, proactive mechanism to improve access for people with disabilities to key aspects of the life of the community.

Recommendations

PIAC recommends that the Federal Disability Discrimination Commissioner be empowered and resourced to investigate alleged breaches of Disability Standards, and to be the complainant in complaints under the Human Rights and Equal Opportunity Commission Act 1986 alleging failure to comply with Disability Standards, without requiring an individual complainant.

PIAC recommends that the Human Rights and Equal Opportunity Commission Act 1986 be amended to guarantee standing for disability sector organisations to initiate and pursue complaints alleging failure to comply with the requirements of Disability Standards and intervene in cases involving systemic breaches of Disability Standards.

8. Five-year review

Finally, PIAC submits that careful consideration needs to be given to the five-year review to be conducted. In particular, work should commence on what criteria should guide the review and what baseline data is needed to ensure that the review can effectively review what impact the Draft Premises Standards have had on access to premises for people with disability.

A matter of particular importance in the five-year review will be to analyse the operation and impact of the various thresholds that apply in the Draft Premises Standards, for example, the 40 metre perimeter threshold for swimming pool access²⁵, the 200 sq metre threshold for upper stories in class 5, 6, 7B or 8 buildings with only two or three storeys²⁶, and the lift size and vertical travel distance concession²⁷. A key question will be whether or not these thresholds and other limits on the application of the Draft Premises Standards should be lowered or removed altogether.

Another aspect of the Standards that should be carefully considered is the concessions provided to building developers, certifiers and managers²⁸ in respect of new work being undertaken by lessees in existing buildings and whether those concessions are being exploited to avoid obligations to implement access features in compliance with the Premises Standards.

Recommendation

PIAC recommends that an appropriate body be established before or at the time the Draft Premises Standards come into effect to:

- (a) *identify and collect the baseline data necessary to inform the five-year review;*

²⁴ Federal Court of Australia Act 1976 (Cth) Part IVA; Federal Court Rules (Cth), Order 6 Rule 13.

²⁵ Draft Disability (Access to Premises) Standards 2009, sch 1, cl D3.1.

²⁶ Draft Disability (Access to Premises) Standards 2009, sch 1, cl D3.4(f)

²⁷ Draft Disability (Access to Premises) Standards 2009, cl 4.4.

²⁸ Draft Disability (Access to Premises) Standards 2009, cl 4.3.

- (b) determine key criteria for the five-year review; and*
- (c) work with key stakeholders to ensure that data is collected and reported in standardised (and therefore comparable) form across jurisdictions.*

9. Conclusion

PIAC urges the Committee to recommend the adoption of the Draft Premises Standards with amendments particularly in respect of the inclusion of residential premises that are currently excluded. For the Standards to be effective, monitoring of compliance and effective education of those involved in the building industry will be vital. The Draft Premises Standards represent a very important development for people with disabilities. If effectively implemented they should result in greater social inclusion for people with disability in Australia.