

Building certifier responsibilities regarding access for people with a disability

Guideline

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1. Purpose

The purpose of this guideline is to:

- provide building certifiers with guidance on applying the *Building Act 1975* (BA) in circumstances in which the *Disability Discrimination Act 1992* (DDA) may affect the performance of their building certification functions associated with the assessment of development applications for building work and
- provide guidance to building certifiers about assessing development applications for building work that are subject to the requirements of the National Construction Code (NCC) relevant to the access requirements for people with a disability and those parts of Premises Standards not specifically referenced in the NCC (for example, concessions and exemptions).

2. Legal status of guidelines

Section 133A of the BA requires a building certifier, in performing a function under the BA, to have regard to a guideline made under section 258 of the BA. Having regard to this guideline may reduce the likelihood of a successful complaint against a building certifier in performing their building certification functions.

This guideline is made under section 258 of the BA. Section 258 provides for guidelines to be made to help achieve compliance with the BA. It is recommended that the information given in this guideline be followed, however strict compliance with this guideline is not mandatory under the BA.

3. Background

On 1 May 2011, the Disability (Access to Premises—Buildings) Standards 2010 (the Premises Standards) made under the Commonwealth DDA commenced. The Premises Standards are the result of cooperative policy development between the Commonwealth and state and territory governments and the Australian Building Codes Board (ABCB) over a ten-year period.

The purpose of the Premises Standards is, in part, to harmonise the requirements of the NCC and the DDA in relation to access to buildings through the replication of the Access Code, which forms part of the Premises Standards, into the NCC. Queensland adopted NCC 2011 on 1 May 2011 to facilitate consistency with the two sets of requirements.

The Premises Standards ensure an appropriate level of access to new buildings and new alterations to a building for people with a disability is provided. They will also provide a greater level of certainty to the building industry, building certifiers and building managers by the establishment of building standards which are taken to automatically comply with the DDA. This means that if a complaint of discrimination is made under the DDA with regard to access to premises, the complaint will be assessed against the same building standards used to construct buildings.

The Premises Standards are the culmination of work that began in 2001 when the ABCB was asked to develop a proposal for technical requirements which could form the basis of the

Standards. This followed requests for improved certainty under the DDA in satisfying its requirements for non-discriminatory access to premises. A proposal was presented by the ABCB to the then government in mid-2005.

A reference group to advise further on a range of unresolved matters was subsequently formed and provided its report to the government in mid-2008. The Attorney-General referred draft Premises Standards to the House of Representatives Standing Committee on Legal and Constitutional Affairs in December 2008, for its review and inquiry. The committee reported to Parliament on 15 June 2009 in a report titled *Access all areas*. The Standards incorporate changes to the draft to implement those drafting aspects of the government's response to the committee's *Access all areas* report.

4. Relationship between the Disability Discrimination Act and the Building Act

If there is an inconsistency between a Commonwealth law and a state law, the Commonwealth law prevails to the extent of the inconsistency. That means that the DDA standards for people with a disability will apply instead of any inconsistent state requirements. The DDA includes technical requirements, such as those contained in the Access Code (refer to Schedule 1 of the Premises Standards), and the operational provisions of the Premises Standards, such as those in Parts 2, 3 and 4 of the Standards. Therefore, both the technical provisions of codes and how buildings are assessed under the BA may be affected by the DDA.

The legislative scheme established by the DDA deals with the same subject matter as the BA. Therefore, the operation of the affected BA provisions has been modified to the extent provided by the DDA.

This guideline outlines the operation of the BA in the context of the DDA. For example, because the DDA and NCC do not provide discretion the use of the discretion under the BA is not available.

5. Legislation

The following legislation is applicable:

- *Disability Discrimination Act 1992 (Commonwealth)*
 - Section 23 makes it unlawful to discriminate against another person on the grounds of the person's disability in relation to access to or use of premises.
 - Section 31(1) provides that standards can be formulated in relation to any area in which it is unlawful to discriminate against another person on the grounds of a disability of another person.
- The Disability (Access to Premises—Buildings) Standards 2010 (Premises Standards) (Commonwealth)
- The Building Code of Australia
- The *Building Act 1975*
 - Section 258
 - Section 133A

- Sections 37, 61 and 112. The sections are discretionary provisions that enable a building certifier to give a building approval under the building assessment provisions in force prior to the commencement of the Premises Standards.

6. Access panels

There may, in exceptional circumstances, be some practical constraints on the extent to which a building standard can account for all possible situations. In some circumstances it may be unreasonable to require full compliance, particularly when undertaking new work on existing buildings. Paragraph 4.1(3)(p) of the Premises Standards therefore provides that *'any decision of a State or Territory body established to make recommendations to building authorities about building access matters is a relevant consideration in determining a claim of unjustifiable hardship'*. These bodies are known as access panels.

The explanatory statement to the Premises Standards contemplate an access panel will also be able to provide advice and recommendations on matters associated with alternative solutions under the NCC. The statement also states that access panels will play a role in guiding a court about the existence of unjustifiable hardship in the event of a complaint.

Under the Commonwealth scheme, state and territory administrations are not required to establish access panels. However, the Commonwealth Government has encouraged jurisdictions to do so to facilitate uniform implementation. Consequently, the department has established an access panel. Members of the panel will be able to provide advice to building certifiers on alternative solutions or advice on claims of unjustifiable hardship.

Details of the access panel and its members, established by the department to provide advice on issues of unjustifiable hardship and alternative solutions, can be found on the department's website at www.hpw.qld.gov.au

The access panel will be established in accordance with the *Model process to administer building access for people with a disability* (the Protocol) published by the ABCB. It is also intended that access panels manage the operation of the panel as they see fit and that they may seek whatever advice they think necessary to address the requirements of paragraph 4.1(3)(p) of the Premises Standards.

Before deciding matters associated with an alternative solution to the NCC relevant to the access requirements for people with a disability, building certifiers should seek the advice and recommendations of a member of the access panel.

Under this guideline, building certifiers may act on the advice of a member of the access panel and if they do, they satisfy their obligations under the BA with regards to performing a building certification function involving the assessment of building work against the NCC.

7. Information for building certifiers about the application of the Premises Standards

Using discretionary provisions of the BA

Because the Premises Standards do not provide a building certifier with the discretion given in sections 37, 61 and 112 of the BA, Building Codes Queensland is of the opinion that the DDA overrides the BA in those areas and that the BA provisions will not apply.

If the discretion is applied to allow, for example, an existing building undergoing alterations to be approved other than in accordance with the Premises Standards, it may expose the building certifier to a claim of discrimination.

For the effective operation of the Premises Standards and to avoid claims of discrimination, building certifiers should not use the discretionary provisions of the BA to give building approval under the building assessment provisions in force prior to the commencement of the Premises Standards.

Compliance with the Access Code

A building covered by the Premises Standards can meet the performance requirements under the Access Code, and therefore comply with the Premises Standards by:

- a. complying with the relevant deemed-to-satisfy provisions of the Access Code, or
- b. formulating an alternative solution to the deemed-to-satisfy provisions that satisfies the performance requirements of the access code, or can be shown to be at least equivalent to the deemed-to-satisfy provisions of the access code made under the Premises Standards.

The requirements of the Access Code have been replicated in the NCC. This means that compliance with the deemed-to-satisfy requirements of the NCC will also ensure compliance with the Access Code and therefore the relevant parts of the Premises Standards.

The Premises Standards also allows for and encourages innovative solutions to meet the performance requirements through the development of new technologies and through the use of alternative solutions, so long as the proposed solution provides equivalent or better access than the deemed-to-satisfy solutions.

Alternative solutions

The NCC also allows a building solution that complies with the performance requirements of the NCC to be approved by a building certifier (alternative solution). As is the case with any alternative solution, a building certifier must ensure that appropriate supporting documentation is provided when assessing alternative solutions about the access requirements of the NCC. A building certifier may receive and rely on supporting documentation from experts in a particular field, including those competent in the area of access for people with a disability, to support a decision on an alternative solution about access.

A building certifier may require advice to be received from a member of the access panel established by the department to provide advice about matters associated with access for people with a disability. The building certifier may act on that advice when deciding if a development application for building work involving an alternative solution complies with the performance requirements of the NCC relevant to access for people with a disability.

Providing access ‘to the degree necessary’

The performance requirements of both the Access Code and the NCC relevant to access (for example refer to DP1 of the Access Code and the NCC) require access to be provided ‘to the degree necessary’.¹

This acknowledges that there may, in exceptional circumstances, be some practical constraints on the extent to which a building standard can account for all possible situations. In some circumstances it may be unreasonable to require full compliance, particularly when undertaking new work on existing buildings. This concept is consistent with the unjustifiable hardship provisions of the Premises Standards.

However, in determining whether a specific measure regarding access for people with a disability is not necessary building certifiers should seek advice from appropriately qualified persons as part of their consideration of an alternative solution (for example members of the access panel established by the department) before deciding the matter. As is the case with any alternative solution, reasons for the decision must be properly documented.

Paragraph 4.1(3)(p) of the Premises Standards gives guidance on the matters to be considered when addressing an alternative solution or matters associated with unjustifiable hardship. While this is primarily about matters associated with unjustifiable hardship, the explanatory statement² to paragraph 4.1(3)(p)³ states that the criteria may also be used to assist in deciding an alternative solution.

It is expected that an access panel established by the state would address the matters detailed in Part 4 of the Premises Standards when providing advice to building certifiers about alternative solutions to access requirements in the NCC.

¹ The BCA states in section A1.7 of Volume 1 that ‘a reference in a Performance Requirement to “the degree necessary” means that consideration of all the criteria referred to in the Performance Requirement will determine the outcome appropriate to the circumstances. These words have been inserted to indicate that in certain situations it may not be necessary to incorporate any specific measures to meet the Performance Requirement.’

² The text in the explanatory statement relevant to 4.1(3)(p) of the Premises Standards states ‘this paragraph is intended to provide a mechanism for the recognition of decisions of specialist Access Panels established in States and Territories to advise building authorities on whether to accept claims of unjustifiable hardship from building developers and on whether proposed Alternative Solutions provide adequate access.’ and

‘where Access Panels are established, it is anticipated that they will provide expert advice on solutions in cases where the Deemed-to-Satisfy solutions are impractical or would impose unjustifiable hardship. This provision recognises that access panels would play an important and meaningful role in guiding a court about the existence of unjustifiable hardship in the event of a complaint’.

The full explanatory statement can be found at

www.comlaw.gov.au/Details/F2010L00668/Explanatory%20Statement/Text

³ 4.1(3) p) states ‘any decision of a State or Territory body established to make recommendations to building authorities about building access matters is a relevant consideration in determining a claim of unjustifiable hardship’.

8. Exceptions and concessions

Unjustifiable hardship

Unjustifiable hardship issues are more likely to occur to an alteration or addition to an existing building. There is no mechanism in the DDA or the Premises Standards for anyone to give prior approval for non-compliance with any part of the Premises Standards on the grounds of unjustifiable hardship. This is because unjustifiable hardship cannot be determined without reference to the particular facts of a case. The presence or absence of unjustifiable hardship can therefore only be conclusively determined by a Court. However, building certifiers may take into account advice received from a member of the access panel that there are exceptional circumstances to support a claim of unjustifiable hardship when deciding to what degree (the degree necessary) access should be provided.

Part 4⁴ of the Premises Standards gives guidance on the matters that may be considered when addressing unjustifiable hardship. These include:

- additional capital, operating or other costs
- reductions in capital
- the extent to which the building is to be used for public purposes
- exceptional technical factors
- whether the costs to make the building accessible is disproportionate to the value of the building, etc.

Lessee concession

Section 4.3 of the Premises Standards provides that where an existing building is upgraded or extended, the Premises Standards will impose access requirements on the 'affected part' of the building. That is, they will require an accessible path of travel to be provided between the principal pedestrian entrance and the new part of the building.

Section 4.3 of the Premises Standards provides a limited concession from this requirement. Where an application for approval of building work is made by a lessee for work on the area of the building that they lease, there is no requirement on the lessee or any other person to provide an accessible path of travel to the part of the new work which the person leases. If the building application extends beyond the area of the building leased by the applicant, the concession will not apply to the path of travel to those areas.

For example, if a lessee applies for an approval for a renovation of the sixth level of an existing multi-storey building, and this approval triggers the application of the Premises Standards, then the lessee would only need to upgrade the area subject to the building approval. That is, the lessee would not need to provide an accessible path of travel from the entrance to the building to the sixth floor.

This concession applies instead of the discretionary provisions of the BA, if there is an inconsistency with the BA.

⁴Refer to clause 4.1 of the Premises Standards for a complete list of matters to be considered when addressing unjustifiable hardship

Lift concession

Section 4.4 of Premises Standards provides a concession from the requirements of Table E3.6(b) of the Access Code in relation to lift dimensions for existing lifts.

Where an existing lift travels more than 12 metres and has a lift floor of not less than 1100 mm by 1400 mm (that is, if it complies with access requirements imposed by the NCC prior to the commencement of the Premises Standards) it does not have to meet the usual Premises Standards requirements. The Premises Standards would otherwise require the floor space of a lift which travels more than 12 metres to be a minimum of 1400 mm by 1600 mm.

Other access features on a lift undergoing upgrade required by Table E3.6(b), such as requiring accessible lift controls, are not affected by this concession and must be provided.

This concession applies instead of the discretionary provisions of the BA, if there is an inconsistency with the BA.

Toilet concession

Section 4.5 of the Premises Standards provides a concession for existing accessible sanitary compartments. The concession provides that the requirements of paragraphs F2.4(c) and (e) of the Access Code to comply with AS 1428.1—2009, *Design for access and mobility, Part 1: General requirements for access—New building work* do not apply to certain existing sanitary compartments. The concession is available where an existing sanitary compartment complies with the requirements of AS 1428.1—2001 (that is, if it complies with the requirements imposed by the Building Code prior to the commencement of the Premises Standards), and is in a new part, or an affected part, of a building.

This concession applies instead of the discretionary provisions of the BA, if there is an inconsistency with the BA.