



Review of the Disability (Access to Premises – Buildings) Standards 2010

Submission of the Tasmanian Anti-Discrimination Commissioner

15 June 2015

Office of the Anti-Discrimination Commissioner
Celebrating Difference, Embracing Equality

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1. Introduction

Thank you for providing me with an opportunity to make a submission to the review of the *Disability (Access to Premises – Buildings) Standards 2010* (Cth).

The following sets out my views on issues in the review discussion paper and other matters I consider relevant to the implementation of the Premises Standards.

Section 3 provides information on the level of disability discrimination complaints received by me and makes recommendations in relation to any proposed outcomes from the review.

Section 4 provides input to issues raised by the review, including matters related to the affected parts and unjustifiable hardship defence provisions.

Section 6 raises a number of other matters I consider are relevant to the review.

I would be happy to elaborate on these matters should you wish me to do so.

Robin Banks
Anti-Discrimination Commissioner, Tasmania

15 June 2015

2. Summary of recommendations

- 1 That a working group of stakeholders from federal, territory and state levels, including representatives of discrimination authorities (through the Australian Council of Human Rights Authorities), building industry, state and territory building regulators, and people with disability be convened to consider any proposed changes to the *Disability (Access to Premises – Buildings) Standards 2010* (Cth) arising from the review process.
- 2 That any proposals to change the *Disability (Access to Premises – Buildings) Standards 2010* (Cth) are consistent with the policy directions established by Australian Governments in the National Disability Strategy, the National Disability Insurance Scheme and related policies aimed at enabling people with disability to maximise their independence and have equal opportunities for participation in the community.
- 3 That the Australian Standards referenced in the *Disability (Access to Premises – Buildings) Standards 2010* (Cth) be made freely available.
- 4 That the *Guideline on the application of the Premises Standards* published by the Australian Human Rights Commission be fully updated to reflect any changes arising from this current review of the *Disability (Access to Premises – Buildings) Standards 2010* (Cth).
- 5 That research be undertaken to determine the extent to which people with disability are experiencing barriers to short-term holiday accommodation in Class 1b buildings and the identification of options to improve accessibility where a demonstrated need exists.
- 6 That, if regulation is being considered in relation to currently unregulated short-term accommodation, such regulation should include compliance with accessibility requirements.
- 7 That the hotel/motel industry be encouraged to work with the disability sector to improve the way in which requirements under the *Disability (Access to Premises – Buildings) Standards 2010* (Cth) are met, including the way in which rooms are planned and marketed.
- 8 That there be no reduction made to the accessible room ratio for Class 3 buildings (for example, hotels and motels) in the *Disability (Access to Premises – Buildings) Standards 2010* (Cth).

- 9 That research be undertaken to determine the extent to which people with disability are continuing to experience barriers to the provision of residential accommodation in Class 1a buildings and the identification of options to improve the accessibility of new dwellings and dwellings made available for rent or lease. On completion of this research, amendments be made to the *Disability (Access to Premises – Buildings) Standards 2010* (Cth) to reflect appropriate mechanisms to respond to the need for accessible residential accommodation.
- 10 That broader consideration be given in relation to the provision of toilet facilities in public buildings to address the needs of the whole community through the provision of combined accessible and gender neutral sanitary facilities.
- 11 That the width of passageways in the *Disability (Access to Premises – Buildings) Standards 2010* (Cth) be increased to 1200 mm.
- 12 That further research be undertaken on the use of mobility aids, including mobility scooters and the relevant anthropometrics be identified, with a view to ensuring that the *Disability (Access to Premises – Buildings) Standards 2010* (Cth) are aligned with current practices.
- 13 That the dimensions required for 180° turning circles and landing length in the *Disability (Access to Premises – Buildings) Standards 2010* (Cth) be increased.
- 14 That the design of shower basins and shower recesses in the *Disability (Access to Premises – Buildings) Standards 2010* (Cth) be amended to take account of the 2014 research findings of Caple *et al.*
- 15 That the seating space allocated in auditoriums and assembly spaces in the *Disability (Access to Premises – Buildings) Standards 2010* (Cth) be amended to take account of the 2014 research findings of Caple *et al.*
- 16 That the *Disability (Access to Premises – Buildings) Standards 2010* (Cth) be clarified to ensure the provision referring to the installation of stairway platform lifts is understood to limit such installation to situations where it would cause unjustifiable hardship to do otherwise.
- 17 That the *Disability (Access to Premises – Buildings) Standards 2010* (Cth) be amended to remove the 40 m threshold concession for all pools open to the public, noting the continued availability of the unjustifiable hardship defence to permit provision of accessibility that falls short of full compliance where full compliance would cause unjustifiable hardship.
- 18 That further research is undertaken into the adequacy of the *Disability (Access to Premises – Buildings) Standards 2010* (Cth) in relation to the number of accessible car parking spaces and associated specifications, including the distance from the accessible parking spaces to the nearest accessible entrance to the building or facility it serves.
- 19 That further work be done to ensure all entities with responsibility for the provision of parking, including specialist parking station providers, shopping centre managers and local government, be reminded of the requirements in the *Disability (Access to Premises – Buildings) Standards 2010* (Cth) and asked to assess the local need based on relevant demographic data and issued disability parking permits.

- 20 That accessibility guidelines be developed for a whole-of-journey approach to public transport for people with disability, including the alignment of the *Disability (Access to Premises – Buildings) Standards 2010* (Cth) and the *Disability Standards for Accessible Public Transport 2002* (Cth) where they are jointly applicable or there is a necessary interface.
- 21 That urgent action be taken to identify what parts of the way-finding standard can reasonably be incorporated into the *Disability (Access to Premises – Buildings) Standards 2010* (Cth) and do so.
- 22 That the issue of emergency egress be considered as a matter of priority with a view to incorporating specific measures into the *Disability (Access to Premises – Buildings) Standards 2010* (Cth) for the prevention, early warning and evacuation of people with disability in emergency events.
- 23 That the *Disability (Access to Premises – Buildings) Standards 2010* (Cth) include, at a minimum, requirements for audible and visual alarms, smoke-isolated refuges on upper floors in multi-storey buildings, and protocols for the use of lifts during an emergency.
- 24 That the exemption in the *Disability (Access to Premises – Buildings) Standards 2010* (Cth) of small buildings from the requirement to install a lift or ramp to the upper storeys be removed with owners/developers having access to the defence of unjustifiable hardship.
- 25 That the way in which owner-upgrade triggers and lessee concessions interact in respect of the requirements in the *Disability (Access to Premises – Buildings) Standards 2010* (Cth) be given urgent consideration with a view to identifying the most effective way of ensuring that some progress towards accessibility is made for all buildings in a timely way.
- 26 That the additional trigger included in the 2004 draft of the standards requiring all common areas to be upgraded when 50% or more of the volume of the building is refurbished, be implemented in the *Disability (Access to Premises – Buildings) Standards 2010* (Cth).
- 27 That the process for determining unjustifiable hardship applications be reviewed with a view to ensuring a more effective, more timely and clearer process for considering problems with compliance with the deemed-to-satisfy provisions, identifying or considering alternative solutions and, where this is not achievable, considering the potential application of the defence.
- 28 That training and other resources be developed to promote awareness and understanding of the *Disability (Access to Premises – Buildings) Standards 2010* (Cth) across the building industry, including the functional purpose of particular access features; and consideration be given to requiring such training as a component of mandatory professional development for relevant professionals.
- 29 That training to promote awareness and understanding of the *Disability (Access to Premises – Buildings) Standards 2010* (Cth) is targeted at those who have responsibility for the ongoing maintenance of accessible features.
- 30 That the Australian Standards referenced in the *Disability (Access to Premises – Buildings) Standards 2010* (Cth) be made freely available in accessible formats.

- 31 That consideration be given to developing additional guidelines aimed at ensuring ongoing maintenance of accessibility features and compliance with the *Disability (Access to Premises – Buildings) Standards 2010* (Cth) once the installation and upgrade of buildings to include accessible features is complete.
- 32 That the Disability Discrimination Commissioner and each of the state and territory human rights and discrimination authorities be given the power to investigate non-compliance with the *Disability (Access to Premises – Buildings) Standards 2010* (Cth) and to bring a complaint where there is non-compliance with the *Disability (Access to Premises – Buildings) Standards 2010* (Cth) without requiring an individual complaint.
- 33 That consideration be given to requiring that the relevant state or territory human rights or discrimination authority be notified of any application in relation to unjustifiable hardship and that such authorities have an automatic right of standing in such proceedings.

3. General view of the Premises Standards

The objective of the *Disability (Access to Premises – Buildings) Standards 2010* (Cth) (the *Premises Standards*) is to provide improved accessibility to relevant buildings (and the facilities and services provided in those buildings) for people with disability and enhanced certainty to the building industry around accessibility requirements for new or upgraded buildings.

The *Premises Standards* form an essential mechanism for meeting Australia’s commitment under the United Nations *Convention on the Rights of Persons with Disabilities*.¹

The *Premises Standards* apply in a complex regulatory environment: legislated by the Federal Parliament, enforced through a system of certification at state or territory, and commonwealth level, and applying to situations that can be subject to discrimination complaint at commonwealth, and state and territory level.

It is important to acknowledge that the *Premises Standards* are the result of extended negotiation over many years at state and territory, and federal levels. As such, they balance the rights of people with disability to more equitable access with the interests of the building industry. The exceptions, exemptions and concessions built into the *Premises Standards*, especially in respect of existing buildings, provide tangible evidence of the compromises reached during their development.

As currently drafted, the *Premises Standards* provide a minimum benchmark against which improved accessibility to premises for people with disability can be measured. The *Premises Standards* provide a level of certainty around the accessibility features of new buildings and a measured approach to the upgrade of existing buildings.

The effort that went into the development of a workable approach to the *Premises Standards* must be kept in mind during the Review process. For that reason, it is of central importance that any proposed changes to the *Premises*

¹ *Convention on the Rights of Persons with Disabilities*, opened for signature 31 March 2007, Doc.A/61/611 (entered into force 3 May 2008, ratified by Australia 17 July 2008, entered into force for Australia 16 August 2008).

Standards, how they are implemented and the way in which they interact with discrimination law are given careful consideration.

Any attempt to change the *Premises Standards* in a way that impacts on the levels of discrimination experienced by people with disability risks lessening the capacity of compliance with the *Premises Standards* to be the proper basis for a legitimate defence against discrimination complaint.

Complaints alleging discrimination in building and facilities access are usually properly characterised as complaints alleging indirect discrimination because of the effective imposition of a requirement in relation to access to the building and its facilities. A key question in such complaints is whether or not the requirement or its imposition is ‘reasonable in all the circumstances’.

In the event of a discrimination complaint relating to the build environment, it is my practice to seek clarification from the respondent of its compliance with the *Premises Standards*. In relation to buildings to which the *Premises Standards* don’t apply (because of the date of their approval and construction), the *Premises Standards* provide a useful guide to what is currently considered appropriate to ensuring equitable access. In relation to buildings to which the *Premises Standards* apply, I would consider compliance with the relevant parts to be highly influential in respect of the question of reasonableness.

Any reduction in the level of accessibility required by the *Premises Standards*, or change to how they are implemented would require me to consider further the question of whether the *Premises Standards* provide an appropriate benchmark for compliance with the *Anti-Discrimination Act 1998* (Tas) (the Tasmanian Act).

Accordingly, I seek assurance that further consultation with discrimination authorities at the state and territory, and federal levels take place before any final recommendations are made to the Australian Government to amend the *Premises Standards*. This should include the establishment of a body constituted along similar lines to the Disability Access Reference Group that was responsible for the negotiation of issues during the final stages of the development of the Standards.

Recommendation 1 – That a working group of stakeholders from federal, territory and state levels, including representatives of discrimination authorities (through the Australian Council of Human Rights Authorities), building industry, state and territory building regulators, and people with disability be convened to consider any proposed changes to the *Disability (Access to Premises – Buildings) Standards 2010* (Cth) arising from the review process.

3.1 Interaction with related national policies

The need for improved accessibility to buildings is growing as Australia’s population ages and greater premium is placed on facilitating equitable access to services within the community. The roll-out of the National Disability Insurance Scheme (NDIS) will see these demands grow at a faster rate in coming years with the demand for full inclusion of people with disability in social, economic, sporting and cultural life.

In Tasmania, around 119,000 or 24.6% of people have some form of disability.² This is the highest proportion of people with disability of any state or territory in Australia.

The large number of people with disability in Tasmania is, in part, due to the age profile of the Tasmanian population. Tasmania also has the highest proportion of people aged 65 years and over with disability (55%), due to the number of people who have acquired impairments as they age.³ Those with profound or severe core activity limitation account for approximately 7% of the total population, again the highest proportion within the population of any state or territory.⁴

It is important, therefore, that matters raised in the review of the *Premises Standards* be considered in the context of the policy directions established by the *National Disability Strategy 2010–2020* and related initiatives such as the NDIS. These acknowledge that access to the built environment is critical in enabling increased participation in employment and other areas of community life for people with disability.

Recommendation 2 – That any proposals to change the *Disability (Access to Premises – Buildings) Standards 2010* (Cth) are consistent with the policy directions established by Australian Governments in the National Disability Strategy, the National Disability Insurance Scheme and related policies aimed at enabling people with disability to maximise their independence and have equal opportunities for participation in the community.

3.2 Interaction with discrimination law

Section 13(3) of the *Disability Discrimination Act 1992* (Cth) (DDA) expressly preserves the operation of state and territory laws able to operate concurrently. Tasmanian discrimination legislation does not specifically reference the *Premises Standards*.

The *Anti-Discrimination Act 1998* (Tas) (the Tasmanian Act) provides that it is unlawful to discriminate against a person on the basis of disability.⁵

There is no requirement under the Tasmanian Act for the disability on which the alleged discrimination is based to be permanent. Nor is the protection afforded under the Tasmanian Act limited to Tasmanians. Rather, it provides protection to any person who is discriminated against or subjected to other conduct that is prohibited under the Act (referred to as ‘prohibited conduct’) in Tasmania or where there is a sufficient connection between the action or conduct and the State of Tasmania.⁶ So, for example, a person with disability visiting Tasmania

² Australian Bureau of Statistics, *Disability, Ageing and Carers: Summary of Findings, 2012* (Cat. No. 4430.0 Table 4).

³ Ibid.

⁴ Ibid.

⁵ *Anti-Discrimination Act 1998* (Tas) s 16(k).

⁶ The *Anti-Discrimination Act 1998* (Tas) has been found not to apply to Agencies of the Commonwealth: *Commonwealth of Australia v Anti-Discrimination Tribunal (Tasmania) and Rodney John Nichols* [2008] FCAFC 104; *Daly Chris and Swanton Mick v Australian Broadcasting Authority*

from interstate or overseas has the same protection under the Tasmanian Act as a Tasmanian resident.

Discrimination is unlawful in specified areas of activity, including employment (paid and unpaid)⁷; education and training⁸; provision of facilities, goods and services⁹; accommodation (residential and business)¹⁰; membership and activity of clubs¹¹; administration of any law of the State or any State program¹²; and awards, enterprise agreements or industrial agreements.¹³

Discrimination prohibited under the Tasmanian Act includes both ‘direct’ and ‘indirect’ discrimination.¹⁴ The Tasmanian Act provides, in section 14, that:

- (2) Direct discrimination takes place if a person treats another person on the basis of any prescribed attribute ... less favourably than a person without that attribute ...
- (3) For direct discrimination to take place, it is not necessary –
 - (a) that the prescribed attribute be the sole or dominant ground for the unfavourable treatment; or
 - (b) that the person who discriminates regards the treatment as unfavourable; or
 - (c) that the person who discriminates has any particular motive in discriminating.

Indirect discrimination is defined in section 15 of the Tasmanian Act:

- (1) Indirect discrimination takes place if a person imposes a condition, requirement or practice which is unreasonable in the circumstances and has the effect of disadvantaging a member of a group of people who –
 - (a) share, or are believed to share, a prescribed attribute; or
 - (b) share, or are believed to share, any of the characteristics imputed to that attribute –

more than a person who is not a member of that group.
- (2) For indirect discrimination to take place, it is not necessary that the person who discriminates is aware that the condition, requirement or practice disadvantages the group of people.

[2005] TASADT 05. As such, any alleged discrimination or prohibited conduct by a Commonwealth Agency that takes place in Tasmania is not subject to the Act.

⁷ *Anti-Discrimination Act 1998* (Tas) ss 22(1)(a) and 3, definition of ‘employment’.

⁸ *Anti-Discrimination Act 1998* (Tas) s 22(1)(b).

⁹ *Anti-Discrimination Act 1998* (Tas) s 22(1)(c) and 3, definition of ‘services’.

¹⁰ *Anti-Discrimination Act 1998* (Tas) s 22(1)(d) and 3, definition of ‘accommodation’.

¹¹ *Anti-Discrimination Act 1998* (Tas) s 22(1)(e) and 3, definition of ‘clubs’.

¹² *Anti-Discrimination Act 1998* (Tas) s 22(1)(f) and 3, definition of ‘State program’. Express protection on the basis of disability in relation to the administration of any law of the State or any State program has only applied from 1 January 2014, as a result of amendments to the Act in 2013.

¹³ *Anti-Discrimination Act 1998* (Tas) s 22(1)(g) and 3, definitions of ‘award’, ‘enterprise agreement’ and ‘industrial agreement’. Express protection on the basis of disability in relation to awards, enterprise agreements or industrial agreements had only applied from 1 January 2014, as a result of amendments to the Act in 2013.

¹⁴ *Anti-Discrimination Act 1998* (Tas) s 14(1).

The prohibition against direct and indirect discrimination are broadly equivalent to those found in the DDA¹⁵, and in other state and territory discrimination laws.¹⁶ The prohibitions against discrimination in relation to access to buildings and facilities differs across jurisdictions, but is found in all relevant discrimination legislation as discrimination in the provision of goods, services and facilities¹⁷, discrimination in accommodation¹⁸, or discrimination in access to premises¹⁹.

Under the Tasmanian Act, an ‘exception’ applies where a respondent can demonstrate that the discrimination was ‘reasonably necessary’ to comply with ‘any law of this State or the Commonwealth’.²⁰ In respect of compliance with Commonwealth law, the DDA includes an ‘exemption’ in section 47 of the DDA for ‘anything done ... in direct compliance with a prescribed law’.²¹ However, no Tasmanian laws have been prescribed under this provision of the DDA. (It is relevant to note that an ‘exception’ under the Tasmanian Act is a defence to a complaint of discrimination, as is an ‘exemption’ under the DDA.)

An exception is provided in the Tasmania Act for discrimination that ‘is for the purpose of carrying out a scheme for the benefit of a group which is disadvantaged or has a special need because of a prescribed attribute’.²² An exception is also provided for discrimination through a ‘program, plan or arrangement designed to promote equal opportunity for a group of people who are disadvantaged or have a special need because of a prescribed attribute’.²³

Also relevant is the defence for situations where, to avoid discrimination, the person or organisation would have to make changes (‘adjustment’ or ‘accommodation’) to the situation and such changes would imposed unjustifiable

¹⁵ *Disability Discrimination Act 1992* (Cth) ss 5 and 6.

¹⁶ *Discrimination Act 1991* (ACT) s 8; *Anti-Discrimination Act 1977* (NSW) s 49B; *Anti-Discrimination Act 1992* (NT) s 20; *Anti-Discrimination Act 1991* (Qld) ss 9–11; *Equal Opportunity Act 1984* (SA) s 66; *Equal Opportunity Act 2010* (Vic) ss 7–9; *Equal Opportunity Act 1984* (WA) s 66A. It is important to note that the structure and approach in each of the discrimination laws differs and not all expressly refer to ‘direct’ and ‘indirect’ discrimination, but all contain both concepts within their provisions prohibiting discrimination.

¹⁷ See: *Anti-Discrimination Act 1977* (NSW) s 49M; *Anti-Discrimination Act 1992* (NT) s 28; *Anti-Discrimination Act 1991* (Qld) s 46; *Equal Opportunity Act 1984* (SA) s 76; *Anti-Discrimination Act 1998* (Tas) s 22(1)(c).

¹⁸ See: *Anti-Discrimination Act 1991* (Qld) s 83; *Anti-Discrimination Act 1998* (Tas) s 22(1)(c).

¹⁹ See: *Discrimination Act 1991* (ACT) s 19; *Equal Opportunity Act 2010* (Vic) s 57; *Equal Opportunity Act 1984* (WA) s 66J.

²⁰ *Anti-Discrimination Act 1998* (Tas) s 24. For similar defences in other discrimination laws in Australia, see *Discrimination Act 1991* (ACT) s 30; *Anti-Discrimination Act 1977* (NSW) s 54; *Anti-Discrimination Act 1992* (NT) s 57; *Anti-Discrimination Act 1991* (Qld) ss 106; *Equal Opportunity Act 2010* (Vic) ss 75; *Equal Opportunity Act 1984* (WA) s 69; *Disability Discrimination Act 1992* (Cth) s 47.

²¹ *Disability Discrimination Act 1992* (Cth) s 47.

²² *Anti-Discrimination Act 1998* (Tas) s 25.

²³ *Anti-Discrimination Act 1998* (Tas) s 26. For equivalent defences to those found in sections 25 and 26 of the Tasmanian Act in other discrimination laws in Australia (in some cases specific to disability), see *Discrimination Act* (ACT) s 27; *Anti-Discrimination Act 1977* (NSW) s 126A; *Anti-Discrimination Act 1992* (NT) s 53; *Anti-Discrimination Act 1991* (Qld) ss 104 and 105; *Equal Opportunity Act 1984* (SA) s 47; *Equal Opportunity Act 2010* (Vic) ss 12 and 88; *Equal Opportunity Act 1984* (WA) s 66R; *Disability Discrimination Act 1992* (Cth) s 45.

hardship. The Tasmania Act provides an exception in relation to access to public places ‘if the provision of access would cause unjustifiable hardship’.²⁴

3.3 Level of complaint about disability discrimination

Under the Tasmanian Act, a person can make a complaint on any matter relating to access to any building of any age or type (or ‘class’). Complaints are not made under the Tasmanian Act specifically alleging a breach of the *Premises Standards*, because such complaints must properly be made under the DDA. The case-management system used in my office does not allow complaints to be identified as complaints alleging breaches of the *Premises Standards*. As a result, it is not possible to give precise data on the number of complaints about situations to which the *Premises Standards* apply.

I can advise, however, that allegations of discrimination and prohibited conduct on the basis of disability continue to dominate the number of complaints received under the Tasmanian Act.²⁵ Of the 181 formal complaints made to me under the Tasmanian Act in 2013–14, 90 or 49.7% included allegations of discrimination on the basis of disability.²⁶ In the current year to date, 52% of complaints alleging discrimination have included allegations of discrimination on the basis of disability.

Table 1: Disability complaints made by area of activity 2013–14²⁷

Area of Activity	Number of complaints alleging disability discrimination
Provision of facilities, goods and services	53
Employment	31
Education and training	6
Accommodation	11
Membership and activities of clubs	4
Administration of State laws and programs	2
Industrial awards and enterprise agreements*	0

²⁴ *Anti-Discrimination Act 1998* (Tas) s 48(a). For equivalent defences in other discrimination laws in Australia (in some cases specific to disability), see *Discrimination Act* (ACT) s 52; *Anti-Discrimination Act 1977* (NSW) s 49M(2) in relation to provision of goods and service; *Anti-Discrimination Act 1992* (NT) s 58; *Anti-Discrimination Act 1991* (Qld) s 51 in relation to provision of goods and services; *Equal Opportunity Act 1984* (SA) s 84; *Equal Opportunity Act 2010* (Vic) s 58(1); *Equal Opportunity Act 1984* (WA) s 66K(2) in relation to the provision of goods, services and facilities; *Disability Discrimination Act 1992* (Cth) s 29A.

²⁵ Disability discrimination has been alleged in a significantly higher percentage of complaints made under the Tasmanian Act in all years since 2003–04. Records for the years prior to that seem to indicate the same pattern. From 2004 to 31 December 2013, the number of attributes on which basis discrimination was prohibited was 20. From 1 January 2014, the number of attributes has been 22.

²⁶ Anti-Discrimination Commissioner, Tasmania, *Annual Report 2013–14* (2014) 52.

²⁷ *Ibid.*, 59.

The provision of facilities, goods and services is the most often identified area of complaint involving those who identified disability as the basis of the alleged discrimination, followed by employment.

In considering complaints related to the accessibility of buildings, as noted above the Tasmanian Act does not provide specific protection against non-compliance with the *Premises Standards*, although (as noted above) the extent to which a respondent has met the requirements of the *Premises Standards* may be a factor in considering the question of ‘reasonableness’ as a factor in indirect discrimination.

There are several factors that impact on my capacity to consider complaints that involve the potential application of the *Premises Standards*. These include:

- the availability of the technical expertise needed to assess whether the *Premises Standards* properly apply; and
- the availability of the technical expertise needed to assess whether the requirements of the *Premises Standards* have been met either through compliance with the deemed-to-satisfy provisions or through an alternative solution; and
- the lack of public access to the Australian Standards upon which many of the deemed-to-satisfy provisions of the *Premises Standards* rely.

In my view, it remains incongruous that the Australian Standards referenced in the *Premises Standards* remain largely unavailable, particularly to people with disability who may be relying on the *Premises Standards* as the basis of a complaint or as a relevant measure of accessibility.

In the absence of access to the Australian Standards, I and my staff are heavily reliant on the Guidelines prepared by the Australian Human Rights Commission²⁸ to provide an understanding of the design requirements contained in the Standards. It is important, therefore, that any changes arising from the current review be reflected in these documents

Recommendation 3 – That the Australian Standards referenced in the *Disability (Access to Premises – Buildings) Standards 2010 (Cth)* be made freely available.

Recommendation 4 – That the *Guideline on the application of the Premises Standards* published by the Australian Human Rights Commission be fully updated to reflect any changes arising from this current review of the *Disability (Access to Premises – Buildings) Standards 2010 (Cth)*.

²⁸ Australian Human Rights Commission, *Guideline on the application of the Premises Standards* (version 2, 2013).

4. Issues

4.1 Accommodation buildings

Review question 1: Is the bedroom/dwelling threshold for specified Class 1b buildings appropriate?

The *Premises Standards* exclude a significant proportion of Class 1b buildings from the requirement to be accessible. Where the buildings are separate dwellings, access is only required if there are four or more dwellings used for short-term holiday accommodation on the same allotment; as is the case for existing buildings being converted to this type of accommodation where there are less than four bedrooms.

In Tasmania, as with other states and the territories, short-term accommodation of this type is becoming increasingly prevalent, particularly as holiday makers seek more unique or boutique experiences.

It is also relevant to note that the growth of AirBNB will potentially increase this sector of the short-term accommodation market. This raises an important matter for consideration by governments in respect of the application of building accessibility requirements to such accommodation. Without such facilities being required to comply, the proportion of the short-term accommodation market that is available to people with disability will decrease and that part of the market that is subject to regulation may become more expensive due to greater unregulated competition. Rather than removing the regulatory requirement, which would be very likely to exclude people with disability from this accommodation option, regulators need to consider the extent to which AirBNB properties should be required to comply with the same regulatory requirements and thereby ensure a fair market for all competitors and increased access for people with disability.

It remains unclear to what extent this is impacting on the ability of people with disability to enjoy the same holiday experiences as others in the community. It is important, therefore, that growth in this type of accommodation is monitored and that the *Premises Standards* are adjusted where it is demonstrated that the trigger for the application of the Standards may be leading to increased exclusion of people with disability from this form of accommodation.

Recommendation 5 – That research be undertaken to determine the extent to which people with disability are experiencing barriers to short-term holiday accommodation in Class 1b buildings and the identification of options to improve accessibility where a demonstrated need exists.

Recommendation 6 – That, if regulation is being considered in relation to currently unregulated short-term accommodation, such regulation should include compliance with accessibility requirements.

Review question 2: Has the bedroom/dwelling threshold had any effect on the construction of new specified Class 1b buildings and/or the conversion of existing buildings to specified Class 1b buildings since May 2011?

I am not aware of any situations where the threshold for new specified Class 1b buildings has affected the construction of new facilities or the conversion of existing buildings.

I note in this context the cost-effectiveness of including accessible design features in new buildings. I also note the availability of the defence of unjustifiable hardship where there may be difficulties converting existing buildings because of inherent design limitations due, for example, to geography, or heritage significance that would genuinely be affected by ensuring accessibility.

As outlined in later sections, very few matters have been the subject of an application in respect of the unjustifiable hardship defence in Tasmania.

Review question 3: Is the accessible room ratio for Class 3 buildings (for example, hotels and motels) appropriate?

The *Premises Standards* require Class 3 buildings to make a specified number of accommodation rooms accessible. Whilst it is unclear to what extent action has been taken to comply with this requirement, complaints received by me suggest that hotel/motel owner/operators continue to view the provision of accessible facilities as an add-on to mainstream services.

It remains unclear to me why the provision of accessible rooms in hotels and/or motels with the same or equivalent amenity should not represent an integral part of good business practice.

As indicated in the *Access All Areas* report²⁹, there is no fundamental reason why accessible facilities should not also be suitable for a broader range of clientele, if carefully designed.

²⁹ House of Representatives Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Access All Areas: Report of the Inquiry into Draft Disability (Access to Premises – Buildings) Standards* (2009) [5.71–5.81].

Case Study

Ms S is a person with disability who requires accessible accommodation.

She alleged that during a visit to Tasmania she experienced less favourable treatment in the provision of accommodation at three separate hotel/motel facilities. She alleged the views available from the accessible rooms on each occasion were less pleasant than those provided to other guests. In the first hotel, she was provided with a room that overlooked residential housing rather than the water views overlooked by other guests. In the second, she had a view of a brick wall. In the third, she had a view of a hedge when other rooms faced the water.

Ms S also alleged the access to the room from the accessible parking spaces was poor and she did not have the same access to fire exits as people without mobility impairment.

Ms S also alleged she and her female carer were offered rooms with a double or king-sized bed rather than separate beds as requested, and when this was raised as a problem they were provided with a folding bed. Despite this, there was no reduction in the tariff charged and Ms S indicated she paid the same price for their accommodation as other customers.

Recommendation 7 – That the hotel/motel industry be encouraged to work with the disability sector to improve the way in which requirements under the *Disability (Access to Premises – Buildings) Standards 2010* (Cth) are met, including the way in which rooms are designed and marketed.

Recommendation 8 – That there be no reduction made to the accessible room ratio for Class 3 buildings (for example, hotels and motels) in the *Disability (Access to Premises – Buildings) Standards 2010* (Cth).

Review question 4: Are there other issues with accommodations buildings you think should be addressed?

The provision of accessible and well-designed housing remains a critical need for people with disability. Evidence suggests that people with disability continue to face considerable barriers, particularly in relation to accessing suitable rental accommodation, particularly in the private rental market.³⁰

In the absence of mandatory design features that improve the adaptability and accessibility of Class 1a residential properties, responsibility for developing

³⁰ See, for example, the Victorian Equal Opportunity Commission's 2012 Report, *Locked Out: Discrimination in Victoria's private rental market* (State of Victoria, 2012). The issue of access to housing accommodation was also raised by a large number of submissions to the 2009 National Disability Strategy consultations see National People with Disabilities and Carer Council, *Shut Out: the experience of people with disabilities and their families in Australia* (Commonwealth of Australia, 2009) 28; and the *National Disability Strategy 2010-2020* (Council of Australian Governments, 2011) 32.

universally accessible homes has fallen largely to governments through social housing programs.

The lack of access to suitable housing through the private rental market has been the subject of several complaints made under the Tasmanian Act. I have also received complaints about difficulties in getting changes made to public housing to allow a current tenant with disability to maintain their tenancy in the property they have been in for some time. In all of the latter complaints, the tenants have noted the need to remain in their current accommodation as they have developed strong networks of friends and identified and used local services that have become aware of their particular circumstances and needs. As well, the tenants indicate they have, over time, identified the most accessible routes of travel for them to key services in their local community.

The issue of accessible housing is one I consider requires further consideration in the context of the *Premises Standards*, commencing with the identification of strategies to improve adherence to universal design principles in the construction of new residential dwellings and dwellings made available for rent or lease.

Recommendation 9 – That research be undertaken to determine the extent to which people with disability are continuing to experience barriers to the provision of residential accommodation in Class 1a buildings and the identification of options to improve the accessibility of new dwellings and dwellings made available for rent or lease. On completion of this research, amendments be made to the *Disability (Access to Premises – Buildings) Standards 2010* (Cth) to reflect appropriate mechanisms to respond to the need for accessible residential accommodation.

4.2 Accessible sanitary facilities

Review question 1: Have any issues arisen with multiple tenancies on one floor restricting access to accessible sanitary facilities?

Review question 2: Have any issues arisen with the distance between accessible sanitary facilities?

Review question 3: Have there been any issues satisfying the requirements for accessible sanitary facilities?

Review question 4: Are there any other issues with accessible sanitary facilities you think should be addressed?

The provision of accessible sanitary facilities raises issues beyond those related to the *Premises Standards*.

The provision of sanitary facilities is one that is raised in a number of contexts. For example, access to sanitary facilities has been an issue raised in the context of the need to accommodate people who are intersex or gender diverse.

Taken together, I believe these matters require a rethink of the way in which the provision of accessible sanitary facilities should be addressed. It is not uncommon, for example, for smaller facilities to be required to make available a

number of toilets to meet both the needs of accessibility and to accommodate males and females.

Solutions involving the provision of individual gender-neutral and accessible facilities have the capacity to deal appropriately with a range of issues, not just disability access. It is important that the *Premises Standards* be considered in the development and implementation of these approaches.

To give effect to more streamlined provisions regarding sanitary facilities, however, it is necessary to reduce misunderstanding surrounding concepts such as a ‘bank’ of toilets.

The *Premises Standards* include a number of provisions that require case-by-case assessment of their application. This includes an assessment of what constitutes a ‘bank’ of toilets. It is clear from feedback I have received that there remains considerably difficulty in interpreting this concept and further guidance may be required.

Recommendation 10 – That broader consideration be given in relation to the provision of toilet facilities in public buildings to address the needs of the whole community through the provision of combined accessible and gender neutral sanitary facilities.

4.3 80th and 90th Percentile wheelchair dimensions

Review question 1: Do you have any comments you would like to make regarding dimensions of building features in the Premises Standards?

The dimensions of passageways and other building features are central to providing accessibility for people reliant on a wheelchair as well as for those who use other mobility aids. It is important that those dimensions take into account the requirements of independent access for those with mobility impairment and their changing needs.

In 2012, 632,200 people with disability required the use of some form of mobility aid.³¹ Of these, 163,700 used either a manual or electric wheelchair, and a further 42,000 used a motorised scooter. This represents an increase on the numbers who reported requiring the use of some form of mobility aid in 2009 (555,300), of whom 145,000 used either a manual or electric wheelchair; and a further 32,900 used a motorised scooter.³²

It is also evident that the proportion of people with disability using a powered wheelchair is increasing. In 2009, 13.2% of wheelchairs used were electric. This increased to 14.6% in 2012. Similarly, as indicated above, the proportion of people with disability using a motorised scooter continues to grow.

³¹ Australian Bureau of Statistics, *Disability, ageing and carers, Australia 2012* (4430.0 Table 13.1).

³² *ibid*

It is important that the specifications contained within the *Premises Standards* reflect the changing needs of people with disability and accommodate the range of mobility aids being used where possible.

Mobility scooters provide important advantages to people with mobility problems, largely because they eliminate or minimise the effect of physical strength difficulties posed by an un-powered wheelchair.

They provide enhanced independence for a growing number of people who wish to remain actively connected to their communities as their mobility diminishes. Their drawbacks are, however, their greater length and turning radius, which can limit their manoeuvrability and the ability of users to use lifts and other parts of buildings.

Research presented to a 2013 Australasian Transport Research Forum suggests that the main trip destinations identified by those using motorised mobility scooters were to doctor's offices, local shops, libraries and the homes of friends. Given this and the potential impact of the NDIS on participation of people with disability in a range of activity, it is arguably highly likely that motorised scooters will become increasingly prevalent in the built environment.³³

Concern has been expressed, however, that without a legislated design standard covering these devices, models available are becoming larger and heavier, thereby limiting their use.³⁴ Whilst this is not a matter that directly relates to the *Premises Standards*, it is important that design standards for mobility devices take into account the specifications contained within the *Premises Standards* (and other Disability Standards made under the DDA) and that the *Premises Standards* reflect the changing needs of people with disability.

In this context, it is disappointing that the research report prepared by David Caple and Associates specifically excluded data collection on the use of motorised scooters in the built environment, as information regarding the ability to use motorised scooters in the built environment could have usefully informed any changes to the wheelchair dimensions contained in the *Premises Standards*.

In any event, I note their research in respect of manual and powered wheelchairs found there is a need to re-assess the dimensions required for the 180° turning circles and landing length; the dimensions of lifts; the design of hand basins and shower recesses; and the seating spaces in auditoriums of assembly spaces to accommodate manual and electric wheelchair users.³⁵

³³ Marilyn Johnson, Geoffrey Rose & Jennie Oxley, 'Motorised mobility scooters – understanding a growing transport mode for older Australians' (Paper presented to the Australasian Transport Research Forum, Brisbane, 2–4 October 2013) 6, available at <http://www.atrf.info/papers/2013/2013_johnson_rose_oxley.pdf>.

³⁴ Ibid, 7.

³⁵ David Caple, Nick Morris, Jodi Oakman, Mike Atherton & Sharon Herbstreit, *Research on spatial dimensions for occupied manual and powered wheelchair project: Final report* (David Caple and Associates, December 2014) 2.

I also note the *Disability Standards for Accessible Public Transport 2002* (Cth) (the *Transport Standards*) require passageway widths of 1200 mm. Use of this dimension in the *Premises Standards* would improve the amenity of accessways for many users.

In assessing these matters, it is important any changes to the *Premises Standards* also be informed by the emerging needs of people with disability using other mobility devices such as motorised scooters.

Recommendation 11 – That the width of passageways in the *Disability (Access to Premises – Buildings) Standards 2010* (Cth) be increased to 1200 mm.

Recommendation 12 – That further research be undertaken on the use of mobility aids, including mobility scooters and the relevant anthropometrics be identified, with a view to ensuring that the *Disability (Access to Premises – Buildings) Standards 2010* (Cth) are aligned with current practices.

Recommendation 13 – That the dimensions required for 180° turning circles and landing length in the *Disability (Access to Premises – Buildings) Standards 2010* (Cth) be increased.

Recommendation 14 – That the design of shower basins and shower recesses in the *Disability (Access to Premises – Buildings) Standards 2010* (Cth) be amended to take account of the 2014 research findings of Caple *et al.*

Recommendation 15 – That the seating space allocated in auditoriums and assembly spaces in the *Disability (Access to Premises – Buildings) Standards 2010* (Cth) be amended to take account of the 2014 research findings of Caple *et al.*

4.4 Passenger lifts

Review question 1: Have you had issues using lifts which are locked off and/or controlled by a constant pressure device?

Review question 2: Is there an alternative option to locking off some types of lifts?

Review question 3: Have there been any issues satisfying the restriction on the installation of stairway platform lifts?

Review question 4: Are there any other issues with passenger lifts you think should be addressed?

Extensive discussion occurred during the development of the *Premises Standards* on the appropriateness of stairway platform lifts. Many considered these types of lifts should not be allowed as they do not provide a safe or dignified way of accessing different levels of buildings.

The House of Representatives Standing Committee on Legal and Constitutional Affairs recommended that further research be undertaken in this area. I understand this has yet to be undertaken.

It remains my view that the installation of stairway platform lifts should only be permitted in circumstances where it would cause unjustifiable hardship to do otherwise.

Recommendation 16 - That the *Disability (Access to Premises – Buildings) Standards 2010* (Cth) be clarified to ensure the provision referring to the installation of stairway platform lifts is understood to limit such installation to situations where it would cause unjustifiable hardship to do otherwise.

4.5 Swimming pools

Review question 1: Is the 40-metre perimeter threshold appropriate?

Review question 2: Have there been any issues satisfying the requirements for swimming pools?

Review question 3: Are there any other issues with the swimming pool provisions you think should be addressed?

The *Access All Areas* report recommended that the exemption for swimming pools under 40 metres and the exclusion of swimming pools for exclusive use of occupants of a class 1b building or a sole-occupancy unit in a Class 3 building be reviewed as part of the 2015 review of the *Premises Standard*.³⁶

Case Study

Tasmania's newest public swimming pool facility has an indoor 50 m competition pool and an outdoor 25 m lap pool together with a number of leisure pools. The facility was completed before the commencement of the *Premises Standards*.

Ms L is a 66-year-old woman who lives near the pool. She has arthritis in her joints and seeks to swim laps throughout the year to maintain her physical strength and mobility. The outdoor lap pool is closed during the winter months and the leisure pools are not suitable for lap swimming.

The 50 m competition pool has vertical, recessed wall ladders that do not reach down deep enough in the water for Ms L to use because of arthritis in her major joints.

When Ms L approached the facility managers, a hoist was suggested. Ms L said she would find this too embarrassing to use.

Ms L suggested drop-in steps be made available when required. The facility managers are concerned to ensure that any solution not encroach on the lane width available for swimming.

³⁶ House of Representatives Standing Committee on Legal and Constitutional Affairs, above n 29, [5.91] and [7.77].

As our case study illustrates, there remains issues surrounding the access to swimming facilities for people with mobility impairment. While the solution proposed by the facility managers would be compliant with the *Premises Standards*, and may be appropriate for use by a person reliant on a wheelchair, it would not achieve dignified access for all people with physical limitations. Discussions are ongoing in relation to Ms L's situation. The case study highlights issues with the *Premises Standards*.

Issues relating to design and cost are sometimes significant in situations where the provision of solutions to improve accessibility is added to an existing facility.

It is my view, therefore, that an emphasis on incorporating accessible design features at the outset is a more cost-effective approach in the long run and should be applied to the greatest extent possible.

It is clear from information available to me that providing access to smaller facilities (such as the inclusion of zero-depth or ramp entry) is not a barrier to making smaller pools accessible. For this reason, I consider that the 40-metre threshold should be removed from the *Premises Standards* for all pools available to members of the public, noting the availability of unjustifiable hardship as a defence to full compliance. This would mean that some measures would generally need to be implemented to at least improve access to those facilities rather than them being totally exempted from the operation of the *Premises Standards*.

Recommendation 17 – That the *Disability (Access to Premises – Buildings) Standards 2010* (Cth) be amended to remove the 40 m threshold concession for all pools open to the public, noting the continued availability of the unjustifiable hardship defence to permit provision of accessibility that falls short of full compliance where full compliance would cause unjustifiable hardship.

4.6 Accessible car parking

Review question 1: Has the availability of accessible car parking for people with disability changed with the introduction of the *Premises Standards* in May 2011?

Review question 2: Have there been any issues satisfying the requirements for accessible car parking?

Review question 3: Are there any other issues with accessible car parking provisions you think should be addressed?

The adequacy and implementation of accessible car parking spaces continues to be a significant source of complaint under the Tasmanian Act. Complaints about the lack of accessible parking, including the failure to implement parking that is compliant with the specifications, have been received in relation to a wide variety of sites, including shopping centres, tourist attractions and other facilities.

In 2013–14, 29,934 disability parking permits were on issue in Tasmania. This is equivalent to 5.3% of all vehicles registered in Tasmania (including motorcycles,

trailers, trucks and other commercial vehicles) rising to 9.9% of all registered cars and station wagons and 11.2% of all car licensed drivers.³⁷

These figures indicate that requiring a maximum of 2% of car parking spaces to be accessible falls well short of demand and should be revised. Particular concerns have been identified in relation to high-use areas such as hospitals and other medical facilities, supermarkets and shopping centres where the availability of accessible parking would appear to be particularly difficult for many.

Case Study

Mr E made a complaint alleging discrimination on the basis of disability in the provision of facilities, goods and services.

Mr E complained about the location of the parking facility ticket machine at his local shopping centre. The ticket machine was located in the space required to be kept clear adjacent to the accessible parking bay. Its location prevented Mr E from opening the door of his car and assembling his wheelchair.

Through conciliation, agreement was reached that the disability car parking bay be widened to enable better access.

In addition to Mr E's complaint, I have received complaints about the maintenance of accessible parking spaces, with complainants citing the placing of bollards or other obstructions adjacent or within the accessible parking area which similarly restrict the use of the area.

I have also received complaints about accessible parking facilities being removed or used for other purposes and the excessive distances some accessible parking spaces are from the main building or facility they serve.

In visiting one town centre where the lack of accessible parking had been identified in a complaint, I observed that the spaces provided were not compliant with the standards in terms of size, circulation space, or signage, and were located significant distances away from the main shopping facilities, despite there being ordinary parking available much closer.

All of these factors significantly inconvenience those who rely on accessible parking facilities and act to curtail the involvement of people with disability in the community.

³⁷ Department of Infrastructure, Energy and Resources, *Annual Report 2013-2014* (Tasmanian Government, October 2014) 27 & 34

Recommendation 18 – That further research is undertaken into the adequacy of the *Disability (Access to Premises – Buildings) Standards 2010* (Cth) in relation to the number of accessible car parking spaces and associated specifications, including the distance from the accessible parking spaces to the nearest accessible entrance to the building or facility it serves.

Recommendation 19 – That further work be done to ensure all entities with responsibility for the provision of parking, including specialist parking station providers, shopping centre managers and local government, be reminded of the requirements in the *Disability (Access to Premises – Buildings) Standards 2010* (Cth) and asked to assess the local need based on relevant demographic data and issued disability parking permits.

4.7 Public transport buildings

Review question 1: Have there been any unintended consequences or inconsistencies in applying both the Premises Standards and the Transport Standards to public transport buildings?

Review question 2: Are there other issues with public transport buildings you think should be addressed?

People with disability are often heavily reliant on public transport as a means of moving in and around their community. Both the *Premises Standards* and *Disability Standards for Accessible Public Transport 2002* (Cth) (the *Transport Standards*) make provision for improving the accessibility of public transport buildings. Whilst the accessibility of public transport facilities is an issue of particular concerns in those jurisdictions with passenger train networks, many stakeholders have raised concerns about the failure to look at the accessibility of public transport from a whole of community perspective. For example, whilst the *Transport Standards* require that bus stop infrastructure be compliant with accessibility standards and the *Premises Standards* require that a building meets accessibility standards, it is often the case that the path of travel between the two is inaccessible. I have received reports, for example, that the placement of poles or other infrastructure on the path of travel to the bus stop may create barriers for people with mobility or vision impairment. Similar reports are made about access to other public transport facilities such as airports.

Whilst these are not matters that are solely the responsibility of operators of public transport services or building owners or developers, they are critical to ensuring people with disability are able to move around within the community and that the benefit of investment in ensuring the built environment is accessible is fully realised.

A recommendation arising from the 2014 draft report of the *Transport Standards* review was that the Australian Government jointly with state, territory and local governments develop accessibility guidelines for a whole-of-journey approach to public transport planning by 31 December 2015.³⁸ Whilst a final report has yet to be released, I am strongly supportive of this approach.

³⁸ Department of Infrastructure and Regional Development, *Review of the Disability Standards for Public Transport 2002: Draft report* (Australian Government, May 2014) 12.

To give effect to this approach also requires alignment between building and infrastructure standards and approval mechanisms, including those related to public transport buildings.

Recommendation 20 – That accessibility guidelines be developed for a whole-of-journey approach to public transport for people with disability, including the alignment of the *Disability (Access to Premises – Buildings) Standards 2010* (Cth) and the *Disability Standards for Accessible Public Transport 2002* (Cth) where they are jointly applicable or there is a necessary interface.

4.8 Way-finding

Review question 1: Do the way-finding provisions in the Premises Standards provide adequate accessibility to buildings and building services for people with disability?

Review question 2: Have there been any issues satisfying the way-finding requirements in the Premises Standards?

Review question 3: Are there other issues with way-finding you think should be addressed?

To be effective, the design and fit-out of buildings must facilitate entry and exit from buildings as well as assist people with disability navigate within them. Signage and other way-finding indicators are critical in this regard.

It is evident in advice provided to me that this is an issue that needs to be addressed in a more comprehensive and coherent manner in the *Premises Standards*. The case study provided below, for example, indicates that unless guidance is provided on good design principles, it is easy to increase barriers to accessibility.

Case Study

Mr T lodged a complaint about a recently constructed access pathway into a major Tasmanian hospital. The way in which the pathway had been designed and implemented created hazards for his daughter who has vision and mobility disabilities.

In particular, the up-lights installed in the walkway surface shone into the pedestrians' eyes and, in Ms T's case dazzled her, affecting her capacity to discern the path/ground.

Mr T also complained about a part of the access at the start of the walkway that was a space shared by pedestrians and vehicles. Mr T complained this is unsafe for people with vision impairments if there are vehicles also using the space.

At conciliation, the parties agreed on a number of actions to be undertaken by the respondent. These included: removal of the up-lights from the walkway and replacement of them with LED lights above the walkway; installation of tactile ground surface indicators (TGSIs) and improved

signage; installation of a wheelchair rail over the stanchions on the access walkway; removal of the TGSIs installed on the public footpath adjacent to the access walkway; and development of a plan for appropriate placement of TGSIs after consultation with Vision Australia.

Way-finding specifications are included in the relevant standards adopted in many other jurisdictions.

In Singapore, for example, way-finding recommendations include the use of ceiling lights to orient people along walkways and the use of contrasting colour luminance at baseboards, walls and doors to assist in delineating access routes.³⁹

Similarly, it is a requirement of Canadian and Singaporean standards that floor and ground surfaces shall produce minimal glare⁴⁰, and the edge of drop-offs must be marked by a noticeable change in texture in Canada, Sweden and Singapore.⁴¹

Detectable direction indicators and tactile ground surface indicators are also mandatory in some countries to assist people with vision impairment.⁴²

It is my understanding that work is progressing in Australia to develop a draft way-finding standard. I strongly recommend incorporation of this standard in the *Premises Standards* as a matter of urgency.

Recommendation 21 – That urgent action be taken to identify what parts of the way-finding standard can reasonably be incorporated into the *Disability (Access to Premises – Buildings) Standards 2010* (Cth) and do so.

4.9 Emergency Egress

Review question 1: Do you have any comments to make regarding emergency egress?

The adoption of emergency egress measures is critical to ensuring people with disability are able to exit a building in an emergency in a safe, dignified and, wherever possible, independent manner. In this regard, the *Access All Areas* report recommended the development of deemed-to-satisfy provisions and amendment of the Building Code as soon as possible.⁴³

Whilst there have been some minor amendments to the deemed-to-satisfy provisions in the *National Construction Code* and the Australian Building Codes Board (ABCB) has issued a non-mandatory handbook on the use of lifts in evacuation, little progress has been made in developing new measures to meet the deemed-to-satisfy provisions of the *Premises Standards*.

³⁹ Canadian Human Rights Commission, *International Best Practices in Universal Design: A Global Review* (Revised edition, August 2007) 15

⁴⁰ Ibid 16

⁴¹ Ibid 15

⁴² Ibid 53–54

⁴³ House of Representatives Standing Committee on Legal and Constitutional Affairs, above n 29, [6.3–6.30] and [7.77].

Of particular concern is the ABCB's decision not to support new measures to meet the deemed-to-satisfy provisions of the *Premises Standard* in relation to emergency egress because they were either already industry practice or difficult to justify on a cost-benefit basis.

In my view there is little in the Regulatory Impact Statement (RIS) to substantiate this assertion. It is noted in this context that the ABCB acknowledges the lack of deemed-to-satisfy provisions in the NCC appears to be resulting in less-than-optimum outcomes and in some cases avoidance of responsibility. It is also noted the ABCB's own findings were that the overall percentage increase in building cost from implementing all measures was small.⁴⁴ Most importantly, the RIS identifies it is impossible to put a price on the cost of life and avoidance of dignity harm arising from the measures.

There are several factors of concern about the RIS statement:

- the decision to limit regulatory analysis to new buildings;
- the failure to take into account the public nature of many buildings and make assessments based on the intended use of the building;
- the failure to take into account the option of mandating the use of lifts for emergency evacuations;
- the assessment of options against levels of fatality rather than the provision of safe, dignified and independent egress;
- the way in which the options are cast, with little exploration of alternatives and the main options considered being to adopt the full suite of proposals; retain the status quo, or develop non-regulatory approaches; and
- the failure to examine alternative or additional options suggested by stakeholders, some of which may have significantly reduced the costs associated with the options examined.

Reliance on the development of Personal Emergency Evacuation Plans (PEEPs) ignores the need to ensure design and construction of buildings facilitate evacuation options, and depends on timely development of individual plans for specific occupants. Not only is it reliant on specific individuals making themselves known to building managers—a requirement that does not apply to people without disability—it fails to address situations where buildings are publicly accessible and could at any time be visited by a person with mobility or other impairment going about their daily business.

As outlined in the RIS, the primary limitations in terms of emergency evacuation for people with disability is the inability to independently manoeuvre stairs and the difficulty for people who are vision or hearing impaired in recognising safe paths of egress and traditional emergency warning cues.

⁴⁴ Australian Building Codes Board, *Emergency Egress for Occupants with Disability: Regulation Impact Statement* (2015) [36] at <<http://www.abcb.gov.au/work-program/Emergency%20Egress%20for%20All%20Occupants.aspx>>.

In the absence of accessible evacuation pathways and warning systems, evacuation of people with disability is left to administrative evacuation management procedures. Whilst it is appreciated that evacuation management procedures should also be required to take into account the needs of people with disability, in my view it is not an option to place the onus on building occupiers or managers to develop effective solutions.

For this reason, I believe the ABCB needs to re-examine this issue as a matter of priority.

Recommendation 22 – That the issue of emergency egress be considered as a matter of priority with a view to incorporating specific measures into the *Disability (Access to Premises – Buildings) Standards 2010* (Cth) for the prevention, early warning and evacuation of people with disability in emergency events.

Recommendation 23 – That the *Disability (Access to Premises – Buildings) Standards 2010* (Cth) include, at a minimum, requirements for audible and visual alarms, smoke-isolated refuges on upper floors in multi-storey buildings, and protocols for the use of lifts during an emergency.

4.10 Small building exemption

Review question 1: Is the small building exemption still appropriate?

Review question 2: Are there other issues with the small building exemption you think should be addressed?

Access All Areas called for further research in the first 5 years of the implementation of the *Premises Standards* on how many buildings and what type are exempted from requirements to install a lift or ramp to the upper storeys of Class 5, 6, 7b or 8 buildings with no more than three storeys, where the floor area of each upper storey does not exceed 200 m² (known as the small building exemption).⁴⁵

During the development phase of the *Premises Standards*, differing views were offered on the costs and/or impacts of making existing small buildings fully accessible. The intention was to gather further data for this to be reviewed in 2015. Unfortunately, however, we have no real data against which to judge whether the exemption remains valid.

The exemption excludes all people who are unable to climb stairs from all but the entrance storey of a significant proportion of commercial buildings. It also militates against the development of innovative solutions, particularly in retail areas and for heritage-listed buildings.

My preference is that the exemption be removed allowing reliance on the unjustified hardship provisions. This would enable the implications of upgrading access to upper storeys in small buildings to be considered on a case-by-case

⁴⁵ House of Representatives Standing Committee on Legal and Constitutional Affairs, above n 29, [4.4–4.20] and [7.77].

basis and would ensure modifications would be made to improve access short of unjustifiable hardship. This was the position submitted by the previous Anti-Discrimination Commissioner in relation to the draft *Premises Standards* and is my preferred approach. I note that in order for this to be a viable approach, the mechanisms for dealing with the question of unjustifiable hardship need to be improved so they are accessible, affordable and timely.

A further option to consider may be to set the exemption at a level which takes into account the extent and cost of any upgrade, for example where the cost of installing a lift or ramp to upper storeys would exceed a specified percentage of project costs.

Recommendation 24 – That the exemption in the *Disability (Access to Premises – Buildings) Standards 2010* (Cth) of small buildings from the requirement to install a lift or ramp to the upper storeys be removed with owners/developers having access to the defence of unjustifiable hardship.

4.11 Lessee Concession

Review question 1: Is the lessee concession being used appropriately?

Review question 2: Are there other issues with the lessee concession you think should be addressed?

The lessee concession remains a particularly contentious area of the *Premises Standards*. Concerns were expressed during the development of the *Premises Standards* that the lessee concession could be used by building owners to avoid their obligations to upgrade the affected part of the building.

At the time the *Premises Standards* were being developed, the ABCB advised it was not possible to substantiate the proportion of development applications submitted by owners and lessees. An assumption was made that the proportions were broadly similar and the RIS was prepared on the basis that 50% of upgrades would be made by lessees and would, therefore, avoid obligation under the *Premises Standards* to upgrade lifts, toilets and paths of travel to and from their tenancy.

Several other assumptions were made during the development of the RIS. In particular, it was assumed the public areas of commercial buildings would be upgraded over a 15-year cycle, with upgrades to commence halfway through this cycle (from Year 8). This was identified as a major strategy for minimising the immediate costs associated with full implementation of the *Premises Standards* for existing buildings.

These assumptions remain to be tested. In my experience, sufficient evidence exists to suggest some building owners are avoiding, through leasing arrangements, triggering the affected part requirements of the *Premises Standards*.

Of particular concern in this context is the impact this is having on making Class 5 buildings accessible, as this class of building is one in which a large proportion of people with disability may be expected to work or otherwise access daily services.

The House of Representatives Standing Committee on Legal and Constitutional Affairs required that the 5-year review consider the proportion of existing building stock that has been upgraded, with an obligation to reconsider the ‘owner upgrade trigger’ if it is shown it has not resulted in a significant proportion of buildings being upgraded.⁴⁶

It is my view that the way in which owner-upgrade triggers and lessee concessions interact in respect of the requirements applying to the upgrade of existing buildings requires urgent consideration to ensure building features are upgraded in a timely way.

The trigger for requiring new works to an existing building to be compliant with the *Premises Standards* is the issuing of a building permit. During the discussion leading up to the adoption of the *Premises Standards* in 2010, several organisations proposed that an additional trigger be included in the *Premises Standards* to ensure greater certainty about the upgrading of existing buildings. This proposal arose from concerns that the application of the *Premises Standards* to only ‘owner-upgraded’ areas of buildings and the accessible path of travel to that area would not result in the full application of the *Premises Standards* to the whole of a building in all circumstances.

The absence of definitive advice on the extent of existing building upgrades makes it difficult to gauge progress. It is evident, however, that some building works that would otherwise have been caught by the affected part provisions of the *Premises Standards* have not been required to be made accessible because of inappropriate use of the lessee concession

Unfortunately, there does not appear to be any data to quantify the proportion of existing buildings have been fully upgraded, nor what proportion is owner-occupied or leased. It is evident from the complaints I have received, however, that access to existing buildings remains an issue for many people with disability.

Options suggested at the time of review included an additional trigger when 50% or more of the volume of the building was refurbished. This was a provision included in the 2004 draft of the *Premises Standards* that was not carried over to the final document.

Whilst it is acknowledged the application of the *Premises Standards* to existing buildings remains a significant policy challenge, the intent of the lessee concession (and other concessions) was to ameliorate the immediate costs

⁴⁶ House of Representatives Standing Committee on Legal and Constitutional Affairs, above n 29, [4.73–4.77] and [7.77].

associated with upgrading and not displace the requirements of the *Premises Standards* entirely.

In the absence of progress in this area, it is my view consideration must be given to reinstating the provisions contained in the 2004 draft of the standards. This would have the effect of making clear to building owners at what point upgrades are required and dispense with the complexities of the current concession arrangements.

Where the provision of access is cost-prohibitive, building owners should rely on the unjustifiable hardship provisions contained within the *Premises Standards*.

Recommendation 25 – That the way in which owner-upgrade triggers and lessee concessions interact in respect of the requirements in the *Disability (Access to Premises – Buildings) Standards 2010* (Cth) be given urgent consideration with a view to identifying the most effective way of ensuring that some progress towards accessibility is made for all buildings in a timely way.

Recommendation 26 – That the additional trigger included in the 2004 draft of the standards requiring all common areas to be upgraded when 50% or more of the volume of the building is refurbished, be implemented in the *Disability (Access to Premises – Buildings) Standards 2010* (Cth).

4.12 Unjustifiable Hardship

Review question 1: Is the unjustifiable hardship exception operating appropriately?

Review question 2: Are the arrangements for identifying and responding to questions of unjustifiable hardship adequate?

Review question 3: Is the guidance available for people considering cases of unjustifiable hardship consistent and transparent?

Review question 4: Do you have other comments you would like to make on unjustifiable hardship?

The provisions contained in Part 4.1 of the *Premises Standards* relating to unjustifiable hardship do not appear to be utilised to the extent that was originally envisaged. This relates, in part, to the lack of guidance around the processes for the assessment of unjustifiable hardship in the *Premises Standards* and, in Tasmania's case, the complexity of the mechanism available to building owners or lessees wishing to seek a determination.

In Tasmania, section 218A of the *Building Act 2000* (Tas) provides for unjustifiable hardship applications to be made to the State's Resource Management and Planning Appeal Tribunal (RMPAT). RMPAT assumed this role in November 2012 when it took over the functions of the former Building Appeals Board and is constituted as an Access Panel for this purpose. Applications are required to be submitted at an early stage of the development, usually during the preliminary design stage.

In 2013–14, only one application was received by RMPAT relating to section 218A of the *Building Act* and it did not proceed to a determination.⁴⁷

Whilst I support the view that a high bar must be set for unjustifiable hardship claims, a more effective, more timely and clearer process is needed to determine when the defence should properly apply. Without this, the process can become the reason that determinations are not sought and, potentially, building work does not proceed.

Procedures are required that enable an independent expert body or panel to determine whether an access provision does or does not apply or applies with modifications or variations, whether or not a substantive question of unjustifiable hardship exists and whether or not a proposed alternative solution would meet the performance requirements of the *National Construction Code*. This body should include expert consultants experienced in assessing design solutions. I note that the experience in Victoria appears to have been significantly more positive than that in Tasmania. Consideration could usefully be given to identifying the most effective approaches in place across the country and encouraging or requiring the adoption of similar processes to ensure greater consistency between jurisdictions.

Recommendation 27 – That the process for determining unjustifiable hardship applications be reviewed with a view to ensuring a more effective, more timely and clearer process for considering problems with compliance with the deemed-to-satisfy provisions, identifying or considering alternative solutions and, where this is not achievable, considering the potential application of the defence.

⁴⁷ Resource Management and Planning Appeal Tribunal, *Annual Report* (2013–14) [3] <http://www.rmpat.tas.gov.au/data/assets/pdf_file/0011/298640/Annual_Report_for_2014_.pdf>.

5. Inconsistencies in the interpretation and application of the *Premises Standards*

Review question 1: Are the Premises Standards easy to understand and use?

Review question 2: Is there sufficient training and professional guidance on the application of the Premises Standards in the building industry?

Review question 3: Do you use training and guidance material?

Review question 4: Is there evidence of any inconsistent and incorrect application of the deemed-to-satisfy provisions in the Premises Standards?

Review question 5: Are the deemed-to-satisfy provisions sufficiently clear for practical application by the building industry?

Review question 6: Are there any impediments to using Alternative Solutions?

Review question 7: Do the unjustifiable hardship provisions have an impact on building work?

Review question 8: Does the building industry make adequate use of independent expertise to assist in assessing compliance with the Premises Standards?

Review question 9: Do you have other comments on inconsistencies in the interpretation and application of the Premises Standards you would like to make?

The *Premises Standards* are exceedingly complex and difficult for those without technical expertise to understand.

The Australian Human Rights Commission's *Guideline on the application of the Premises Standards* assists in the interpretation of the *Premises Standards*. The fact that the *Premises Standards* and the *National Construction Code* draw on a number of Australian Standards that are difficult and costly to access means, however, that those for whose benefit the *Premises Standards* were developed—people with disability—are often prevented from fully understanding their detail and application.

This impedes individuals and their representative bodies from ensuring the *Premises Standards* are properly applied.

It also affects the ability of authorities such as Anti-Discrimination or Equal Opportunity Commissioners to assess complaints where the *Premises Standards* have relevance.

It is extremely unusual (if not unique) for rights-based legislation, such as the DDA, to rely on material that is not publicly available at no cost. Legislation of states, territories and the commonwealth is now generally available online at no cost to the public. It is also often available in local libraries. This is not the case with respect to the *Premises Standards*. This is of particular concern given the economic situation of most people with disability, who have one of the lowest labour force participation rates in Australia. According to the Australian Bureau of Statistics:

Between 1993 and 2009, the labour force participation rate for working-age people (15-64 years) with disability was relatively stable. In 1993, the rate was 55%, and this was broadly similar in 2009 at 54%. Conversely, over the same period, the participation rate for working-age people with no disability increased from 77% in 1993 to 83% in 2009.⁴⁸

It is also relevant to note the very limited funding made available to organisations that advocate for people with disability.

It is not appropriate, nor should it be expected, that people with disability themselves and/or their advocacy organisations have the resources or necessary skills to monitor and drive compliance with the *Premises Standards*.

As I have recommended earlier in this submission, it is important that all people with an interest or obligation under the *Premises Standards* have free and full access to the Australian Standards referenced in them and that documents such as the *Guideline on the application of the Premises Standards* remain up-to-date and available to provide guidance, both for professionals and members of the community. Currently, the Australian Standards referenced in the *Premises Standards* are only available at considerable cost and in a format that is inaccessible to blind people. This matter requires urgent attention.

There is also an urgent need for additional training and other resources to promote awareness and understanding of the *Premises Standards* across the building industry, including awareness of the functional purpose of particular access features. This is particularly important for those who have responsibility for ongoing building management.

Recommendation 28 – That training and other resources be developed to promote awareness and understanding of the *Disability (Access to Premises – Buildings) Standards 2010* (Cth) across the building industry, including the functional purpose of particular access features; and consideration be given to requiring such training as a component of mandatory professional development for relevant professionals.

⁴⁸ Australian Bureau of Statistics, *Australian Social Trends, March Quarter 2012* (Cat. No. 4120.0).

Recommendation 29 – That training to promote awareness and understanding of the *Disability (Access to Premises – Buildings) Standards 2010* (Cth) is targeted at those who have responsibility for the ongoing maintenance of accessible features.

Recommendation 30 – That the Australian Standards referenced in the *Disability (Access to Premises – Buildings) Standards 2010* (Cth) be made freely available in accessible formats.

6. Other Issues

Review question 1: Is there anything else you would like to tell us about the Premises Standards?

There is currently no clearly articulated mechanism for ensuring the *Premises Standards* are met or that additional works—not requiring a building permit—are not undertaken that diminish the accessibility implemented as a result of the requirements of the *Premises Standards* at the time of construction or upgrade of a building.

Regulations adopted in Tasmania require that building owners and occupiers maintain any feature or measure provided to make a building accessible to people with disability.⁴⁹ In the absence of a clear understanding of specifications, however, it is evident that poor maintenance of buildings is resulting in situations where accessibility features are diminished over time. This includes the removal or ramps and/or handrails; furniture and fixed features being incorrectly placed in corridors; and accessible sanitary facilities being used for other purposes.

In circumstances where the *Premises Standards* are no longer met, the only avenue to address the issue is through a complaint of discrimination under federal, territory or state discrimination law.

This matter requires further consideration, including the possible development of additional guidelines.

Recommendation 31 – That consideration be given to developing additional guidelines aimed at ensuring ongoing maintenance of accessibility features and compliance with the *Disability (Access to Premises – Buildings) Standards 2010* (Cth) once the installation and upgrade of buildings to include accessible features is complete.

I also note recommendation 17 made in the *Access All Areas* report in respect of empowering the Disability Discrimination Commissioner ‘to investigate non-compliance with the *Premises Standards* and to bring a complaint where there is

⁴⁹ The Tasmanian *Building Regulations 2014* (Part 7) require building owners or occupiers to maintain any feature or measure in, or associated with, a building that have been provided to make that building accessible to persons with a disability. See also ‘Guidance on the regulatory documents for disability access for premises and their application’ available at http://www.justice.tas.gov.au/building/publications_folder/Guidance_on_Disability_Access_to_Premises_August_2013.pdf

non-compliance with the Premises Standards without requiring an individual complaint'.⁵⁰

In 2013, the Tasmanian Act was amended to provide the Commissioner with power to investigate discrimination and prohibited conduct without requiring an individual complaint and to 'prosecute' the matter in the Anti-Discrimination Tribunal.⁵¹

In addition, the Tasmanian regulations made under the *Building Act 2000* (Tas) provide that the Anti-Discrimination Commissioner is to provide a report to RMPAT on an application in respect of unjustifiable hardship.⁵² This provides an automatic mechanism for the Tasmanian Commissioner to be notified of any such application to RMPAT.

In light of the difficulties facing people with disability pursuing complaints to drive compliance with the *Premises Standards*, I strongly support the Committee's recommendation 17 and propose such authority be extended to state and territory human rights and discrimination authorities. I also recommend consideration be given to ensuring, at minimum, notification be required to be given to the relevant state or territory human rights or discrimination authority of any approach relating to questions of unjustifiable hardship and standing be given for that authority in the proceedings.

Recommendation 32 – That the Disability Discrimination Commissioner and each of the state and territory human rights and discrimination authorities be given the power to investigate non-compliance with the *Disability (Access to Premises – Buildings) Standards 2010* (Cth) and to bring a complaint where there is non-compliance with the *Disability (Access to Premises – Buildings) Standards 2010* (Cth) without requiring an individual complaint.

Recommendation 33 – That consideration be given to requiring that the relevant state or territory human rights or discrimination authority be notified of any application in relation to unjustifiable hardship and that such authorities have an automatic right of standing in such proceedings.

⁵⁰ House of Representatives Standing Committee on Legal and Constitutional Affairs, above n 29, [7.50–7.60].

⁵¹ *Anti-Discrimination Act 1998* (Tas) s 60(2).

⁵² *Building Regulations 2014* (Tas) r 17.