

---

**Discrimination**


---

## Disabled Access

---

- **Paula Gerber, Partner,  
Maddock Lonie Chisholm Lawyers.**
- 

The *Disability Discrimination Act 1992* (Cth) (“DDA”) offers no guidance as to appropriate standards for building designs to ensure access for people with disabilities. Nor does the legislation, which provides for formulation and application of disability standards in some areas of disability discrimination, compliance with which is a complete defence, apply to access to buildings.

The courts alone can offer guidance as to what constitutes disability discrimination in the area of access. Most readers will be familiar with the 1994 case of *Cocks v The Queensland State Government* which formulated the concept of “access with dignity”. The most recent decision on this issue is that of *Cooper v The Human Rights and Equal Opportunities Commission*, handed down by the Federal Court in March of this year.

The case involved the 1995 redevelopment of a Coffs Harbour cinema complex without provision for wheelchair access to the new or existing auditoriums. The Federal Court set aside the decision of the Human Rights and Equal Opportunity Commission (“HREOC”) that the Coffs Harbour Council was not liable under Section 122 of the DDA, which extends liability for auxiliary involvement in a breach of the DDA. Section 122 states:

*“a person who causes, instructs, induces, aides or permits another person to do an act that is unlawful ... is for the purposes of this Act, taken also to have done the act.”*

The Court remitted the matter back to HREOC to be determined according to law, with costs being ordered against the Council.

It was argued that Council, by granting the development approval, permitted a breach of the *Act*. When granting the development application, Council considered several reports on the matter including a general advice from HREOC and a letter from the owners stating that a requirement to provide access to the disabled would be an unjustifiable hardship as it would cost in the order of \$120,000. This, in comparison to the overall cost of the renovation works (represented to be \$100,000), was excessive.

However, HREOC found that the cost of the renovation was likely to be approximately \$400,000 i.e. substantially more than represented to the Council at the time of the development application. The Court carried out an extensive examination of what “*permit*” means under Section 122 of the DDA and concluded that the term should be given a wide definition. It carefully considered the objects of the DDA and concluded that it was intended to have far-reaching consequences.

Council argued that an honest and reasonable mistake of fact occurred in that it had, on issuing the development permit, decided that the owners would suffer unjustifiable hardship (a defence under the DDA) should they be required to provide disability access. While the Court held that Council had made an honest mistake it did not accept that it was a reasonable one.

As the regulator of buildings in a thriving and large coastal city, and no doubt the instigator of various construction works itself, Council was well placed to assess and/or investigate the realism of the owners’ representations regarding cost estimates.

This decision means that building surveyors, councils and other responsible authorities must be acutely aware of the requirements of the DDA when considering development applications. That a council issued approvals or permits in accordance with State legislation and other requirements such as the Building Code of Australia (“BCA”) is not a defence to a claim under the DDA.

### What Do You Need To Do?

So long as this climate of uncertainty regarding disabled access continues, it is imperative that you take all possible precautions to avoid being on the receiving end of a claim under the DDA. The following table may assist in determining what steps you should be taking:

Issue	Building Owner to do	Contractor/Consultant to do	Council/Building Surveyor to do
<b>Ensuring compliance with the DDA</b>	<p>Advise consultants that you will be relying on them to design in accordance with the DDA and include such a requirement in your contract with them.</p> <p>Consult with disability groups prior to undertaking works.</p>	<p>Design consultant to ensure any disabled access is dignified and is available to all parts of the building.</p> <p>Liaise with the owner and the building surveyor to ensure the DDA has been considered.</p> <p>Consider all requirements of AS4128.</p>	<p>Bring to the developer/ applicant's attention that compliance with the DDA is required in addition to the BCA and State legislation.</p> <p>Ensure plans and specifications comply with the DDA.</p> <p>Assess compliance with the DDA and/or any defences to compliance.</p> <p>Consider all requirements of AS4128.</p>
<b>Preventing A claim</b>	<p>Have an audit process which identifies possible discriminatory actions.</p> <p>Have an Action Plan that sets out how you will rectify any discriminatory access identified in the audit process.</p> <p>Ensure that all consultants, contractors and employees have a clear understanding of the DDA requirements.</p> <p>Obtain HREOC advisory notes.*</p> <p>Keep informed of amendments to AS4128 and the BCA.</p>	<p>Contractor to check with the owner/designer/consultant that DDA compliance has been addressed.</p> <p>The consultant should ensure that facilities are evenly distributed throughout the building.</p> <p>The consultant should ensure any tender and contract documentation calls up requirements for compliance with DDA.</p> <p>Both the contractor and consultant should obtain HREOC advisory notes.</p>	<p>Obtain and follow HREOC advisory notes.</p> <p>Carefully scrutinise all claims of unjustifiable hardships.</p> <p>Keep informed of amendments to AS4128 and the BCA.</p>

**Matters for general consideration by all parties**

- Are there suitable parking facilities for vehicles used by people with disabilities?
- Is there equitable and dignified access to the building and to all levels of the building which are usually accessed to the public?
- Are all facilities such as toilets, light switches, control panels in lifts, benches, etc constructed in a manner and at a height that they can be used by people with disabilities?
- Are floor coverings/surfaces traversable by all users?
- Are there visual as well as audible emergency alarm systems?

\* HREOC advisory notes are available at <http://www.hreoc.gov.au>

HREOC has developed a draft policy to encourage compliance with the DDA.

The policy aims to provide regulators, owners and operators of buildings and premises with greater certainty as to how they should deal with the requirements of the Act.

The recent Federal Court decision of *Cooper v The Human Rights and Equal Opportunities Commission*, highlighted that councils must be acutely aware of the requirements of the DDA when considering development applications. The fact that a council has issued permits in accordance with State legislation and other requirements is not a defence to a claim under the DDA.

The proposed HREOC policy, "*Use of power to decline complaints on access to premises – alternative remedies*", has been widely circulated for comment and is also available on HREOC's website at

Under the policy, approval authorities, such as local councils, would develop a policy and procedure framework requiring acceptance by HREOC as providing an alternative means of dealing with access-related issues. Where the approved policy and procedure framework had been applied or where approval had been obtained to vary the need for compliance with the DDA, HREOC would then decline to hear a complaint.

HREOC is seeking feedback and contributions on the following aspects of its proposed policy:

- whether there are other ways in which compliance can be achieved;
- any development control plans, access policies or similar which might be used as the basis for developing a model policy;
- any appeal mechanisms developed by a local government authority which may act as a good model;
- comments on information or education strategies to inform architects, designers, developers and builders of the need to ensure access issues are addressed at the earliest possible stage of the development;
- how private approval authorities ensure compliance with the DDA and reduce their vulnerability to complaints.

HREOC's attempt to provide greater certainty in this imprecise area is welcome. However, even if the policy is implemented, it is but one small step towards specificity in the area of disabled access.

- Maddock, Lonie & Chisholm's Construction Update.