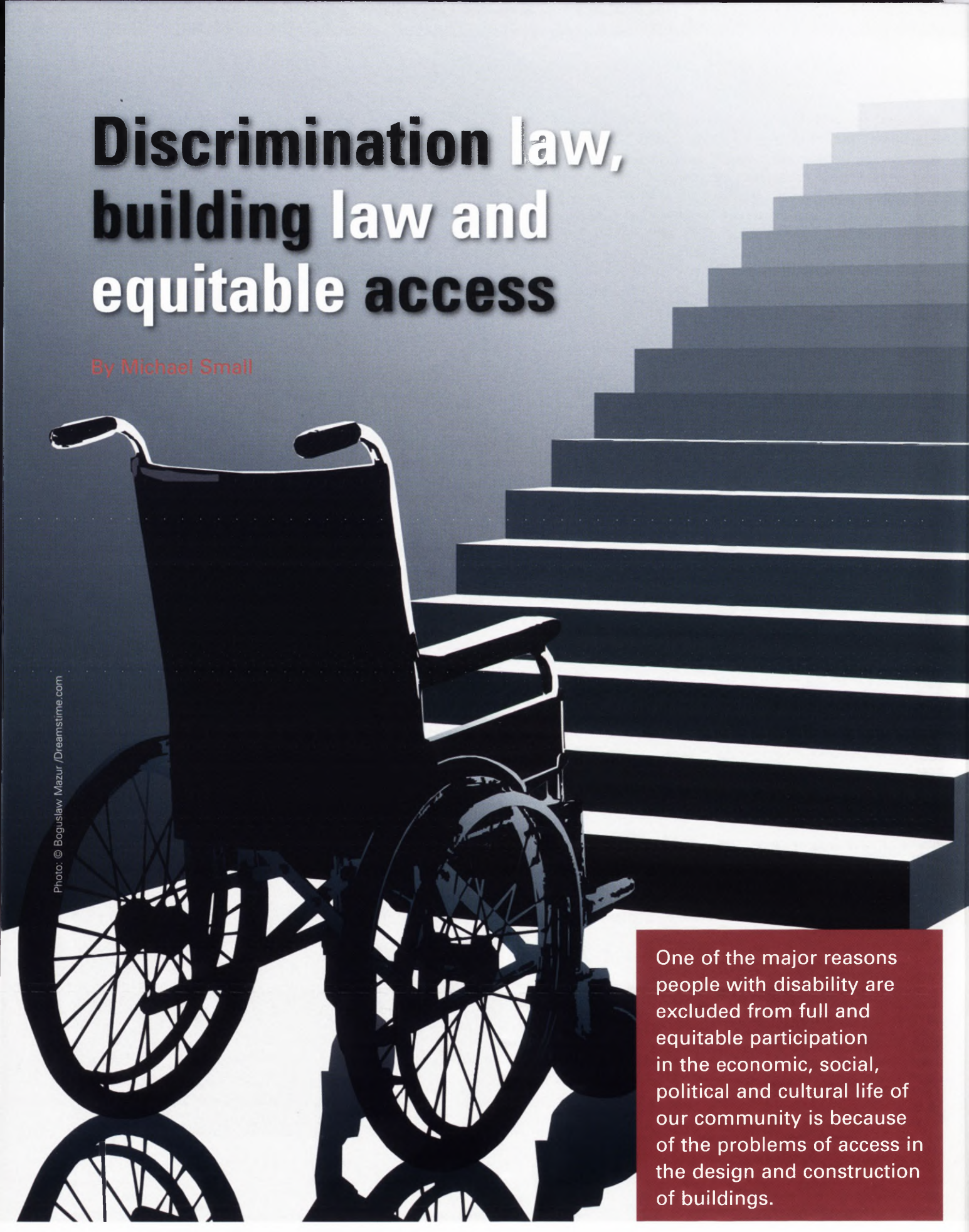
Discrimination law, building law and equitable access

By Michael Small



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One of the major reasons people with disability are excluded from full and equitable participation in the economic, social, political and cultural life of our community is because of the problems of access in the design and construction of buildings.

The *Disability Discrimination Act* 1992 (DDA), and similar state and territory discrimination laws, aim to remove those barriers to participation. While individual complaints of discrimination have so far been the primary means of achieving rights, attempts are being made to harmonise building and discrimination law to achieve broader and more consistent change.

OVERVIEW

Since the DDA came into force in March 1993, complaints to the Human Rights and Equal Opportunity Commission (HREOC) have exposed significant inconsistencies between anti-discrimination law and building law in Australia.

These inconsistencies include both the level of access required – for example, the number and location of accessible toilets – and the amenity of the access provided – for example, the location of accessible entrances.

As a result, even if a building complies with the national building code at the time it was built – the Building Code of Australia (BCA) – the owner/operator could still be subject to a successful complaint of unlawful discrimination if a person with a disability experienced difficulty in trying to access or use the building.

Progressive changes to the BCA have been made since 1995 to address these inconsistencies, but in 2000 significant momentum was given to the process when the Commonwealth government amended the DDA to allow for the development of Disability Standards for Access to Premises (Premises Standard).

This amendment aims to clarify accessibility requirements under the DDA and ultimately ensure consistency between building law and the DDA.

A Premises Standard would enable owners and developers of new public buildings to meet the objectives of the DDA (as they apply to buildings). Without a Premises Standard, people with disability, as well as owners and developers, would continue having to rely on the individual complaints mechanism of the DDA as the only means of defining compliance.

However, rather than develop a Premises Standard as a separate and additional code, all stakeholders – including the building industry, government and the disability community – have agreed to change the access provisions of the BCA to reflect the content of the Premises Standard. Compliance with the new BCA, and therefore the Premises Standard, would consequently ensure compliance with the DDA.

THE BUILDING CODE OF AUSTRALIA (BCA)

The BCA is developed and maintained by the Australian Building Codes Board (ABCB) on behalf of the Commonwealth in conjunction with the state and territory governments, which each have statutory responsibility for building control and regulation within their jurisdiction.

It is a comprehensive statement of the performance and technical requirements relevant to the design and construction of buildings, and is a national code that is administered at a state and territory level.

The BCA is referred to as a 'performance-based' code, describing acceptable performance requirements that buildings must meet. For example, Performance Requirement DP1 states that access must be provided to the degree necessary to enable safe, equitable and dignified movement of people to and within a building.

Building design and construction must satisfy performance requirements. These may vary, depending on the building classification. For example, requirements may differ depending on whether the building is a theatre, an office building or a hospital.

There are two ways to meet the performance requirements, referred to as 'building solutions':

- The *Deemed-to-Satisfy* provisions are detailed technical requirements set out in the BCA prescribing how a building is to be constructed and equipped. They refer to technical details found in Australian Standards, such as AS 1428.1, which is the main Australian Standard covering building access-related issues for people with a disability.
- An *Alternative Solution* is one that can be demonstrated to meet the performance requirements of the BCA by other means. The onus is on the building applicant to show that the alternative solution complies with the performance requirements.

Compliance with the BCA is demonstrated through the building certification process. Either a local government or >>

private building surveyor checks that a building meets the BCA requirements before granting a certificate.[1]

Where a person with disability is unable to get into a building or equitably use its facilities, they can make a complaint of discrimination, even if the building in question complied with the BCA.

BRINGING THE DDA AND BCA TOGETHER

Progress is slowly being made on a Premises Standard under the DDA, and corresponding changes to the BCA. These changes will ensure greater consistency between building and discrimination law and give a much clearer picture to those who design and construct buildings of their obligations.

The task of drafting these changes was given to the ABCB's Building Access Policy Committee (BAPC). This committee includes representatives from the disability sector, regulators, property owners and operators, government, building certifiers, design professionals and HREOC.

Public consultation on a draft Premises Standard took place in 2004. Agreement on a number of aspects of the Premises Standard could not be reached between members of the BAPC so, in 2006, the ABCB forwarded its recommendations on the proposed content of the Premises Standard to the federal attorney-general and minister for industry, tourism and resources for their consideration.

A final decision on how to proceed has not yet been made and, in the meantime, the current DDA complaints mechanism continues to apply to both new and existing buildings.

APPLICATION OF THE DDA TO PREMISES

The broad objects of the DDA include eliminating, as far as possible, discrimination against people on the ground of disability, and promoting general recognition and acceptance that persons with disability have the same fundamental rights as the rest of the community.

The DDA sets out the specific areas in which a person cannot be discriminated against on the ground of their disability. This includes s23, which refers to access to or use of 'any premises that the public, or a section of the public, is entitled or allowed to enter or use'.

The DDA definition of 'premises' (s4) is very broad and includes:

- existing buildings, including heritage listed buildings;
- proposed or new buildings;
- car parks;
- open air sports venues; and
- pathways, public gardens and parks.

In fact, any part of the 'built environment' that the public is entitled, or allowed, to enter or use falls within the definition.

In addition, because the DDA refers to the 'use' of premises, it also affects fit-out design (for example, the height of service counters, or size of change rooms in clothing retail outlets) and how premises are maintained and managed (for example, ensuring accessible toilets are not used as storage spaces, or that overhanging branches within the premises are not obstacles for people who are blind or vision-impaired).

The DDA recognises that, in certain circumstances, providing equitable access for people with disabilities could be too onerous for an owner or operator of premises. Section 11 does not require access to be provided to the premises if it would impose an 'unjustifiable hardship' on the person who would have to provide the access.

Whether or not something would involve an unjustifiable hardship depends on the individual circumstances of the case and the resources available to the owner or operator of any building.

THE COMPLAINTS PROCESS

The DDA makes it unlawful to discriminate; however, where barriers have not been eliminated – for example, a set of steps into a restaurant – compliance with the law may be achieved through complaints. Under the *Human Rights and Equal Opportunity Commission Act* (HREOCA), a complaint must generally be made in writing by a person who has been personally affected by the alleged discrimination.

However, the Act recognises that some people may not be able to make a complaint themselves. In these cases, another person can make a complaint on their behalf.

A complaint may also be made by one affected person on behalf of a group of people similarly affected, such as a group of workers or service-users. This kind of complaint is a representative complaint or 'class action'.

Neither the complainant nor the respondent needs to have legal advice to make or respond to a complaint, although they may obtain it if they wish.

Putting it in writing

The first step for a person making a complaint is putting it in writing.

A complaint can take the form of a simple letter or email to HREOC. It does not need to be long or complicated, but it should contain important information including:

- the name, address and contact details of the complainant;
- contact details for the person, people and/or the organisation the complaint is against;
- a description of what happened, where it happened, when it happened and who was involved;
- a list of any people (and their details) who could help to explain what happened;
- any correspondence or other documentation that may be important; and
- some suggestion as to what a fair settlement of the complaint would be.

Assessing a complaint

HREOC assesses each complaint according to the circumstances and evidence to decide which part of the DDA it falls under and what action should be taken.

Each complaint is also considered to determine whether it would best be handled by HREOC or by another agency.

Terminating a complaint

The president of HREOC may decide to terminate a complaint at any stage. This will usually be done early in the process if the complaint is not covered by the legislation;

if more than 12 months have passed since the event with no sound explanation for the delay; if a better remedy is available; or if the matter has already been dealt with by another authority.

The president may terminate a complaint at any time if satisfied that:

- the discrimination is not unlawful;
- the complaint was lodged more than 12 months after the alleged discrimination took place;
- the complaint lacks substance;
- the complaint has been adequately dealt with;
- a more appropriate remedy is reasonably available;
- the complaint has been adequately dealt with by HREOC or another statutory body;
- the complaint could be more effectively or conveniently dealt with by another statutory authority; and/or
- the complaint involves an issue of public importance that should be considered by the court.

Contacting the respondent

Once HREOC has decided that the complaint requires investigation, it will contact the respondent person or organisation.

In most matters, HREOC will supply the respondent with a copy of the letter of complaint and seek a written response.

Early conciliation

Where appropriate, HREOC will attempt to conciliate the complaint at an early stage in the process. This will generally happen if:

- there is little or no disagreement about the facts;
- the discrimination may have been caused by a misunderstanding; or
- the respondent is not fully aware of the law.

Responding to a complaint

HREOC has the legal authority to compel people to provide any information that it requires to investigate the complaint.

The respondent will be asked to respond to all the allegations and will be given an opportunity to record its version of events and provide any evidence to support its response.

Sometimes, HREOC decides that the matter may be relatively easy to resolve without relying on formal measures. In such cases, HREOC may contact the respondent by telephone seeking a more informal discussion.

The response is usually provided to the complainant.

Conciliating a complaint

Throughout the investigation, both parties have the option of trying to resolve the complaint through conciliation.

Conciliation is an opportunity for the parties to resolve a complaint on their preferred terms. It may take place either by face-to-face conferences, teleconferences or the exchange of letters.

HREOC's conciliation staff are impartial and do not act for either party.

In trying to reach a conciliated settlement, both parties are encouraged to see the situation from the other's point of view. Having realistic expectations of what settlement arrangements might be possible makes it more likely that a mutually satisfactory settlement will be reached.

Confidentiality

So that the conciliation process works effectively, HREOC encourages the open sharing of information by both parties. However, conciliation proceedings are generally considered confidential. Nothing said or done in conciliation can be used later in any report the president may provide to the court. It is up to the parties to agree how confidential they want to keep the details of the conciliation process and its outcomes.

Compulsory conferences

If a person or organisation will not take part in a conciliation conference voluntarily, HREOC has the authority to compel attendance.

Reaching an agreement

The purpose of the conciliation process is to assist both parties to settle on an agreed set of arrangements. These may include an apology, changes to a building, financial compensation and/or undertakings for future action.

Once an agreement is reached, it is usually put in writing and signed by both parties. >>

HREOC will close the file once the complaint has been conciliated. In cases where parties are not able to settle the complaint, the president may terminate it.

Federal Court of Australia/Federal Magistrates Court

If a complaint alleging unlawful discrimination is terminated for any reason, the president will write a letter of termination to the complainant, explaining why the complaint was terminated and advising them of their right to have the complaint heard and determined by the Federal Court or the Federal Magistrates Court.

If the complaint is not resolved, the person affected by the discrimination may lodge an application with the court within 28 days of the date of the Notice of Termination.

HREOC advises people to seek independent legal advice before commencing proceedings.

Only the Federal Court or Federal Magistrates Court can determine whether or not unlawful discrimination has occurred and what constitutes 'unjustifiable hardship'.

In making such a determination, the court considers factors such as:

- the cost of removing the discrimination;
- any technical difficulties that might exist;
- the resources available to the respondent; and
- the effect that changes might have on others.

Information on conciliations and court decisions in relation to the DDA can be found at http://www.humanrights.gov.au/disability_rights/decisions/decisions.html.

CONCLUSION

HREOC is confident that the proposed Premises Standard will be completed in the near future, and will provide much-needed improvements in access to the built environment and greater surety for people with disability, regulators and the building industry. In the meantime, HREOC has produced a number of resources to assist those responsible for the design and construction of buildings, which can be found on the Access to Premises page of HREOC's website, at www.humanrights.gov.au. ■

Note: 1 Although the BCA explicitly refers to detailed technical specifications relating to access, these specifications are unfortunately often misinterpreted or ignored. HREOC recently released resources aimed at improving compliance with technical requirements at http://www.humanrights.gov.au/disability_rights/buildings/good.htm.

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