

# ADVISORY NOTICE

## BUILDING

02/17

re-issue 07/12

Advisory Notices are issued to assist in the interpretation of the Development Act 1993

September 2017

### TECHNICAL:

## Upgrading access and facilities for people with a disability

The purpose of this advisory notice is to provide information about the requirements to provide access and facilities for people with a disability in new and existing buildings.

In 2012, amendments were made to provisions in the *Development Act 1993* (the Act) and the *Development Regulations 2008* (the Regulations) for upgrading access for persons with a disability when a building is being altered or extended. These amendments aligned state requirements with those contained in the federal *Disability (Access to Premises) Standards 2010* (the Premises Standard), which were adopted under the *Disability Discrimination Act 1992* on 1 May 2011.

### BACKGROUND

The Premises Standard contains improved access provisions for both new and existing buildings. For new buildings the improved access provisions were simultaneously incorporated into the 2011 edition of the Building Code of Australia (the Building Code).

For existing buildings, the improved access provisions in the Premises Standard were incorporated into the requirements of section 53A of the Act and regulations 80 and 80A of the Regulations. The requirements superseded previous requirements in South Australia for upgrading access in existing buildings.

### UPGRADING REQUIREMENTS

#### Affected part

From 1 October 2012, when an existing building is being altered or added to and the new work is such that it requires assessment against the access provisions of the Building Code, the council or private certifier undertaking the building rules assessment can require that an 'affected part' must also be upgraded to make it accessible.

An 'affected part' of a building includes the principal pedestrian entrance of the building and any other part necessary to provide a continuous accessible path of travel (an accessway) from that entrance to the location of the new building work. Upgrading an 'affected part' to make it accessible means that the main building entrance and an identified accessway to the new building work will have to comply with the access requirements of the Building Code and Australian Standard AS1428.1 (2009). This includes-

- not having any steps, stairways, turnstiles, revolving doors, escalators, moving walks, or other impediments within it that could restrict access for a person with a disability;
- having not less than the prescribed unobstructed widths and heights throughout the accessway and at doorways;
- having sufficient circulation space at doorways;

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- having passing and turning spaces where necessary;
- having door handles not less than the required height above floor level;
- ensuring that any ramps within the identified accessway have the correct gradient, landings, kerbs and handrails; and
- having suitable slip resistant floor finishes

### **Class 1b buildings**

With regard to Class 1b buildings, the Premises Standards only apply to '*specified Class 1b buildings*'. These are defined in the Premises Standard as-

- (a) a new building with 1 or more bedrooms used for rental accommodation; or
- (b) an existing building with 4 or more bedrooms used for rental accommodation; or
- (c) a building that comprises 4 or more single dwellings that are:
  - (i) on the same allotment; and
  - (ii) used for short-term holiday accommodation.

Under these provisions, the upgrading requirements can therefore only be applied to building if it has or will have (as the result of any proposed additions or alterations) 4 or more bedrooms used for rental accommodation. If a building has less than 4 bedrooms available for rental, there is no requirement under the Premises Standard to upgrade access to and within that existing building.

When a building rules consent is being sought for development consisting of an alteration to a Class 1 building and the applicant has applied for a change of classification to a Class 1b building, the council or private certifier needs to be satisfied that the building will be safe and structurally sound before issuing the consent. However, under the Premises Standard there is no requirement to upgrade accessibility of the existing building unless that building, when reclassified, will be a '*specified Class 1b building*'.

Councils and private certifiers must take the provisions of the Premises Standard into account when considering a proposed change of classification to a Class 1b building and whether or not the '*building possesses the attributes appropriate to...its intended use*' (regulation 82(4)).

### **EXCEPTIONS AND CONCESSIONS**

There are some circumstances under which an 'affected part' of a building cannot be required to be upgraded by the council or private certifier. These are-

- if it would cause 'unjustifiable hardship' to require the work to be carried out;
- if the part of the building being altered is being undertaken by a lessee (other than where the whole building is leased by the same lessee); and
- if the building being altered is a class 2 building constructed before 1 May 2011

A concession also applies to existing lifts and sanitary facilities, ie if they meet the criteria specified in regulation 80(3)(b) and (c), they cannot be required to be upgraded to the amended access requirements that were adopted by the Premises Standard and the Building Code since 1 May 2011.

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## **MODIFICATION OF THE BUILDING CODE AND REFERRALS TO THE STATE PLANNING COMMISSION**

The Act and Regulations require all new building work to comply with Building Code. However, in relation to access, regulation 80A provides for the Building Code access provisions to be modified if requiring them would cause unjustifiable hardship. Any person claiming unjustifiable hardship must document their claim (which must include details of the circumstances that are relevant to the particular application) and submit their claim to the person or body undertaking the building rules assessment for consideration.

The council or private certifier must be satisfied that any claim is justifiable as they could share liability if a complaint is made and upheld about their decision at a later date. To reduce potential liability in this regard, the council or private certifier may refer an application to the State Planning Commission, for an independent opinion as to whether or not a particular claim of unjustifiable hardship is justified and the proposed building work will still meet the access performance requirements to the maximum extent possible under the circumstances.

**Note:** From 1 August 2017 the State Planning Commission assumed the functions, powers and duties of the State Commission Assessment Panel.

## **CLAIMS OF UNJUSTIFIABLE HARDSHIP**

Circumstances that can be taken into account when considering a claim of unjustifiable hardship are listed in Part 4 of the Premises Standard (an extract follows). If a claim is made to modify the access provisions on the grounds of unjustifiable hardship, the applicant and the council or private certifier have an obligation under the Premises Standard to ensure that compliance is still achieved to the maximum extent not involving unjustifiable hardship.

### **Extract from the Disability (Access to Premises – Buildings) Standards 2010**

#### ***Clause 4.1 Unjustifiable hardship***

- (1) It is not unlawful for a person to fail to comply with a requirement of these Standards if, and to the extent that, compliance would impose unjustifiable hardship on the person.*
- (2) However, compliance is required to the maximum extent not involving unjustifiable hardship.*
- (3) In determining whether compliance with a requirement of these Standards would involve unjustifiable hardship, all relevant circumstances of the particular case are to be taken into account, including the following:*
  - (a) any additional capital, operating or other costs, or loss of revenue, that would be directly incurred by, or reasonably likely to result from, compliance with this requirement;*
  - (b) any reductions in capital, operating or other costs, or increases in revenue, that would be directly achieved by, or reasonably likely to result from, compliance with this requirement;*
  - (c) the extent to which the construction of the building has or will be financed by government funding;*

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- (d) *the extent to which the building:*

  - (i) *is used for public purposes; and*
  - (ii) *has a community function;*

- (e) *the financial position of a person required to comply with these Standards;*
- (f) *any effect that compliance with the requirement is reasonably likely to have on the financial viability of a person required to comply;*
- (g) *any exceptional technical factors (such as the effect of load bearing elements on the structural integrity of the building) or geographic factors (such as gradient or topography), affecting a person's ability to comply with the requirement;*
- (h) *financial, staffing, technical, information and other resources reasonably available to a person required to comply with these Standards, including any grants, tax concessions, subsidies or other external assistance provided or available;*
- (i) *whether the cost of alterations to make a premises accessible is disproportionate to the value of the building, taking into consideration the improved value that would result from the alterations;*
- (j) *benefits reasonably likely to accrue from compliance with these Standards, including benefits to people with a disability, to building users or to other affected persons, or detriment likely to result from non-compliance;*
- (k) *detriment reasonably likely to be suffered by the building developer, building certifier or building manager, or people with a disability or other building users, including in relation to means of access, comfort and convenience, if compliance with these Standards is required;*
- (l) *if detriment under paragraph (k) involves loss of heritage significance – the extent to which the heritage features of the building are essential, or merely incidental, to the heritage significance of the building;*
- (m) *any evidence regarding efforts made in good faith by a person to comply with these Standards, including consulting access consultants or private certifiers;*
- (n) *if a person has given an action plan to the Commission under section 64 of the Act – the terms of the action plan and any evidence about its implementation;*
- (o) *the nature and results of any processes of consultation, including at local, regional, State, national, international, industry or other level, involving, or on behalf of, a building developer, building manager or building certifier and people with a disability, about means of achieving compliance with the requirement, including in relation to the factors listed in this subsection;*
- (p) *any decisions of a State or Territory body established to make recommendations to building authorities about building access matters [in South Australia this would include the State Commission Assessment Panel];*

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- (4) *If a substantial issue of unjustifiable hardship is raised having regard to the factors mentioned in subsection (3), the following additional factors are to be considered:*
- (a) *the extent to which substantially equal access to public premises is or may be provided otherwise than by compliance with these Standards;*
  - (b) *any measures undertaken, or to be undertaken, by, on behalf of, or in association with, a person or organisation to ensure substantially equal access.*
- *For these Standards, **unjustifiable hardship** is to be interpreted and applied having due regard to the scope and objects of the Act (in particular the object of removing discrimination as far as possible) and the rights and interests of all relevant parties [the Act referred to in this sub-section being the Disability Discrimination Act 1992].*

An [Accredited Access Consultant](#) can provide assistance in preparing a case for unjustifiable hardship.

Further information about access requirements for people with a disability, concessions and unjustifiable hardship can be found on the Government of South Australia website [www.sa.gov.au](http://www.sa.gov.au).

This Advisory Notice is for general information only and should not be relied upon as legal advice or an accurate statement of the relevant legislation provisions. If you are uncertain as to your legal obligations you should obtain independent legal advice.

### Further information

**Department of Planning, Transport and Infrastructure**  
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