



Removing the Obstacles project

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Background of the project

The project progressed with the collaboration of four partnering organisations: Accessible Arts, the Arts Law Centre of Australia, Arts Access Australia, and UTS Shopfront Community Program at the University of Technology, Sydney, and the support of funding toward the project from the Law and Justice Foundation of NSW.

The project began as a response to arts and disability advocacy organisations encountering confusion and at times resistance, from some arts services located in heritage buildings about their obligation to provide disability access.

The aim of this project was to review legislation related to the provision of access into heritage buildings, and to suggest any changes that may assist those applicable to take the step toward improving or providing disability access. Whilst it is general in focus, it is hoped that arts organisations in particular will read the report and after doing so, aspire to take the next steps to provide or improve access to their service/ organisation for people with disabilities.

The scope of the project was restricted to physical access. It does not include the provision of other accessible features such as interpretive material, ticketing and websites. Also whilst local government has a large role in providing access and preserving heritage, the research has primarily reviewed state, territory, Commonwealth, and international policy and legislation.

The research and issues identified are timely and relevant given the March 2010 release of *Disability (Access to Premises – Building) Standards 2010*, the

promotion of a *Social Inclusion Agenda* through the National Arts and Disability Strategy released in October 2009 and the forthcoming *National Disability Strategy*.

This research paper highlights three key areas in the inter-relationship between access and heritage. As the research project progressed, it became clear that the issues are not only applicable to the arts sector but have implications for the broader community.

Project Aim

1. To inform arts organisations located in heritage buildings about related legislation and policy providing access for audiences, participants, staff and arts professionals with a disability.
2. To provide information to assist those who want to know about providing disability access in a heritage building.

Report Objectives

1. To determine whether heritage laws limit the capacity of arts organisations to provide access for people with disability.
2. To determine if there is a need to reform legislation.

Consultation

Consultation has been ongoing since the inception of the project in 2007 with a range of stakeholders being involved. This has included representatives from disability/ access/ advocacy, heritage/trust, architecture, arts, and education/research sectors in addition to those community members on the Accessible Arts board and other community members who have been involved throughout its duration.

Scope of the project

The scope of the project has been limited to physical access and has not considered goods and services (for example: accessibility of interpretive material, ticketing and websites). While acknowledging the importance of local government in providing access and preserving heritage, the research has primarily focussed on State, Territory and Commonwealth policy and legislation application.

Whilst there are many issues and questions within the broad areas within the access, heritage and disability generally, this report focuses upon the law.

The report is not a practical guide with regard to access to heritage buildings; there are numerous resources available related to this, and more up to date resources will emerge as new legislation and policy comes into effect.

Key data

Australia has a three-tier heritage management system whereby different levels of significance of heritage management are aligned to the three tiers of government.

Within this framework the Commonwealth Government manages heritage of national heritage significance, overseas places of significance to Australia, world heritage and Commonwealth heritage. The states manage heritage of state significance and local governments manage heritage of local significance under the auspices of state legislation.

Legislation is enacted at each level to identify, assess and manage heritage places. Local government manages the largest portfolio and is major owners of heritage places in Australia. Heritage places protected by local government statutes comprise more than 76,000 historic heritage places, and 1,770 historic areas (including parks, monuments, streetscapes etc.) (Sullivan, 2006, p. 4).

Based on searches conducted with the [NSW State Heritage Database](#) (Heritage Branch, NSW, as at May 2010), it is estimated that there are over 430 listed arts-related heritage listings in New South Wales.

This figure is based on various searches using the individual criterion (with the number of relevant results in brackets): Gallery (46); School of Arts (98) - note that some are listed as 'former' and that a listed school of arts is not necessarily used for an arts purpose. They may also be called a 'Mechanics Institute', 'Literary Institute', or 'Athenaeum'; Theatre (96); Museum (111); Music, and Conservatorium (12); Art (65); Opera (2) and Playhouse (2). Not included are listings categorised as 'house', 'homestead', 'residence' or 'cottage' even though these may also be a location where art-related services/ collections or an arts precinct resides. Other data shows that 'more than 65% of NSW's museums are housed in heritage listed buildings' (Rennie, S., Croker, A., Raymond, L., 2004, p. 5).

The Australian Bureau of Statistics (ABS) data (ABS, 2003) indicates that one in five Australians or nearly four million people self-identify as having one or more disabilities. An additional 21% (4.15 million people) indicated they had a long-term health condition that did not restrict their every day activities.

It is noteworthy that in the 2007-08 National Health Survey, over 1 in 3 people reported that they had a disability or long-term restrictive condition (e.g. arthritis, asthma, diabetes, circulatory conditions) (ABS, 2009). The data differs markedly from 2003 that states one in five people, and although it is noted that the data is from different sources and research processes it will be of interest to examine the next Census data.

In addition there are a substantial number of people with a limiting or restricting health condition (including older people, defined by the ABS as over 60, who require some assistance – averaged 41% in 2003; this increased to 84% for the age group 85 or over). In Australia we are facing an increasing population, ageing of our population and higher incidence of ill health; these factors have implications for future planning and policy development.

Issues identified

People with disabilities are, as any other group, entitled to access buildings. However they are often not provided the means to do so and are reliant upon those responsible to ensure access is provided.

People with disabilities often visit places with other people and at times that many businesses need patronage the most (such as during off peak and at other quiet times). People with disabilities are a valuable economic source for many businesses and organisations and by creating access for all people, arts organisations can maximise their opportunities for visitation and patronage.

The research identified general challenges in the heritage and anti-discrimination areas respectively and issues specific to the inter-relationship of access and heritage. Three specific access and heritage issues identified are:

- 1) The complexity of heritage and access issues requires more skilled professionals to assess access to heritage buildings, and a mechanism to monitor progress;
- 2) More information is needed to assist individuals/organisations regarding the application of the *Disability (Access to Premises – Building) Standards 2010* to existing heritage buildings;
- 3) 'Heritage significance' as a consideration in determining an 'unjustifiable hardship' defence to providing access requires clarification.

1) Complexity of heritage and access

There is a great deal of complexity of heritage and access considerations in applying standards, legislation and policy. This can easily become confusing and daunting for those who are not familiar with the terminology, or who have had no or limited contact in the past with either the disability or heritage sectors. Also, because there is some flexibility for case-by-case application in heritage and access issues, the individual circumstances of art organisations and services often will require specialist advice and attention to their own situations.

Arts organisations vary in size and available resources. Specialist advice needs to be available, easy to find, and affordable to encourage arts organisations to seek and utilise it.

In addition, regulations are changing and those involved across these sectors need to be up to date. To assist stakeholders to apply the requirements relative to their situation, there is value in a system that would provide clear principles to follow, coupled with easily available resources for guidance. Various organisations have developed and provide up to date resources and information and these will become more available as time progresses.

2) Access and existing heritage buildings

The legislation *Disability (Access to Premises – Building) Standards 2010* will take effect from 1 May 2011. The Premises Standards apply (generally) to buildings that are new, or a new or affected part of a building. (For details regarding the application of the Standards, refer to the Premises Standards Part 2).

This leaves out those who are in existing heritage buildings who have had any renovation work approved prior to 1 May 2011. Many existing buildings do not have disability access and unless an owner/occupier submits a development application that enacts the Premises Standards, there is no legal requirement for access to be provided.

In addition, if a part of the building subject to a development application is leased to more than one person, a building certifier, developer or manager does not have to ensure that the affected part complies with the Premises Standards. Thus in many situations, it relies upon the goodwill of the owner/occupier to make changes to create access for people with disabilities. One way to compel an owner/occupier to do so is via a complaint under disability discrimination law, however this relies upon a person with a disability to submit such a complaint, and for the process to result in an action that facilitates the provision of access.

Particular challenges lie in applying legislation like the *Disability (Access to Premises – Building) Standards 2010* in situations where a heritage listed building is involved. Thus, as linked to the previous issue, this complexity will require the development and retention of a skilled pool of people who can effectively assess, consult, devise solutions and monitor progress regarding the provision of access to buildings, and that also has the specialised knowledge of the heritage sector.

3) Heritage and unjustifiable hardship

There is often deliberation about the costs of heritage buildings regarding maintenance, restoration and potential alteration. The Disability Discrimination Act allows for someone to defend alleged discrimination to use the argument of 'unjustifiable hardship' (Clause 11). One of the factors that can be applied is the cost of making access adjustments is unreasonable in relation to their financial circumstances.

The *Disability (Access to Premises – Building) Standards 2010* also includes an unjustifiable hardship clause in that 'the loss of heritage significance' of the building (as so defined in Part 4.1 (l), p.12) is a consideration in determining if unjustifiable hardship applies.

However, there are examples that demonstrate that access and heritage considerations can co-exist. Some of these examples are provided in this report and there will be more once the Premises Standards and other legislation generates relevant cases. Many organisations and services undertake to provide disability access as a matter of understanding and valuing social equity, and in doing so acknowledge that all people in society are entitled to freely and easily enter public buildings and facilities.

Conclusion

The research considers developments in Australian building regulations and standards, and examines legislation, standards and models of disability access, building standards and heritage in other continents.

Do heritage laws limit the capacity of arts organisations to provide physical access for people with disabilities?

With regard to the first question, heritage, building and discrimination laws have exclusions or aspects that may be applied if special circumstances exist; these may be incorporated into legislation as ‘unjustifiable hardship’ provisions. These provisions acknowledge that each situation will involve individual and unique circumstances, and to apply legislation in a blanket form may be unfair.

Applying the laws, given that they provide this flexibility, can produce variable outcomes. Whilst it may seem that in some cases applying the hardship provisions results in some organisations/ services escaping their obligation to provide access, in other cases the provision of access in some form may be enforced if subject to a disability discrimination complaint.

The complexity of the legislation and policy with regard to disability and heritage may not instil confidence in arts service/organisation staff to make changes to their building, especially if they are not familiar with either the disability discrimination or heritage areas.

However at the very least, once individuals or organisations are aware of their obligations, they may be encouraged to seek an assessment of what could be done to provide access. Owners, managers and others are also more likely to understand that the existence of heritage significance is not a barrier to explore the options to provide disability access, and that once their individual circumstances are assessed, alterations for access could be made.

A lack of capacity to provide access may be attributed in part to limited understanding and knowledge, and whilst there are some restrictions and limitations in how and what changes may be made to heritage buildings, the laws in themselves do not limit the capacity to make any change to improve physical access, or to take the steps to find out how.

The provision of easy to understand information to those located in heritage buildings may be the first step in increasing the number of buildings that have access. Connecting people with the relevant resources and contacts to assist them, will build their capacity to make changes, and to provide or improve the physical access to their building.

Is there a need for legislative reform?

There is some scope for legislative reform, in that there are amendments that could be made that strengthen current protection for people with disabilities, and provide more resources and support for those that wish to alter their heritage building.

The following recommendations go beyond addressing these research questions regarding legislation, and endeavour to stimulate thinking and action in a range of related areas.

Recommendations

Recommendation 1: Unjustifiable Hardship in the DDA and Standards

1a) That the definition of “unjustifiable hardship” which applies throughout the DDA be made clear under section 11, or section 23 of the DDA. In doing so, “heritage” status of a building must not automatically lead to the raising of the “unjustifiable hardship” defence.

1b) The *Access to Premises Standards 2010* should be amended to ensure that the heritage status of a building does not in itself lead to invocation of the “unjustifiable hardship” defence.

1c) That any deviation from the conditions of either the DDA or the Premises Standards require a publicly available Access Statement, similar to the Statement required in accordance with UK legislation (see pp.27-8 of this report).

Recommendation 2: Access Strategy and Access Assessments

That agencies (funded via government and privately) in heritage buildings be required to have an Access Strategy, demonstrating a strategic and high level commitment to making the whole organisation accessible beyond physical access; this would also include for sensory impairments and learning difficulties.

In addition, that organisations be required to undertake Access Assessments as per the UK approach and the requirement that organisations also have an Access Statement. An Access Statement is a way of demonstrating that every effort has been made to provide an inclusive environment.

Recommendation 3: Change DDA to compliance based legislation

That Australia adopts a more compliance-based approach to disability discrimination law whilst still retaining the right of an individual to complain. The U.S. approach is a potential model for future law reform in Australia. It provides a compliance-based approach to resolve the issues regarding the provision of access for people with a disability and the need to preserve heritage sites.

Recommendation 4: Information about creating access to existing buildings

That more resources and information be directly provided to arts organisations and services located in heritage buildings - to increase knowledge and understanding about how access can be achieved in and around existing buildings.

Recommendation 5: Heritage significance definition

In the *Disability (Access to Premises – Building) Standards 2010*, the term ‘heritage significance’ is defined as the ‘extent to which the heritage features of the building are essential, or merely incidental, to the heritage significance of the building’ (Section 4.1 (l)).

This definition, particularly the measures of ‘essential’ and ‘merely incidental’ should be clearly defined; it is subject to wide interpretation by those who will need to adjudicate and likely to result in broad inconsistencies in its application. In addition, easy to understand guidelines should be developed to facilitate consistent use, and should be applicable across national, state/ territory and local boundaries.

Recommendation 6: Access Coordinators

That Australia adopts a similar approach to that of United States with regard to access coordinators, i.e. anyone in receipt of federal government money must adhere to the federal disability discrimination legislation - organisations need to appoint a coordinator responsible for the overseeing the accessibility requirements of that organisation.

Recommendation 7: Monitoring body for compliance/ access audits

To monitor, support and enforce the provision of disability access, an organisation or body to monitor compliance/access audits should be established, or this authority be provided to an existing independent body. In addition, this authority should include the function of undertaking disability access audits and develop action plans with recommendations for implementation.

Recommendation 8: Funding for heritage/ access provisions

8a) That much more funding be made available by government to those located in heritage buildings who wish to provide or improve the provision of access for people with disabilities. In addition, funding could contribute toward projects that involve the employment of an access consultant, or incorporating access into a business plan, visitor management plan, or developing an Access Policy.

These specific and specialist types of services are necessary to assist those in heritage listed buildings, given the complexity of heritage, building and disability access laws and policy.

8b) That more funding is made available all levels of government to assist the building industry with making alterations and meeting requirements to existing buildings, particularly those located in heritage buildings.

8c) That staff of government, and the disability, heritage and arts sectors continue to support and inform arts organisations in heritage buildings of the opportunities to access funding opportunities, and for the latter stakeholders to lobby government for more funding to enable the dissemination and expansion of resource material.

Recommendation 9: Funding for more Access Auditors/ Assessors

Adequate resources are required to plan, develop and implement a national program to facilitate Recommendations 2 (Access Strategy), 6 (Access Coordinators) and 7 (Monitoring compliance). However, there are a small number of people skilled in both access and heritage that can provide unbiased advice in this area, and can be difficult for arts organisations and others to locate. The model demonstrated by the UK, in requiring an Access Strategy and an Access Statement should be strongly considered.

Future considerations

The implementation phase of new legislation such as the *Disability (Access to Premises – Building) Standards 2010* will test this new environment for the building and disability sectors.

The following decade and beyond will be an interesting time. Over the coming years there will be opportunities to review the issues that have arisen in the course of their implementation and to make any adjustments as required. These issues will serve as good topics for future research, and pave the way for necessary amendments to legislation and policy.

Improvements to access via legislation, policy and in practice continue to be made and organisations in many sectors demonstrate a strong commitment to and awareness of the difficulties that people with disabilities face.

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