

AUSTRALIAN HUMAN RIGHTS COMMISSION

DISABILITY DISCRIMINATION ACT 1992 (Cth), Section 55

DISABILITY STANDARDS FOR ACCESSIBLE PUBLIC TRANSPORT 2002 (Cth), Section 33A.1

NOTICE OF PRELIMINARY VIEW ON APPLICATION FOR TEMPORARY EXEMPTION: CITY OF RYDE COUNCIL

The Australian Human Rights Commission ('the Commission') gives notice of its preliminary view regarding an application made by the City of Ryde Council for a temporary exemption pursuant to s 55 of the *Disability Discrimination Act 1992* (Cth) ('DDA') and s 33A.1 of the *Disability Standards for Accessible Public Transport 2002* (Cth) ('Transport Standards') in relation to bus stop upgrades.

1 THE APPLICATION AND BACKGROUND

- 1.1 The applicant, the City of Ryde Council, is a metropolitan local council in New South Wales. It supplies and maintains 723 bus stops within its jurisdiction which form part of public bus services.
- 1.2 The Transport Standards came into effect on 23 October 2002 and set out specific standards for bus stops, including in relation to access paths, manoeuvring areas, surfaces, lighting, signage, and tactile ground surface indicators.
- 1.3 In its application, the City of Ryde Council acknowledges that it is obliged to meet the relevant requirements of the Transport Standards with regards to the bus stops that it supplies and maintains.¹
- 1.4 The Transport Standards provide that all public transport services (except trains and trams) are required to be in full compliance with the Transport Standards by 31 December 2022. This includes bus stops.
- 1.5 The City of Ryde Council has identified that, on its current projections, not all the bus stops that it supplies and maintains will meet this requirement for full compliance with the Transport Standards by 31 December 2022.²
- 1.6 The City of Ryde Council is therefore seeking a temporary exemption pertaining to all Transport Standard requirements for the non-compliant bus stops within its jurisdiction, to the extent set out in Schedule 2 of its application, for a period of five years. Schedule 2 outlines a bus stop upgrade program ranging from upgrades that

¹ City of Ryde Council, *Application for Temporary Exemption from DSAPT for Bus Stops: Access Report*, 16 November 2021, page 11, available at <https://humanrights.gov.au/our-work/legal/exemption-applications-under-disability-discrimination-act-1992-cth>.

² Ibid at page 4.

have already been completed to ones that are not scheduled for completion until 31 October 2025.

2 PRELIMINARY VIEW OF THE COMMISSION

2.1 The Commission is of the preliminary view that it will not grant a temporary exemption from:

- the requirement that all bus stops supplied and maintained by the City of Ryde Council be in full compliance with the Transport Standards after 31 December 2022.

3 CONSIDERATION AND REASONS

3.1 In reaching its preliminary view, the Commission has considered the following:

3.1.1 The application and submissions by the City of Ryde Council, including the access report provided by Morris Goding Access Consulting

3.1.2 All further information provided by the City of Ryde Council in relation to this application

3.1.3 Information from the Accessible Public Transport Jurisdictional Committee ('APTJC')

3.1.4 Submissions from other interested parties, and

3.1.5 The response of the City of Ryde Council to the public submissions received by the Commission.

3.2 Many of these documents are available on the Commission's website at: www.humanrights.gov.au/disability_rights/exemptions

3.3 In reaching its preliminary view, the Commission had regard to the following:

3.3.1 The terms and objects of the DDA

3.3.2 The Transport Standards

3.3.3 The *Disability Standards for Accessible Public Transport Guidelines 2004* (No. 3), and

3.3.4 The *Commission Guidelines: Temporary Exemptions under the Disability Discrimination Act* (2010).

3.4 The history of the application and the reasons for the Commission's preliminary view are set out below.

4 MEANING OF IMPORTANT TERMS

4.1 Unless the contrary intention appears, any term used in this preliminary view and in the Transport Standards has the same meaning in this preliminary view as it has in the Transport Standards.

- 4.2 Unless the contrary intention appears, any term used in this preliminary view and in the DDA has the same meaning in this preliminary view as it has in the DDA.

5 THE COMMISSION'S PROCESS

- 5.1 Following receipt of the City of Ryde Council's application, the Commission published the application on its website and commenced a six-week public consultation period. It did this by:
- publishing the application and access report on its website, and calling for public submissions on its merits
 - writing to State and Territory anti-discrimination bodies, inviting them to make submissions
 - writing to a number of peak bodies representing people with disability, inviting them to make submissions, and
 - writing to the APTJC, inviting its members to make submissions.
- 5.2 In this way, the Commission satisfied its obligation to consult with APTJC, pursuant to s 33A.1(4)(a) of the Transport Standards.
- 5.3 On 13 May 2022, the Disability Discrimination Commissioner, Dr Ben Gauntlett, as well as a member of the Commission's Legal section, attended a site viewing of several bus stops in the City of Ryde area. The Commission thanks the City of Ryde Council for facilitating this viewing. The visited bus stops included examples of those that are fully compliant with the Transport Standards, as well as those that are not presently compliant.
- 5.4 In addition to a response from the APTJC, the Commission received 5 submissions during its public consultation. A list of these submissions is contained in Schedule 1 to this preliminary view. The public submissions were made available on the Commission's website and the applicant was provided with the opportunity to reply.
- 5.5 On 29 July 2022, the City of Ryde Council provided a letter to the Commission addressing matters raised in the public submissions. This letter has been uploaded onto the Commission's website.
- 5.6 The Commission has considered all the materials referred to above in reaching its preliminary view in relation to this application.

6 PROCEDURAL FAIRNESS CONSIDERATIONS

- 6.1 Consistent with fundamental principles of procedural fairness, the Commission considers that the process outlined above has provided both the applicant and the public with an adequate opportunity to comment on this application for temporary exemption.
- 6.2 The City of Ryde Council and the public will also be provided with a further opportunity to respond to this preliminary view before the Commission makes its final decision in this matter.

7 LEGISLATIVE REGIME AND THE COMMISSION'S POWER TO GRANT EXEMPTIONS

The DDA and the Transport Standards

- 7.1 The DDA makes it unlawful to discriminate on the ground of disability in a range of areas of public life. Most relevantly for the present application, the DDA makes discrimination unlawful in relation to the provision of goods, services and facilities (s 24).
- 7.2 The DDA also empowers the Minister to formulate disability standards (DDA s 31(1)). The Transport Standards are disability standards made under this provision.
- 7.3 The Transport Standards came into operation on 23 October 2002. The purpose of the Transport Standards is 'to enable public transport operators and providers to remove discrimination from public transport services' (s 1.2(2)). At the time they were made, the Transport Standards regulated aspects of conveyances, premises and infrastructure used to provide public transport services.
- 7.4 Pursuant to s 34 of the DDA, a person will not contravene the DDA if they act 'in accordance with a disability standard.' In this way, disability standards provide an avenue whereby persons and bodies such as public transport operators and providers can ensure that they will not be found to have discriminated unlawfully on the ground of disability.
- 7.5 Conversely, pursuant to s 32 of the DDA, it is unlawful to contravene a disability standard.

The Commission's powers to grant exemptions

- 7.6 The Commission has the power to grant exemptions under the DDA (s 55) and the Transport Standards (s 33A.1).
- 7.7 The effect of an exemption under the Transport Standards is that, where a person fails to comply with the Transport Standards, but that failure is in accordance with an exemption that has been granted by the Commission, the person does not contravene the standards (Transport Standards s 33A.3). However, this does not automatically mean their conduct is 'in accordance with' the relevant Standard (and so within the proviso contained in s 34 of the DDA). For this reason, a person seeking an exemption under a disability standard will ordinarily also seek an exemption from the DDA, as the applicant has done in this matter. The effect of a temporary exemption under the DDA is that any discrimination covered by the exemption is not unlawful under the DDA while the exemption remains in force.
- 7.8 Exemptions granted by the Commission may be granted subject to terms and conditions. Failure to comply with such a term or condition does not, of itself, amount to unlawful conduct. However, where the beneficiary of an exemption fails to comply with a condition attached to the exemption, they will be deprived of the benefit of the exemption. They will then be subject to the requirements of the relevant disability standard or the DDA in the usual way.
- 7.9 In practical terms, the granting of a temporary exemption means that the activities or circumstances covered by it cannot be the subject of a successful complaint

under the DDA. Situations that might otherwise be unlawful under the DDA cannot be effectively contested through the usual discrimination complaints process, with its consequent legal remedies.

- 7.10 Pursuant to s 55(1) of the DDA, the Commission's exemption power is exercisable 'on application' and any exemption is to be granted 'by instrument'. An exemption is to be granted for a period, specified in the instrument, not exceeding 5 years (DDA s 55(3)(c)). Despite this temporal limitation, the Commission is empowered by s 55(2) of the DDA to grant a 'further exemption' on application made before the expiration of the specified period. An exemption or further exemption may be granted 'subject to such terms and conditions as are specified in the instrument' and 'may be expressed to apply only in such circumstances, or in relation to such activities, as are specified in the instrument' (DDA s 55(3)(a) and (b)).
- 7.11 Section 33A.1(2) of the Transport Standards confers power on the Commission to grant an exemption from compliance 'with some or all' of the Transport Standards. This power is exercisable only 'after receiving an application' under s 33A.1 (Transport Standards s 33A.1(2)) and only after consultation with the APTJC occurs in accordance with s 33A.1(4). Consistent with exemptions under the DDA, exemptions from the Transport Standards 'must not be granted for a period of more than 5 years' (Transport Standards s 33A.1(5)), however a 'further exemption' can be granted on application made before the expiration of the specified period (Transport Standards s 33A.1(3)). The present application is for an initial exemption not a 'further' exemption.
- 7.12 Notwithstanding the few express limitations referred to above, the Commission's power to grant exemptions from compliance with the DDA and the Transport Standards is otherwise unconfined. Consistent with established principles of administrative law, the Commission's statutory discretion must be exercised in conformity with the subject matter, scope and purpose of the legislation under which it arises: *R v Australian Broadcasting Tribunal; Ex parte 2 HD Pty Ltd* (1979) 144 CLR 45 at 49; *FAI Insurances Ltd v Winneke* (1982) 151 CLR 342 at 368; *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at 40; *O'Sullivan v Farrer* (1989) 168 CLR 210 at 216; *Oshlack v Richmond River Council* (1998) 193 CLR 72 at [22], [31].
- 7.13 The objects of the DDA are stated in s 3 to be:
- (a) to eliminate, as far as possible, discrimination against persons on the ground of disability in the areas of:
 - (i) work, accommodation, education, access to premises, clubs and sport; and
 - (ii) the provision of goods, facilities, services and land; and
 - (iii) existing laws; and
 - (iv) the administration of Commonwealth laws and programs; and
 - (b) to ensure, as far as practicable, that persons with disabilities have the same rights to equality before the law as the rest of the community; and
 - (c) to promote recognition and acceptance within the community of the principle that persons with disabilities have the same fundamental rights as the rest of the community.

- 7.14 By conferring an exemption power on the Commission, the Australian Parliament has clearly contemplated that some discriminatory conduct might be justified and that, in certain circumstances, derogation from the terms of the DDA and the Transport Standards is permissible.
- 7.15 However, this exemption power must be interpreted in light of the objects of the DDA and the legislative scheme as a whole. The DDA defines discrimination and makes discrimination on the grounds of disability unlawful. The grant of an exemption pursuant to s 55 of the DDA and s 33A.1 of the Transport Standards has the effect of taking relevant conduct out of the DDA's prohibitions and denying redress to a person who is affected by that conduct for the period covered by the exemption. The effect of granting a temporary exemption is to qualify the norms of conduct that the DDA and the Transport Standards seek to establish.
- 7.16 As the DDA and the Transport Standards already provide for permanent exemptions and defences that render any alleged discrimination not unlawful, and because the Commission's exemption power must be interpreted in light of the objects of the DDA and the Transport Standards, the Commission considers that temporary exemptions should not be granted lightly. In exercising its statutory discretion, the Commission must have regard to the circumstances of each individual case and balance the relevant factors. Given the significant legal consequences for potential complainants, the Commission must be satisfied that a temporary exemption is appropriate and reasonable, and persuasive evidence is needed to justify the exemption.
- 7.17 The Commission issued guidelines in 2010 (see [3.3.4]) concerning the way in which it proposes to exercise its power under the DDA. These provide that the Commission will consider:
- whether an exemption is necessary
 - whether granting an exemption would be consistent with the objects of the DDA
 - an applicant's reasons for seeking an exemption
 - submissions by interested parties
 - all relevant provisions of the DDA, and
 - any terms or conditions subject to which an exemption might be granted.
- 7.18 The Commission's guidelines do not expressly deal with the Commission's powers to grant exemptions under the Transport Standards. However, the Commission considers that the factors that are relevant to the exercise of its powers under the DDA are also relevant to the exercise of its powers under the standards.

8 PRELIMINARY VIEW TO REFUSE EXEMPTION

- 8.1 The Commission is of the preliminary view that it will not grant a temporary exemption from:
- the requirement that all bus stops supplied and maintained by the City of Ryde Council be in full compliance with the Transport Standards after 31 December 2022.

The application

- 8.2 The City of Ryde Council has recognised that not all the bus stops that it supplies and maintains will meet the Transport Standards by the deadline of 31 December 2022 and has made this application for a temporary exemption.
- 8.3 In its application, the City of Ryde Council recognises that ‘the subject matter of this application is the timeliness of the applicant in upgrading the public bus stops that it supplies and maintains in accordance with the target dates that are set by [the Transport Standards].³
- 8.4 The application submits that the City of Ryde Council has conducted extensive upgrades to over 300 bus stops within its jurisdiction but that there have been multiple factors that have inhibited its capacity to meet the compliance requirements of the Transport Standards. These factors are set out comprehensively in the City of Ryde Council’s application⁴ but are summarised below:

Existing topography: The Transport Standards require flooring at the boarding point of a bus stop to be ‘firm and level’. While this requirement is readily achievable on land that is already level, some topography in the City of Ryde LGA is not level. This includes naturally steep and hilly areas and areas where it is not always possible to excavate and re-build the land on which a particular bus stop is located. Changing the levelness would require changing the gradient of the roadway and kerb, or else the conditions of the adjacent lots, or potentially both. There may be environmental and technological factors making such actions unsound (e.g. for drainage or inground services issues) or fraught with legality and ownership issues (such as for roadways and kerbs which are not under the applicant’s ownership but nonetheless have a fundamental influence on the potential for accessibility at any given bus stop location).

Legacy infrastructure: Most of the bus stops within the City of Ryde LGA are legacy infrastructure. The City of Ryde itself was established some 150 years ago. The locations of the bus stops predate the entry into effect of the Transport Standards by many decades. Further, the design of the bus stop infrastructure pre-dates the accessibility criteria of the Transport Standards.

Coordination and direction from State authorities: The City of Ryde Council, as a local government authority, seeks to collaborate with relevant State authorities in the provision of public transport services and infrastructure wherever possible. This includes planning and coordination, the ordering of priority areas, resource allocation, mutual feedback and the formulation and compliance with guidelines. The City of Ryde Council’s Disability Inclusion Action Plan (DIAP) aims to be well aligned with the Transport for NSW DIAP in this regard. In practice, however, the degree of coordination with State authorities over the years has been lower than would be desirable. This has resulted in delays in the understanding of

³ City of Ryde Council, *Application for Temporary Exemption from DSAPT for Bus Stops: Access Report*, 16 November 2021, page 13, available at <https://humanrights.gov.au/our-work/legal/exemption-applications-under-disability-discrimination-act-1992-cth>.

⁴ *Ibid*, pages 16–18.

needs and priorities. This in turn has impacted the City of Ryde Council's ability to meet the Transport Standards' target dates.

Council amalgamations: During 2015–2016, the State of NSW considered the possibility of amalgamating local councils. The possibility of an amalgamation between the City of Ryde and another LGA created uncertainty for the applicant. In particular, it affected the ability of the City of Ryde Council to plan with certainty the remaining phases of its bus stop upgrade program. While it was ultimately decided that an amalgamation between the City of Ryde LGA and another LGA would not proceed, the result was an 18-month delay in the bus stop upgrade program.

Covid-19 pandemic: More recently, the City of Ryde Council has been affected by the Covid-19 pandemic, starting from early in the year 2020 and extending until the present day. This has resulted in a significant impact on funding and budgetary commitments, in part due to reductions in revenue from developer levies. The Covid-19 pandemic has also meant restrictions in the availability of contractors for the construction of upgrade works for bus stops. Reduced mobility due to the pandemic and lockdown measures have impacted the City of Ryde Council's ability to refine the upgrade rollout plan through further study and engagement with the community on priority issues and locations.

- 8.5 In its application, the City of Ryde Council proposed that certain terms and conditions could attach to the grant of a temporary exemption. These included that the City of Ryde Council would:
- commit to a comprehensive plan to upgrade its bus stops (in accordance with Schedule 2 of its application)
 - commit to continuing to receive regular feedback from customers about the efficiency of its bus stops and to fast-tracking an upgrade if there was a critical mass of people requesting it
 - commit to the development of a new four-year DIAP with a working group that included people with lived experience of disability
 - commit to certain initiatives to minimise and reduce hardship for members of the community when accessing bus services.
- 8.6 Notwithstanding its final decision in this matter, the Commission considers that these initiatives will significantly benefit people with disability in the City of Ryde LGA and encourages the City of Ryde Council to continue to undertake them.
- 8.7 The City of Ryde Council also included several questions to the Commission in its application regarding technical aspects of compliance with the Transport Standards. The Commission cannot provide legal advice on these issues and recommends that the applicant seek its own independent advice.

Consideration

- 8.8 The purpose of the Transport Standards is stated to be ‘to enable public transport operators and providers to remove discrimination from public transport services’ (s 1.2(2)). The Transport Standards apply ‘to the widest possible range of people with disabilities as defined by the [DDA]’ (s 1.4) and apply ‘to all operators [and providers] and the conveyances they use to provide public transport services’ (s 1.4).
- 8.9 The Transport Standards are framed around the concept that public transport services and facilities will progressively become more accessible to people with disability as existing, non-compliant conveyances, infrastructure and facilities are replaced with newer, compliant conveyances, infrastructure and facilities.
- 8.10 This is emphasised in s 1.2 of the *Disability Standards for Accessible Public Transport Guidelines 2004 (No. 3)* where it states:
- (1) The purpose of the *Disability Standards for Accessible Public Transport 2002* (referred to in these Guidelines as the Disability Standards) is to remove discrimination on the basis of disability from public transport services over a 30-year period.
 - ...
 - (4) Under the Disability Standards, public transport services and facilities will become more accessible by:
 - (a) the replacement or upgrading of conveyances, premises and infrastructure in accordance with the compliance timetable outlined in Schedule 1 to the Disability Standards (usually at the end of their service lives); and
 - (b) the requirement that, from the commencement of the Disability Standards, all new items comply with the requirements of the Disability Standards.
- 8.11 It is also reflected in s 33.2 which states:
- (1) Existing public transport will progressively become accessible over a 20-year period with substantial access within 10 to 15 years (30 years for trains and trams).
 - (2) The *Disability Discrimination Act 1992* obliges transport operators and providers to comply with the Disability Standards in relation to their services and to adhere to the compliance targets.
- 8.12 The target dates for compliance with the Transport Standards have been part of the Transport Standards since the date they came into operation in 2002. This means that providers of public transport services and infrastructure, such as the City of Ryde Council, had over twenty years of notice that Australia’s public transport networks and associated infrastructure are required to be fully compliant with the Transport Standards by the end of 2022 (except for trains and trams which have until the end of 2032).
- 8.13 Operators and providers can achieve compliance with the Transport Standards in one of two ways:

- by complying with the relevant specifications in the Transport Standards before the target dates, or
- by offering equivalent access (discussed in more detail below).

8.14 The progressive realisation model of the Transport Standards meant that interim targets dates for compliance were included in the Transport Standards and have been public for the past two decades. Any bus stop constructed after the Transport Standards came into effect in 2002 is required to comply with the Transport Standards. In addition, Schedule 1 of the Transport Standards sets out the following timeline by which all existing bus stops are required to comply with the Transport Standards:

- 31 December 2007 – 25% of bus stops
- 31 December 2012 – 55% of bus stops
- 31 December 2017 – 90% of bus stops
- 31 December 2022 – 100% of bus stops

8.15 This means that, from 1 January 2018 — nearly five years ago — 90% of existing bus stops have been required to comply with the relevant Transport Standards.

Public consultation

8.16 The Commission received 5 submissions from interested stakeholders on the City of Ryde Council's application for a temporary exemption, including a joint submission from the Australian Federation of Disability Organisations and the National Inclusive Transport Advocacy Network (the joint submission of AFDO and NITAN).

8.17 These submissions are all public on the Commission's website. None of the submissions supported the Commission granting the temporary exemption requested. Broadly, the submissions either explicitly opposed the request for a temporary exemption or raised concerns about the 5-year period requested by the applicant.

8.18 The majority of APTJC members made no comment on the application.

8.19 The joint submission of ADFO and NITAN submitted that:

The reasoning being used by the City of Ryde to further defer their compliance to [the Transport Standards] is somewhat offensive to people with disability, the disabled community, their families, supporters and the Ryde community. A COVID environment has only existed since March 2020 and not for the entire period of their infrastructure non-compliance. Further, council amalgamations should have played no bearing in relation to this matter as, no matter which council was the eventual owner of the non-compliant infrastructure, they have obligations under [the Transport Standards].

...

We are dismayed that these reasons have been advanced as a defence for what is at its crux, poor planning and prioritisation by the City of Ryde.

...

It is our view that the [Commission] should not be placed in the position of bailing out infrastructure owners and operators that have not adequately budgeted and program managed [Transport Standards]-required compliance works.

8.20 Blind Citizens Australia submitted:

We have several significant concerns about the application by the Council and the exemption report prepared by Morris Goding Consulting (MGAC) and believe it does not meet the criteria for reasonableness set by the Commission's own guidelines for exemption applications. It is the firm position of BCA that the exemption should not be granted.

...

Secondly, we have concerns about the priority given to compliance with the requirements of the [Transport Standards], given the approach taken by the City of Ryde Council throughout this process. While we can understand that the proposed (and ultimately abandoned) council amalgamation in 2015-16 would have created some unforeseen delays, the inclusion of a set of four 'clarification' questions in an application for a five-year exemption to the [Transport Standards], a mere seven months from the legislated completion date, indicates this process has been neglected for a long time. Similarly, while we recognise the challenges posed by the Covid-19 pandemic, this cannot be used as a catch-all excuse and does not warrant the five-year exemption the Council is seeking.

8.21 Physical Disability Australia submitted:

The [Transport Standards have] been part of Australian law for almost 20 years now and include many generous and easy-to-comply-with timetables for vehicle and infrastructure modification. From our perspective, there is no excuse for well-funded government entities (such as the City [of Ryde]) not to meet past and future compliance deadlines.

...

The fact that this schedule allows the glacial progress in making public transport infrastructure accessible to commuters with disability means that the City has been effectively already been provided with a 20 year exemption from the need to obey these important laws already. In general terms, we see no pressing need for this Local Government entity to be granted an exemption from complaint and the need to respond should a commuter with disability choose to make one.

8.22 The Commission considers that there is considerable force in such submissions. In passing the DDA and making the Transport Standards, the Australian Government sought to reverse a history of exclusion from areas of public life for people with disability. It created a comprehensive regime intended to ensure the increasing accessibility of public transport for people with disability. The DDA and the Transport Standards contain a number of provisions that offer latitude and flexibility to public transport operators and providers in bringing about this change. These include the 'equivalent access' provisions under the Transport Standards, the adoption of target dates for gradual, progressive compliance for existing bus stops, and the availability of a defence of unjustifiable hardship.

8.23 The City of Ryde Council has identified that it is unlikely to comply with the requirements of the Transport Standards and has already commenced a detailed audit and upgrade program of its bus stops. During its site visit on 13 May 2022, the Commission observed that current staff at the City of Ryde Council appear

genuinely dedicated to increasing the accessibility of bus stops for people with disability in their community. This is commendable. However, in committing now to a plan to upgrade its bus stops, the City of Ryde Government has principally undertaken, within five years, to meet a legal obligation that has existed since the Transport Standards came into effect in 2002. The Commission is not persuaded that the reasons advanced in favour of the exemption outweighs the impact on people with disability who may experience discrimination in the meantime.

- 8.24 The DDA has been in operation since 1993 and the Transport Standards have been in effect since 2002. This is significant because the Transport Standards represent a national commitment to the community, particularly people with disability, that public transport services, infrastructure and facilities will progressively become more accessible as existing non-compliant infrastructure, facilities and conveyances are replaced with compliant infrastructure, facilities and conveyances. This commitment is undermined if non-compliant infrastructure, facilities and conveyances are not upgraded in line with the targets set by the Transport Standards and then exempted readily from the ordinary application of the DDA and the Transport Standards.
- 8.25 The Commission considers that there is significant public interest in the predictable application of longstanding anti-discrimination law and the national standards. Proposed exemptions to this beneficial legislation, and its concomitant complaint process, must be carefully assessed on a case-by-case basis. The public submissions received by the Commission reflect that there is an expectation in the community that laws relating to disability discrimination will be taken seriously.
- 8.26 As discussed above, Schedule 1 of the Transport Standards provides the following timeline by which existing bus stops are required to comply with the Transport Standards:
- 31 December 2007 – 25% of bus stops
 - 31 December 2012 – 55% of bus stops
 - 31 December 2017 – 90% of bus stops
 - 31 December 2022 – 100% of bus stops
- 8.27 As identified in some of the public submissions received by the Commission, several factors advanced by the City of Ryde Council as affecting its capacity to meet the Transport Standards targets, such as the COVID-19 pandemic and uncertainty around council amalgamations in 2015–2016, are dated after significant upgrade work should have already been completed under the Transport Standards. Between 1 January 2018 and 31 December 2022, the percentage of bus stops remaining non-compliant under the Transport Standards should only account for 10% of the total number of existing bus stops. The number of bus stops marked as ‘to be completed’ in Schedule 2 of the City of Ryde Council’s application suggests that progression may not have been made in accordance with the timeline in the Transport Standards. On the information before the Commission, it is not clear why this is the case, and the Commission welcomes further information from the applicant on this issue.
- 8.28 The Commission appreciates that the COVID-19 pandemic would have had a very real and significant impact on the ability of the applicant to progress bus stop upgrades or any construction work associated with compliance with the Transport Standards. If it was clear from the information before the Commission that this

event had displaced a planned and funded project of works that had met, and was projected to meet, the percentages and target dates in the Transport Standards, this reason would be more persuasive. Again, the Commission welcomes further information from the applicant on this issue.

- 8.29 1 January 2023 is when 100% of all public transport services (except trains and trams) are required to fully comply with the relevant Transport Standards. This date has been long anticipated and is a significant milestone for the community, particularly for people with disability. It also means that the effect of granting an exemption will potentially have a greater impact on the rights of people with disability than if granted at an earlier stage in the timeline.
- 8.30 In its preliminary view, the Commission is not convinced that the reasons provided by the applicant are sufficiently persuasive to grant the exemption and suspend the rights of people who might experience discrimination during this time to make a complaint under the DDA.

Non-compliances post-upgrade and unjustifiable hardship

- 8.31 In its application, the City of Ryde Council states:

[The Transport Standards] requires the flooring at the boarding point of a bus stop to be 'firm and level'. This requirement is readily achievable on land that is already level.

The existing topography of the City of Ryde LGA is, however, not level. The extents of the LGA include the steep riparian zones along the Parramatta River to the south and along the Lane Cove River to the east and north. The extents of the LGA also include naturally hilly areas in the majority of the constituent suburbs, such as in Macquarie Park and North Ryde. The Applicant supplies and maintains numerous bus stops in all of those areas.

The requirement for level boarding point is achievable if there is scope for the land upon which a given bus stop is located to be excavated and re-built to be 'level'. This however is not always a practical possibility. The flooring of the bus stops would typically and practically follow the existing grade of the adjacent roadway and kerb. To change the flooring of the bus stops would require changing the gradient of the roadway and kerb, or else the conditions of the adjacent lots, or all of the above. Such modifications would frequently be implausible and excessive and grounds for unjustifiable hardship. There may be environmental and technological factors making such a proposal unsound (e.g.. for drainage or inground services issues) or fraught with legality and ownership issues (such as for roadways and kerbs which are not under the Applicants ownership but nonetheless have a fundamental influence on the potential for accessibility at any given bus stop location).

- 8.32 It also concludes:

The [City of Ryde Council] maintains that following exhaustive auditing and consideration of upgrade potential at all locations, that full technical compliance with the background [Transport Standards] requirements behind these questions is not achievable at all locations.⁵

⁵ City of Ryde Council, *Application for Temporary Exemption from DSAPT for Bus Stops: Access Report*, 16 November 2021, page 24, available at <https://humanrights.gov.au/our-work/legal/exemption-applications-under-disability-discrimination-act-1992-cth>.

- 8.33 This suggests that, even after the upgrade process, the applicant may not be able to bring all the bus stops that it supplies and maintains into compliance with the Transport Standards.
- 8.34 The Commission considers that, in the long-term, it is appropriate for public transport providers and operators to either comply with the Transport Standards or to rely, where appropriate, on the defences available to them.
- 8.35 Pursuant to s 33.7(1) of the Transport Standards, it is not unlawful to fail to comply with a requirement of the standards if, and to the extent that, compliance would impose unjustifiable hardship on any person or organisation. A similar provision exists in ss 11 and 29A of the DDA.
- 8.36 If a final decision is made by the Commission to refuse to grant this temporary exemption, such a decision would not prevent the applicant from seeking to establish a defence of unjustifiable hardship in response to any complaints. The Commission does not regard it as appropriate to use its power to grant temporary exemptions to certify, potentially on a continuing basis, that unjustifiable hardship exists.

Equivalent Access

- 8.37 Operators and providers can achieve compliance with the Transport Standards in one of two ways:
- by complying with the relevant specifications in the Transport Standards before the target dates, or
 - by offering equivalent access.⁶
- 8.38 Equivalent access allows operators and providers to vary the equipment or facilities that give access to public transport for people with disability, so long as an equivalent standard of amenity, availability, comfort, convenience, dignity, price and safety is maintained.
- 8.39 Equivalent access may involve the provision of direct assistance.⁷ Direct assistance is help given by an operator or provider:
- to make public transport accessible to a person with disability when premises, infrastructure or conveyances do not comply with the specifications of the Transport Standards, or
 - to provide non-discriminatory access on request.⁸
- 8.40 Equivalent access cannot be provided by offering a segregated or parallel service.⁹

⁶ *Disability Standards for Accessible Public Transport 2002* (Cth) s 33.3(1).

⁷ *Disability Standards for Accessible Public Transport 2002* (Cth) s 1.16.

⁸ *Disability Standards for Accessible Public Transport 2002* (Cth) s 1.15.

⁹ *Disability Standards for Accessible Public Transport 2002* (Cth) s 1.16(2).

- 8.41 If specifications in the Transport Standards are unlikely to be achieved by the target dates, the Commission encourages the applicant to consider whether equivalent access is being offered or could be offered.
- 8.42 The Commission has produced recent guidelines on equivalent access titled '*Equivalent Access under the Disability Standards for Accessible Public Transport 2002 (Cth)*' which is available at <https://humanrights.gov.au/our-work/disability-rights/publications/guidelines-equivalent-access-under-disability-standards>

A handwritten signature in black ink, reading "Rosalind Croucher". The signature is written in a cursive, flowing style.

Signed by the President, Emeritus Professor Rosalind Croucher AM on behalf of the Commission.

22 December 2022

SCHEDULE ONE

SUBMISSIONS RECEIVED

The Commission received submissions from the following organisations:

- Australian Federation of Disability Organisations and the National Inclusive Transport Advocacy Network
- Blind Citizens Australia
- Disability Council NSW
- National Inclusive Transport Advocacy Network
- Physical Disability Australia

Copies of all submissions are available on the Commission website at www.humanrights.gov.au/disability_rights/exemptions