

Is a handrail required around a free-standing patio or deck?

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The situation

A timber deck is to be constructed around two fig trees, and which will be accessible by a timber ramp at one end and at one side, and a timber ramp (or steps instead) at the other end. The end ramps and one edge of the deck occupy part of the width of a public footpath alongside a roadway. The height of the deck varies, but it is up to approximately 600mm above surrounding ground level. The deck is to be a public facility. The proposed structure is located in metropolitan Sydney.

The question is whether handrails should be provided for greater accessibility and safety.

Building legislation

With regard to building legislation, were this structure to be connected to or part of a building, it would have to comply with the Building Code of Australia (BCA). However, the BCA does not require handrails for structures such as this that are under one metre above the ground or floor. However, the fact that the BCA does not require handrails does not mean that their provision would not therefore be desirable for reasons of safety – see further below. In any case, the structure is not connected to a building and it is therefore outside the BCA.

Access Legislation

With regard to access legislation, HREOC uses AS1428 as a technical guide to access provisions under the Disability Discrimination Act (DDA) - as demonstrated in its Advisory Notes on Access to Premises. The fact that the Advisory Note refers to Premises does not preclude it being applied to other-than-premises. The Note is not a prescriptive document. It can therefore serve as indication of what is likely to be held by HREOC under the DDA as being appropriate for other-than-premises.

The timber deck is to be a special feature, to provide a special experience for members of the public. Consequently, regardless of the above, because it is known that many people require balance support whilst negotiating steps and ramps, absence of handrails would compromise the amenity for such people of the ramps and deck, and could prevent them

from using and enjoying the deck. Such deprivation of amenity and enjoyment is at odds with the DDA. Non-provision of handrails at the ramps (or ramps and steps) could be grounds for successful complaint under the DDA.

For the above reasons, I believe that the ramps, and steps if they are to be provided, should have handrails (and kerbs etc., or have a graded verge etc) as indicated in AS1428 so as to satisfy the DDA.

With regard to handrails (and kerbs etc) around the timber deck itself, the DDA (but see below) and AS1428 are silent. Nor, it appears, has there been any complaint under the DDA related to such a situation, the outcome of which would provide guidance. In relation to the deck, the issue is one of safety rather than access.

Safety and Access Legislation

Insofar as it is reasonable to assume that the DDA would not provide for unsafe access and opportunities, it follows that equity of safe access and opportunities is inherent within the DDA. Nevertheless, there is no specific reference in the DDA to "safety", although there are four in the "Advisory Notes on Access to Premises": one in relation to information at lifts; two in relation to establishing unjustifiable hardship; and one in relation to slip-resistance of (pedestrian) surfaces.

Accepting that requirement for safety is inherent within the DDA, establishing whether there is discrimination because of a hazard might nevertheless be problematical because the hazard might be the same for many people with a disability as it is for the general population. On the other hand, except possibly for considerations of unjustifiable hardship, the number of people with a disability who may be adversely affected is irrelevant under the DDA. For the deck without handrails, it is people who are blind or vision impaired who could be most vulnerable to hazard because they might not be able discern the perimeter of the deck and for whom, therefore, the unprotected perimeter could be discriminatory under the DDA. However, many people who are blind or vision impaired use canes or guide dogs and would therefore probably be able to discern the perimeter. This would still leave people with impaired vision who do not use a cane or guide dog and who might be unable to discern the perimeter. Incorporation at the perimeter of the deck of tactile and visual cues (in the form of Tactile Ground Surface Indicators, tonal contrast, and possibly a kerb or kerb rail) might be sufficient to enable people who are blind or vision impaired to discern the perimeter and might thus satisfy the DDA. However, it might take a case under the DDA to confirm whether such cues are adequate.

In addition to its function as a safety navigation aid for people who are blind or vision impaired, a kerb or kerb rail would have the advantage of minimising the possibility of wheelchairs or wheeled walking aids rolling off the deck. However, I have concerns about a kerb or kerb rail lest they act as a tripping hazard for pedestrians and increase, not decrease, the hazard of the deck perimeter. On the other hand, it could be argued that a person who would trip on a kerb or rail would have, if the kerb or rail were at the edge of the deck, fallen off the deck were there no kerb or rail anyway, but I am not confident about, and therefore would not recommend using this argument. The contribution of a kerb or rail to a fall off the deck could possibly be minimised by setting the kerb or rails further away from the deck edge. However, it is possible that the kerb or rail could become an even greater tripping hazard, although not necessarily off the deck. This hazard could in turn be minimised by appropriate tonal contrast treatment.

Many people with a disability, including the elderly, would be at greater risk of falling off the deck because they would not be able to take the compensatory action that other people would upon realising that they were about to step off or be accidentally pushed off the deck. This highlights equity considerations with regard to safety and people with a disability, however it is of little help in determining responsibly whether there should be handrails or similar around the deck.

Many people with a disability, including the elderly, will sustain greater injuries and possibly also consequential injury or illness if they fall off the deck than younger people and others without a disability. This also highlights equity considerations with regard to safety and people with a disability. However, extent of injury is obviously an unsound basis for deciding upon handrails.

Regardless of any of the above, the fact is that without a handrail or other suitable barrier, there is risk of persons stepping and falling off the deck and with the high probability of sustaining injury as a result. The matter may therefore be one of civil responsibility and avoidance of action under Common Law.

Safety and Common Law

Whether this is a matter of potential civil liability may depend upon whether, and to what extent the deck forms part of a public road and is the responsibility of the local Council or to what extent it is the responsibility of a person or entity other than a Council or other road authority. If it were the responsibility of an entity other than a Council or road authority, liability for injury sustained from a fall off the deck would probably be borne by that other person or entity because it could

possibly be held that it could reasonably have been foreseen that persons might step or fall off the deck and injure themselves.

As noted above, the timber deck is to be a special feature that, for this very reason, will tend to attract people to it. The outcome of the recent civil case on the Gold Coast may therefore be applicable to the proposed deck. The case related to the injury of a youth who climbed up on a wide-topped balustrade and dived for his enjoyment but to his great detriment into a canal: the owners of the balustrade were held liable. In coming to the finding, it was stated that the width of the balustrade not only facilitated but also "invited" the youth onto it as a de-facto diving platform.

If the deck is the responsibility of a local council in New South Wales, it is possible that the Council would not be liable for any injury from a fall off the deck. This view is based on an opinion given to Statewide Mutual Insurance Company in relation to tactile Ground Surface indicators by a Senior Counsel, P R Garling, (December 2000). He advised that: 'a Council as a road authority does not thereby owe a duty of care to all road users. The mere fact that a Council has the effective care, control and management of a footpath, or that a footpath is vested in fee simple in a Council, does not give rise to any civil liability, nor is it a relevant factor to be considered.'

Summary

It appears that the ramps and any steps would need to have handrails in order for them to satisfy the DDA and its requirements for access and safety, and that there are grounds for concluding, but not certainly, that the deck should have handrails or other barriers for it also to satisfy the DDA - in relation to safety. In any event, in relation to safety, the issue may be more strongly one of public safety and duty of care. For this reason, and to clarify the matter of liability of the relevant Council, the client should seek appropriate legal and insurance advice.

There are other matters that also should be considered and that have not been discussed here. For example, the contribution to a possible slip hazard of leaf and fruit fall from the fig trees, and appropriate signification of the commencement of ramps and steps at their ends.

If a handrail or other balustrade is considered aesthetical inappropriate by the client, alternatives that may be worth considering are continuous seating or plant boxes, or a combination of these.

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