



6 March 2020

Kingsford Legal Centre

Submission to the Statutory Review of NSW Strata Schemes Laws

We welcome the opportunity to make a submission to the Statutory Review of the NSW Strata Schemes Laws. Our submission addresses questions 87, 88, 89 and 90 (pets and assistance animal by-laws) and question 122 (sustainability infrastructure in strata schemes).

We consent to this submission being published. For all case studies in this submission, names and identifying information have been changed to protect confidentiality.

Summary of recommendations

Our recommendations are as follows:

1. Recommendation 1: The NSW Government should amend section 139 of the *Strata Schemes Management Act 2015* (NSW) (**Management Act**) to clarify and limit what evidence can be requested to prove that an animal is an assistance animal and to make it clear that an animal in the process of being trained as an assistance animal should also be treated as an assistance animal;
2. Recommendation 2: The NSW Government should advocate for the Federal Government to amend section 54A(5) of the *Disability Discrimination Act 1992* (Cth) (**DDA**) to similarly clarify and limit what evidence can be requested to prove that an animal is an assistance animal;
3. Recommendation 3: The NSW Government should establish a central accreditation scheme for assistance animals that would meet the requirements of section 9(a) of the DDA. Accreditation under this scheme should be an option, but not a requirement, for establishing that an animal is an assistance animal as contemplated by section 9 of the DDA;
4. Recommendation 4: The Management Act should outline what kinds of evidence are sufficient to prove that an animal is an assistance animal. Such evidence

should be as straightforward to access as possible, not require any information about the person's specific medical condition and be in accordance with section 54A(5) of the DDA;

5. Recommendation 5: The law should not, as a general rule, allow owners corporations to completely ban pets from a strata scheme. Section 137B of the *Strata Schemes Management Amendment (Sustainability Infrastructure) Act 2021* (NSW) (**Sustainability Infrastructure Act**) is a positive amendment;
6. Recommendation 6: The NSW Government should prevent by-laws that prohibit or restrict the installation of sustainability infrastructure in certain circumstances, such as by-laws that prohibit or restrict solar panel installations merely to enhance or preserve the external appearance of a building.

About Kingsford Legal Centre

Kingsford Legal Centre (**KLC**) provides free legal advice, casework and community legal education to our local community in south-east Sydney since 1981. We are part of the UNSW Law & Justice Faculty and provide clinical legal education to over 500 of its students each year.

We have extensive experience in giving legal help to people living in strata. We give legal help to both renters and owner-occupiers in strata.

We also specialise in discrimination law and have a state-wide Discrimination Law Clinic. In 2020, 24% of our clients were people with a disability. We gave 120 disability discrimination advices and provided intensive assistance with 30 disability discrimination matters.

Question 87: Under the law, a by-law cannot ban assistance animals e.g. guide dogs. Are any changes needed to the way the laws govern assistance animals?

As part of our Discrimination Law Clinic, we frequently assist clients who have been discriminated against on the basis of their disability, including due to having an assistance animal. Whilst it is against the law for a person to be discriminated against for having an assistance animal under section 9 of the DDA, this continues to be an area of issue.

The definition of “disability” in the DDA is broad and includes both physical and mental disabilities. An “assistance animal” is also broadly defined as a “dog or other animal...”. As has been highlighted in the Discussion Paper, an assistance animal assisting to

alleviate its owner's mental disabilities may not be as readily apparent to other people as a person who is blind with a guide dog. There is often a general misconception that an assistance animal must be a dog, and that the disability must be a physical one.¹

Whilst section 139(5) of the Management Act expressly restricts by-laws that would prevent the keeping of an assistance animal in line with the DDA, section 139(6) allows for by-laws requiring a person to provide evidence that an animal is an assistance animal. Under section 54A(5) of the DDA, it is not unlawful for a person to request that the person with the disability produce evidence that the animal is an assistance animal, or that the animal is trained to meet standards of hygiene and behaviour that are appropriate for an animal in a public place. As discussed further below, neither the Management Act nor the DDA provide much clarity on what type of and how much evidence is required to prove an animal is an assistance animal.

Our Centre has seen that in practice this is an issue of contention within strata lots. Hugo's story below highlights some of the issues that can arise.

Hugo's story

Hugo, a pensioner with several physical and psychological disabilities, came to KLC for assistance after his owners corporation had issued him with a notice to remove his assistance animal, Patch, a Jack Russell. Hugo got Patch after his doctor recommended that he have an assistance animal to assist him with everyday living. Hugo had Patch as a puppy and was in the process of having him trained through an accredited assistance animal training organisation. As Patch was still in training, he had not yet completed his training or received any certification. Despite providing evidence from Hugo's doctor about the need for Patch, evidence from the training organisation that Patch was completing the program, as well as evidence Patch had been registered as an assistance animal with the local council, the owners corporation refused to agree to let Patch stay. KLC assisted Hugo to make a disability discrimination complaint to the Australian Human Rights Commission (**AHRC**) and assisted him throughout the complaints process. This process took many months and was very stressful and upsetting for Hugo as he was also living alongside members of the owners corporation throughout this time. Eventually, and before the complaint was resolved, Hugo moved out of the premises and withdrew his complaint due to the distress that it was causing him.

¹ NSW Government, *Statutory Review of the NSW Strata Schemes Laws* (Discussion Paper, November 2020) 46.

There is a lack of legislative guidance on the criteria for what training is required for an animal to be considered an assistance animal under the DDA. The phrase “animal training organisation” in section 9(b) of the DDA is not defined, and there is no explanation for what specific training is needed or what standards of hygiene and behaviour are required for a public place in terms of section 9(c) of the DDA. We note that in NSW there is also no centralised government accreditation scheme for assistance animals that would meet the requirements of section 9(a) of the DDA, creating further difficulties for a person asked to prove that an animal is an assistance animal.

The lack of legislative guidance contributes to uncertainty in the law, which in turn contributes to legal disputes, placing further strain on under-resourced tribunals and courts at both the federal and NSW state level. When disputes about assistance animals have ended up in court, the courts have recognised that there is no specific requirement for training to be performed by an accredited or recognised dog training body in order for a dog to be an assistance animal,² and that there is no specific threshold of training or certification which a dog must meet in order to be an assistance animal.³ It remains unclear how much and what type of evidence owners corporations can request or require of a person with an assistance animal, contributing to situations like Hugo’s where an owners corporation prevents a person from living safely with the support they need.

In relation to question 90 below, we recommend that the law should not generally allow owners corporations to completely ban pets from a strata scheme. We note that this recommendation would remove barriers to having an assistance animal, as in many cases, the assistance animal would simply be allowed without any need to provide evidence. Nonetheless, the law should provide clear pathways for people with a disability to access specific protection for assistance animals. This would provide additional protection for people with a disability and would be especially valuable in cases where a pet might reasonably not be allowed, but an assistance animal should be allowed.

Recommendation 1: The NSW Government should amend section 139 of the Management Act to clarify and limit what evidence can be requested to prove that an animal is an assistance animal and to make it clear that an animal in the process of being trained as an assistance animal should also be treated as an assistance animal.

² *Mulligan v Virgin Australia Pty Ltd* [2015] FCAFC 130 [127].

³ *Reurich v Jervis Bay Club* [2018] FCA 1220 [236].

Recommendation 2: The NSW Government should advocate for the Federal Government to amend section 54A(5) of the DDA to similarly clarify and limit what evidence can be requested to prove that an animal is an assistance animal.

Recommendation 3: The NSW Government should establish a central accreditation scheme for assistance animals that would meet the requirements of section 9(a) of the DDA. Accreditation under this scheme should be an option, but not a requirement, for establishing that an animal is an assistance animal as contemplated by section 9 of the DDA.

Question 88: Should owners corporations be allowed to request proof that an animal is an assistance animal?

As noted above, section 139(6) of the Management Act allows for by-laws requiring a person to provide evidence that an animal is an assistance animal, while section 54A(5) provides that it is not unlawful to request that the person with the disability produce broad categories of evidence about the animal. The Discussion Paper notes that the power to require evidence in the Management Act is intended to prevent circumvention of by-laws that control the keeping of other animals.⁴ Both the Management Act and the DDA are currently silent on what evidence owners corporations can request from a person with an assistance animal. We are concerned that this may be interpreted to mean that an owners corporation can request highly personal information such as medical records to make its own assessment.

As the Discussion Paper has highlighted, there is often a misconception that an assistance animal is limited to a seeing eye dog, rather than some other type of animal (for instance a cat) that may assist the person with the disability with other medical conditions, such as mental disabilities.⁵ In Hugo's case, the provision of evidence from Hugo's doctor and documents from Patch's training organisation was still not enough to satisfy the owners corporation, causing considerable stress for Hugo. This reinforces our recommendations above that section 139 of the Management Act and section 54A(5) of the DDA should be amended to clarify and limit what evidence can be requested to prove that an animal is an assistance animal.

⁴ NSW Government, *Statutory Review of the NSW Strata Schemes Laws* (Discussion Paper, November 2020) 46.

⁵ *Ibid.*

Question 89: Should the Management Act outline what kinds of evidence owners corporations can request as part of proving an animal is an assistance animal? If so, what kinds of information should be provided?

In our experience assisting clients who have been discriminated against due to having an assistance animal, it has been a recurring issue of contention what type of evidence can be sought and what type of evidence should be considered sufficient to prove that an animal is an assistance animal. In our experience advising lot owners and tenants in strata schemes, owners corporations often try to impose conditions that erode the person's rights under the DDA. For example, we have given advice in cases where the owners corporation has insisted that assistance animals pass accreditation tests annually and that evidence of this is provided. This is not something that is required in the DDA or in any other legislation for an animal to be considered an assistance animal. Any guidelines or examples should also make it clear that a lot owner or tenant in a strata scheme is able to train their assistance animal themselves, and does not need to do this training through an organisation (section 9(2)(c) DDA).

KLC believes it would be beneficial if the Management Act provided specific examples of evidence that would suffice for proving that an animal is an assistance animal. Any examples should be as straightforward to access as possible, not require any information about the person's specific medical condition and be in accordance with section 54A(5) of the DDA. Examples of the types of evidence that could be sufficient include:

- A letter from a doctor stating that the person requires an assistance animal for a medical condition and that the animal is trained or being trained as an assistance animal;
- A statutory declaration from the person who has an assistance animal stating that they require an assistance animal for a medical condition and that the animal is trained or being trained as an assistance animal;
- A letter from a registered assistance animal training organisation confirming that the animal is an assistance animal and is trained or being trained as an assistance animal;
- If a central assistance animal accreditation body is established, then a letter from that body confirming that the animal is an assistance animal or is being trained as an assistance animal.

Recommendation 4: The Management Act should outline what kinds of evidence are sufficient to prove that an animal is an assistance animal. Such evidence

should be as straightforward to access as possible, not require any information about the person's specific medical condition and be in accordance with section 54A(5) of the DDA.

Question 90: The NSW Court of Appeal found in 2020 that a by-law imposing a blanket ban on pets was oppressive and therefore invalid under the laws. Should the law allow owners corporations to completely ban pets from a strata scheme? Please tell us why.

The law should not, as a general rule, allow owners corporations to completely ban pets from a strata scheme. We agree with the NSW Court of Appeal in the *Cooper* case; a blanket pet ban that is not based on the impact of a pet on other lot owners is oppressive.⁶ Privacy is a human right,⁷ and we consider that banning a person from keeping a pet in their home would generally be a breach of the person's right to privacy.

Pets are greatly important within people lives. As the Discussion Paper notes, people often develop strong emotional bonds with pets and experience improved wellbeing from the relationship.⁸ A pet is often part of a person's family, or in some cases, the only family a person has. As with the loss of a human family member, the loss of a pet can be traumatic.

People with pets already face additional barriers in finding a suitable home for themselves and their (human and non-human) families. Blanket bans on pets worsen this problem by unnecessarily excluding people with pets from otherwise suitable homes. We are especially concerned by the impact of blanket pet bans on people who rent their home, as they may not only have issues with owners corporations in strata schemes, but also landlords of strata or non-strata housing.

We are also deeply concerned by the impact of blanket pet bans on people with a disability who require an assistance animal. We have referred above to the limitations of the current protections for people who require an assistance animal. These limitations are worsened by blanket pet bans, which often force people who require an assistance animal to be singled out as "different", and to challenge discriminatory by-laws via confusing and stressful legal processes. Maintaining and strengthening the *Cooper* decision will help to

⁶ *Cooper v The Owners – Strata Plan No 58068* [2020] NSWCA 250.

⁷ *International Covenant on Civil and Political Rights* article 17.

⁸ NSW Government, *Statutory Review of the NSW Strata Schemes Laws* (Discussion Paper, November 2020) 46.

make strata housing more accessible to people with a disability who require an assistance animal.

The Discussion Paper considers 4 reform options.⁹ These options have largely been made redundant by the Sustainability Infrastructure Act, which passed Parliament on 16 February 2021 and was granted assent on 24 February 2021.¹⁰

Section 137B of the Sustainability Infrastructure Act implements a combination of Options 2 and 4. It voids by-laws that unreasonably prohibit the keeping of an animal on a lot, while recognising that it is “reasonable to keep an animal on a lot unless the keeping of the animal unreasonably interferes with another occupant’s use and enjoyment of the occupant’s lot or the common property”. This amendment is beneficial for the right to privacy and reduces barriers to the right to housing, especially for people who rent and people with a disability who require an assistance animal. Section 137B is a positive amendment to the Management Act.

Recommendation 5: The law should not, as a general rule, allow owners corporations to completely ban pets from a strata scheme. Section 137B of the Sustainability Infrastructure Act is a positive amendment.

Question 122: What changes to the strata laws could encourage the uptake of sustainability measures in strata and how would they work?

We welcome the NSW Government’s interest in encouraging the uptake of sustainability measures in strata, including measures to reduce greenhouse gas emissions. We are gravely concerned by the impacts of climate change on marginalised people, who are hit first and worst by the issue. We join the community legal sector’s calls for all levels of government to rapidly reduce greenhouse gas emissions.¹¹

The housing sector in NSW “produces 26 per cent of NSW’s total greenhouse gas emissions (including electricity and car use), the largest contributor overall”.¹² We note with concern the recent statement by the Minister for Better Regulation and Innovation

⁹ Ibid.

¹⁰ Parliament of NSW, ‘Strata Schemes Management Amendment (Sustainability Infrastructure) Bill 2020’ <<https://www.parliament.nsw.gov.au/bills/Pages/bill-details.aspx?pk=3761>>.

¹¹ Community Legal Centres Australia, ‘CLCs Australia Positions on the Global Climate Crisis’ (Position Statement, December 2019) <<https://clcs.org.au/sites/default/files/2020-01/Climate%20Crisis-Public%20Positions%20December%202019.pdf>>.

¹² NSW Department of Planning, Industry and Environment, ‘A Housing Strategy for NSW’ (Discussion Paper, May 2020) 71 <<https://www.planning.nsw.gov.au/-/media/Files/DPE/Discussion-papers/Policy-and-legislation/Housing/A-Housing-Strategy-for-NSW--Discussion-Paper-2020-05-29.pdf>>.

that “less than 0.5 per cent of residential strata schemes across Australia have installed solar”.¹³ Given the large and growing number of NSW residents living in strata,¹⁴ the uptake of sustainability measures in strata has significant potential to reduce NSW’s contribution to climate change. Sustainability measures that improve energy efficiency will also reduce energy bills, easing cost-of-living pressures for people on lower incomes who live in strata.

The Discussion Paper contains a number of options for encouraging the uptake of sustainability measures in strata. While we do not wish to comment on every option, we support the proposal to prevent by-laws that prohibit or restrict the installation of sustainability infrastructure in certain circumstances, such as by-laws that prohibit or restrict solar panel installations merely to enhance or preserve the external appearance of a building. It does not appropriately balance rights to prioritise opinions about the appearance of a building over the need for a safe and healthy environment.

Queensland law provides examples of where sustainability infrastructure could be reasonably prohibited or restricted. This includes where a roof storage tank would be too heavy for the roof¹⁵ or where noise from the infrastructure would unreasonably interfere with a person’s use or enjoyment of the building.¹⁶ This illustrates a more appropriate balancing of rights.

The recently passed Sustainability Infrastructure Act is intended to encourage greater uptake of sustainability measures in strata.¹⁷ While this is a positive intention, the Sustainability Infrastructure Act does not implement our recommendation to prevent by-laws that inappropriately prohibit or restrict the installation of sustainability infrastructure. We hope that the NSW Government will promptly pass further laws to encourage the uptake of sustainability infrastructure in strata.

Recommendation 6: The NSW Government should prevent by-laws that prohibit or restrict the installation of sustainability infrastructure in certain

¹³ New South Wales, *Parliamentary Debates*, Legislative Assembly, 17 June 2020 (Kevin Anderson) <<https://www.parliament.nsw.gov.au/Hansard/Pages/HansardResult.aspx#docid/HANSARD-1323879322-111003>>.

¹⁴ NSW Department of Customer Service, ‘Statutory Review of the NSW Strata Schemes Laws’ (Discussion Paper, November 2020) <<https://www.haveyoursay.nsw.gov.au/63252/widgets/320220/documents/189097/download>>.

¹⁵ *Building Act 1975* (Qld) s 246O(3).

¹⁶ *Building Act 1975* (Qld) s 246Q(2).

¹⁷ New South Wales, *Parliamentary Debates*, Legislative Assembly, 17 June 2020 (Kevin Anderson) <<https://www.parliament.nsw.gov.au/Hansard/Pages/HansardResult.aspx#docid/HANSARD-1323879322-111003>>.

circumstances, such as by-laws that prohibit or restrict solar panel installations merely to enhance or preserve the external appearance of a building.

Conclusion

For many people in our community, a strata property is their home. This includes both renters and owner-occupiers in strata. We are particularly concerned by the impact on people living in strata of inappropriate by-laws and owners corporation decisions regarding assistance animals and pets. It is hard already for marginalised people to find and keep suitable housing, without the additional barriers that inappropriate by-laws and owners corporation decisions place in their way.

We are pleased by the amendment in section 137B of the Sustainability Infrastructure Act. This will reduce barriers to the right to housing for people with pets and people with a disability who require an assistance animal. We call for stronger, specific laws for people who require an assistance animal to provide clear pathways for accessing protection, guard against inappropriate requests for proof and provide for situations where a pet might reasonably not be allowed, but an assistance animal should be allowed.

If you have any questions about this submission, please contact Emma Golledge at legal@unsw.edu.au.

Yours Faithfully

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