

Submission to 2022 Review of the Transport Standards

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About the Public Interest Advocacy Centre

The Public Interest Advocacy Centre (PIAC) is a leading social justice law and policy centre. Established in 1982, we are an independent, non-profit organisation that works with people and communities who are marginalised and facing disadvantage.

PIAC builds a fairer, stronger society by helping to change laws, policies and practices that cause injustice and inequality. Our work combines:

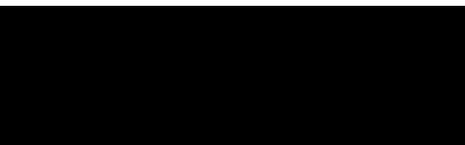
- legal advice and representation, specialising in test cases and strategic casework;
- research, analysis and policy development; and
- advocacy for systems change and public interest outcomes.

Our priorities include:

- Reducing homelessness, through the Homeless Persons' Legal Service
- Access for people with disability to basic services like public transport, financial services, media and digital technologies
- Justice for First Nations people
- Access to sustainable and affordable energy and water (the Energy and Water Consumers' Advocacy Program)
- Fair use of police powers
- Rights of people in detention, including equal access to health care for asylum seekers (the Asylum Seeker Health Rights Project)
- Improving outcomes for people under the National Disability Insurance Scheme
- Truth-telling and government accountability
- Climate change and social justice.

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The Public Interest Advocacy Centre office is located on the land of the Gadigal of the Eora Nation.

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Recommendations

Recommendation 1 – More frequent evaluation of Transport Standards

The Australian Government review and evaluate the Transport Standards every three years. The results of each evaluation be properly considered and the Transport Standards amended as appropriate. The Australian Human Rights Commission, as the recommended independent oversight body monitoring and enforcing compliance, be permitted to request the Minister initiate ad hoc inquiries to address emerging issues and new modes of transport.

Recommendation 2 – Mandatory reporting and publication of data on compliance

The Transport Standards be amended to require public transport operators and providers to report data on their compliance with the Transport Standards to the Department. Reporting requirements should apply to all assets (existing, new, refurbished or upgraded) and to all sections of the Transport Standards. All data be provided in accessible formats and accompanied by plain English explanations prepared by the transport operator or provider.

Recommendation 3 – Publication of Action Plans

The Transport Standards be amended to require transport operators and providers to develop and publish Action Plans indicating the steps they will take to meet the targets set out in the Standards.

Recommendation 4 – Comprehensive collection and publication of data

The Government collect and publish compliance data reported per Recommendation 3, together with other data held by government including organisational data, data from complaints and submissions, research, consultation with staff, customers and the Australian Human Rights Commission. The data collected should be compiled into a publicly available report with a jurisdictional breakdown, published on an annual basis, or at a minimum every two years.

Recommendation 5 – Address the use of Australian Standards in the Transport Standards

The Transport Standards be updated to either replace references to the Australian Standards with the full text of the applicable standard, or the relevant provisions of the Australian Standards which are used in the Transport Standards be attached to the Transport Standards.

Recommendation 6 – Free access to Australian Standards for non-commercial use

Access to the Australian Standards for non-commercial use be made free.

Recommendation 7 – A breach of the Transport Standards should be unlawful

The Transport Standards be amended to state that a breach of the Transport Standards is unlawful. The amendment should expressly provide that a person may lodge a standalone complaint alleging breach of the Transport Standards in the Australian Human Rights Commission.

Recommendation 8 - The Australian Human Rights Commission Act 1986 (Cth) be amended to introduce an 'equal access' costs model for all discrimination and harassment matters

The Australian Human Rights Commission Act 1986 (Cth) be amended to insert a cost determination model in which:

- *Applicants will not be liable for adverse costs unless their claim is found to be vexatious, or they have acted unreasonably in the course of proceedings and so caused the other party to incur costs; and*
- *Where a court finds a respondent has engaged in unlawful discriminatory conduct, the respondent will be liable to pay the applicant's costs.*

Recommendation 9 – The Australian Human Rights Commission be funded to provide independent oversight of industry compliance with the Transport Standards

The Australian Human Rights Commission provide independent oversight of reported compliance and Action Plans of transport operators and providers.

The Commission should be adequately funded to carry out this oversight function.

Recommendation 10 – The Australian Human Rights Commission be empowered and funded to enforce the Transport Standards

The Australian Human Rights Commission be empowered to enforce the Transport Standards, including to:

- *proactively and directly observe all modes of transport to monitor compliance;*
- *conduct reviews or audits of compliance relating to systemic issues;*
- *investigate and inquire into potential breaches and provide recommendations to achieve compliance;*
- *issue fines for breaches of Transport Standards;*
- *issue compliance notices specifying the action an operator or provider must take, or refrain from taking, to comply;*
- *apply to the federal courts for an order to direct compliance with the compliance notice; and*
- *enter into enforceable undertakings with operators and providers.*

The Commission should be adequately funded to carry out these enforcement functions.

Recommendation 11 – Make clear the Transport Standards apply to rideshare services

The Transport Standards be amended to explicitly include rideshare services, and to make both rideshare companies and drivers responsible for complying with the Standards. This should be done by defining 'rideshare service' in the Transport Standards as including private entities that are primarily engaged in a business providing point-to-point transport to people.

Recommendation 12 – Specific standards for air travel should be co-designed

The Transport Standards be amended to include a Schedule with specific standards for accessibility relating to air travel. These standards should be co-designed with people with

disability and representative organisations. In developing specific standards for air travel, the Department should refer to the US regulatory framework, as a starting point for the appropriate level of detail.

Recommendation 13 – The Australian Human Rights Commission be empowered and funded to enforce the specific standards for air travel

As set out in Recommendation 10, the Australian Human Rights Commission be empowered as a regulator, with its remit to include the new specific standards for air travel described at Recommendation 12. The Commission should be adequately funded to carry out its enforcement functions.

1. Introduction

The Public Interest Advocacy Centre (**PIAC**) has a long history of involvement in disability discrimination litigation and public policy development, particularly in the area of public transport. Of particular relevance is PIAC's submissions to the previous reviews of the *Disability Standards for Accessible Public Transport 2002* (Cth) (**Transport Standards**), and our submissions to the Department of Infrastructure, Transport, Regional Development and Communication (**Department**) in relation to both the Stage 1 and Stage 2 Consultation Regulation Impact Statements (**RIS**).¹

Unfortunately, the majority of issues identified in our past submissions and our recommendations, have not been addressed.² This is because of a failure to implement changes to the Transport Standards despite three prior reviews over 20 years. Further, the lack of any reporting or compliance monitoring framework means there is no accountability or enforceability of the Transport Standards. Ongoing shortcomings in the individual complaints process, and the reliance on such a process to enforce compliance, impedes the capacity of the Transport Standards to act as a driver to improve accessibility of public transport.

With most target dates for compliance not achieved, the Transport Standards have not been effective in removing discrimination. PIAC recommends critical amendments to the Transport Standards including self-reporting by transport operators and providers, collection and publication of data, independent monitoring of compliance and the introduction of enforcement mechanisms.

In this submission, we reiterate points from our submission to the Transport Standards Review in 2018,³ and outline two specific transport areas – rideshare services and air travel – where we are aware action is urgently required to provide people with disability with equal access to support their full participation in economic, social and cultural life. The Transport Standards inadequately address these two modes of transport, and PIAC makes specific recommendations to address systemic discrimination at a structural level.

¹ PIAC, Submission to the Review of the Disability Standards for Accessible Public Transport 2002, *Flight Closed: Report on the experiences of People with Disabilities in Domestic Airline Travel in Australia* (August 2007) < https://www.piac.asn.au/wp-content/uploads/07.08.24-DSAPT_Review_Sub.pdf > (**Submission to 2007 review**); PIAC, Submission to the Minister for Infrastructure and Transport, *Get on Board! 2012 Review of the Disability Standards for Accessible Public Transport* (31 May 2013) < https://piac.asn.au/wp-content/uploads/13.05.31_-_get_on_board_2012_review_of_the_dsapt.pdf > (**Submission to 2012 review**); PIAC, Submission to the Department of Infrastructure, Transport, Regional Development and Communications, *Third Review of the Disability Standards for Accessible Public Transport 2002* (12 December 2018) < <https://piac.asn.au/wp-content/uploads/2019/02/18.12.12-PIAC-Submission-Third-Review-of-Disability-Transport-Standards-FINAL-copy.pdf> > (**Submission to 2018 review**); PIAC, Submission to the Department of Infrastructure, Transport, Regional Development and Communications, *Reform of the Disability Standards for Accessible Public Transport: Consultation Regulation Impact Statement* (22 April 2021) < <https://piac.asn.au/wp-content/uploads/2021/04/21.04.22-PIAC-Submission-to-DSAPT-CRIS.pdf> > (**Submission to Stage 1 reforms**); PIAC, Submission to the Department of Infrastructure, Transport, Regional Development and Communications, *Submission to the Reforms of the Disability Standards for Accessible Public Transport 2022 – Stage 2 Consultation Regulation Impact Statement* (9 August 2022) (**Submission to Stage 2 reforms**).

² The Allen Consulting Group, *Review of the Disability Standards for Accessible Public Transport: Final Report* (October 2009); Department of Infrastructure and Regional Development, *Review of the Disability Standards for Accessible Public Transport 2002: Final Report* (July 2015); Department of Infrastructure, Transport, Regional Development and Communications, *Third Review of the Disability Standards for Accessible Public Transport 2002 (Transport Standards)* (November 2021).

³ PIAC, Submission to 2018 review (n 1).

Additionally, we recommend the Transport Standards be subject to more frequent legislative evaluation. Ensuring public transport adequately meets the needs of people with disability is critical to increasing the economic and social participation of people with disability and protecting human rights. The continual development of new modes of public transport and new technologies warrants evaluation occurring every three years, instead of the current five-yearly reviews. In addition to introducing three-yearly evaluations, there should be a mechanism for the Australian Human Rights Commission (**Commission**), as the proposed independent oversight body monitoring and enforcing compliance, to request the Minister for Transport to initiate ad hoc inquiries to address emerging issues and new modes of transport. It is essential the results of each evaluation or inquiry are properly considered, and appropriate amendments to the Transport Standards are made, to improve its operation.

Recommendation 1 – More frequent evaluation of Transport Standards

The Australian Government review and evaluate the Transport Standards every three years. The results of each evaluation be properly considered and the Transport Standards amended as appropriate. The Australian Human Rights Commission, as the recommended independent oversight body monitoring and enforcing compliance, be permitted to request the Minister initiate ad hoc inquiries to address emerging issues and new modes of transport.

2. Reporting and transparency

The rights of people with disability to live without discrimination and to enjoy full economic, social and cultural rights on an equal basis with others are protected in international instruments, including the International Covenant on Economic, Social and Cultural Rights (**ICESCR**), the International Covenant on Civil and Political Rights and the Convention on the Rights of Persons with Disabilities (**CRPD**).

Relevantly, Article 31 of the CRPD requires the Australian Government to collect appropriate information and data to implement policies to give effect to the CRPD. This data is important for reporting, and for monitoring the efficiency and effectiveness of the Transport Standards.

Article 33 of the CRPD, on national implementation and monitoring, creates a positive obligation on national governments to design an effective framework by which they are required to meaningfully implement the CRPD in domestic legislation and civil society. Specifically, it requires the Australian Government to:

- develop a framework to promote and monitor implementation;
- designate one or more focal points within government to manage implementation; and
- consider establishing a coordination mechanism to facilitate action in different sectors.

Similarly, under Article 2(1) of the ICESCR, each State is required to take steps to the greatest extent it is able in relation to the resources available, with a view to achieving full realisation of the rights contained in that Covenant by all appropriate means, including particularly the adoption of legislative measures.

Nonetheless, at present the Transport Standards do not contain a reporting framework. In the absence of such a framework, there is no mechanism to properly monitor and manage

implementation of the Transport Standards. This leaves the Government unable to effectively report data on transport accessibility. It also means the Government is unable to identify areas of concern. Without such data, the Government is unable to assess whether discrimination has been removed, and target reform appropriately.

2.1 Self-reporting by transport operators and providers

The Transport Standards are an important mechanism by which Australia should strive to implement the framework referred to in Article 33 of the CRPD. The Transport Standards set minimum baselines that must be met by transport operators and providers. However, to comply with international law and the CRPD, there needs to be a national mechanism to properly monitor and manage implementation of the Transport Standards.

Recommendation 2 of the 2012 review of the Transport Standards stated, ‘the Australian Government, jointly with state and territory governments, establish a national framework for reporting on progress against the Transport Standards by 31 December 2016’. To date, there is still no mandatory national reporting framework for transport operators and providers.

A national reporting framework should require operators and providers of transport services to report data on their compliance with the Transport Standards to the Department. Without compliance reporting, there is no governance risk for transport operators and providers, and thus limited incentive for them to drive accessibility improvements to their services.

As we submitted to the Stage 2 RIS, these reporting requirements should apply to all assets (existing, as well as new, refurbished or upgraded), and to all sections of the Transport Standards. Any more constrained scope will provide inadequate data and will not result in necessary improvements to the accessibility of public transport and the elimination of discrimination. Reporting on all assets and sections of the Transport Standards would enable identification of areas that need reform and go further towards eliminating discrimination.⁴

If Government considers such broad reporting requirements require progressive implementation, the Transport Standards should require the Department to consult with disability representative organisations and the disability community to develop the incremental expansion of reporting. Following consultation, the process and stages of incremental expansion of reporting should be embedded into the Transport Standards to provide an enforcement mechanism.

A national reporting framework on all sections of the Transport Standards would also assist people with disability by providing clear information on what services are (or should be) accessible, helping with day-to-day travel and use of public transport services.

Additionally, there is no reliable data regarding the extent to which transport operators and providers are meeting or plan to meet the compliance targets set out in the Transport Standards. Therefore, mandatory reporting should go beyond current compliance with the Transport Standards, to also require the development and publication of Action Plans that indicate how transport providers intend to meet future targets.

⁴ PIAC, Submission to Stage 2 reforms (n 1).

Recommendation 2 – Mandatory reporting and publication of data on compliance

The Transport Standards be amended to require public transport operators and providers to report data on their compliance with the Transport Standards to the Department. Reporting requirements should apply to all assets (existing, new, refurbished or upgraded) and to all sections of the Transport Standards. All data be provided in accessible formats and accompanied by plain English explanations prepared by the transport operator or provider.

Recommendation 3 – Publication of Action Plans

The Transport Standards be amended to require transport operators and providers to develop and publish Action Plans indicating the steps they will take to meet the targets set out in the Standards.

2.2 Comprehensive collection and publication of data by government

The introduction of mandatory reporting would be more effective if the resulting data was made public. This level of transparency and accountability would promote greater compliance by operators and providers. It would also be consistent with the requirements for data collection in Article 31 of the CRPD.

This data should be published with relevant data collected by the Government from other sources. As we noted in our 2013 and 2018 submissions:⁵

There is a need for collection of baseline data and evidence on the extent to which people with disabilities are able to access public transport on an equal basis. This includes organisational data, data from complaints and submissions, research, consultation with staff and consultation with customers...

Intrinsic to developing a reliable body of data on the extent to which there has been compliance with the Transport Standards is incorporation of data on compliance that is based on the experiences of people with disabilities. Collection of such data is essential given that the Transport Standards should be classed as beneficial legislation, and the legislative framework is therefore primarily targeted at protecting the rights of passengers with disabilities. Consultation with people with disabilities should be integrated into the design of any data collection process.

The collection and publication of data would be most appropriately coordinated by the Department. The data should be compiled into a publicly available report, with a jurisdictional breakdown, published on an annual basis, or at a minimum every two years.

Recommendation 4 – Comprehensive collection and publication of data

The Government collect and publish compliance data reported per Recommendation 3, together with other data held by government including organisational data, data from complaints and submissions, research, consultation with staff, customers and the Australian Human Rights Commission. The data collected should be compiled into a publicly available report with a jurisdictional breakdown, published on an annual basis, or at a minimum every two years.

⁵ PIAC, Submission to 2012 review (n 1) 15-16; PIAC, Submission to 2018 review (n 1) 3-4.

2.3 Use of Australian Standards

Australian Standards are used to create accessibility benchmarks in the Transport Standards. Access to the Australian Standards is required to understand the outcomes required by transport providers and operators.

For example, Part 18 of the Transport Standards relating to tactile ground surface indicators references AS1428.4 (1992). Not only is AS1428.4 (1992) not freely accessible, but it is also superseded by AS1428.4.1 (2009). First, that the Transport Standards have not been updated since 2009 to refer to the superseded Australian Standard, means the Transport Standards do not reflect the most updated requirements and minimum standards. Second, people with disability are not readily able to understand the legislation designed to promote their inclusion.

The reliance and incorporation on the Australian Standards in the transport Standards is problematic where those Australian Standards are not freely accessible to the public. To obtain access to the Australian Standards, members of the public and civil society organisations are required to purchase them at a significant cost.

Limited access to documents or requiring people to purchase documents to understand and enforce their legal rights is disempowering and is an impediment to holding transport operators and providers accountable.

PIAC acknowledges in 2019 Standards Australia released its *Distribution and Licensing Policy Framework* anticipating access to Australian Standards for non-commercial use will be available by December 2023, subject to financial sustainability considerations and third-party rights.⁶

PIAC repeats its previous recommendation to the Stage 1 and Stage 2 RIS.⁷ We recommend either the references to the Australian Standards be removed and replaced with the text of the Australian Standards, or the text of the relevant provision of the Australian Standards are attached to the Transport Standards.

Recommendation 5 – Address the use of Australian Standards in the Transport Standards

The Transport Standards be updated to either replace references to the Australian Standards with the full text of the applicable standard, or the relevant provisions of the Australian Standards which are used in the Transport Standards be attached to the Transport Standards.

Recommendation 6 – Free access to Australian Standards for non-commercial use

Access to the Australian Standards for non-commercial use be made free.

⁶ Standards Australia, *Distribution and Licensing Policy Framework* (November 2019) <<https://www.standards.org.au/StandardAU/Media/attachment/media%20release/Standards-Australia-Distribution-and-Licensing-Policy.pdf>>.

⁷ PIAC, Submission to Stage 1 reforms (n 1) 12; PIAC, Submission to Stage 2 reforms (n 1) 24.

3. Accountability and enforcement

Mandatory self-reporting of compliance with the Transport Standards, and Government collection and publication of data, are important information-gathering mechanisms. However, information gathering alone is insufficient to achieve compliance and accountability. The lack of mechanisms to enforce the Transport Standards does not promote and ensure compliance.

The Australian Disability Discrimination Commissioner noted target dates for operators and providers to achieve compliance, are inadequate:

The present use of target dates for compliance with the DSAPT has not worked. This has been noted in the Third Review of the DSAPT where it is noted compliance with the mandated timeframes in the DSAPT will not be achieved. It is perhaps obvious that a better enforcement method is needed.⁸

For effective accountability and enforcement, we reiterate our recommendations from our submission to the 2018 review and our submissions to the Stage 1 and Stage 2 RIS below, including the need for:

- amendments to clarify a breach of the Transport Standards is unlawful; and
- reforms to the costs model for discrimination claims in the Federal Court.

Reforms addressing both these issues would facilitate use of the individual complaints system as one driver to improve accessibility of public transport. Additionally, we recommend empowering the Commission to act as a regulator to ensure meaningful compliance with the Transport Standards.

3.1 A breach of the Transport Standards is unlawful

A breach of the Transport Standards is unlawful⁹ and itself constitutes ‘unlawful discrimination’.¹⁰ It is not necessary for a person to show that a breach of the Transport Standards is otherwise ‘direct’ or ‘indirect’ discrimination and exemption provisions in the *Disability Discrimination Act 1992* (Cth) (DDA) generally do not apply.¹¹ This position should be clearly stated in the Transport Standards themselves to avoid any confusion.¹²

Recommendation 7 – A breach of the Transport Standards should be unlawful

The Transport Standards be amended to state that a breach of the Transport Standards is unlawful. The amendment should expressly provide that a person may lodge a standalone complaint alleging breach of the Transport Standards in the Australian Human Rights Commission.

⁹ *Disability Discrimination Act 1992* (Cth) s 32 (‘DDA’). See also Explanatory Memorandum, Disability Discrimination Bill 1992, 15 confirming the intention that a complaint may be made to the Australian Human Rights Commission alleging a breach of the Transport Standards.

¹⁰ See *Australian Human Rights Commission Act 1986* (Cth) s 3, definition of ‘unlawful discrimination’ which includes ‘acts, omissions or practices that are unlawful under’ Part 2 of the DDA.

¹¹ Australian Human Rights Commission, *Federal Discrimination Law* (2016), ch 5, p 228.

¹² See, for example, the decision in *Haraksin v Murrays Australia* [2013] FCA 217, [86] in which the Court states that non-compliance with the Disability Standards does not constitute unlawful discrimination. This is, with respect, clearly wrong; see above n 10.

3.2 Costs

PIAC has long noted the risk of adverse costs orders is a significant barrier to applicants bringing discrimination claims to court, including to enforce the Transport Standards. As our submissions to the past two Transport Standards Reviews noted, '[d]ue to the risk of an adverse costs order, many strong complaints relating to the Transport Standards do not proceed, or settle. This removes any precedent impact a successful court decision might have.'¹³

As part of its response to the *Respect@Work: Sexual Harassment National Inquiry Report*, the Federal Government committed to legislative reform of the current costs model for discrimination claims in the Federal Court.¹⁴ PIAC recently made a joint submission with the Grata Fund to the Attorney-General's Department consultation on the new costs model, in which we argued strongly the 'equal access' model should be adopted. As we set out in that submission:

Under this model:

- Applicants will generally not be liable for adverse costs, except where vexatious claims are made, or an applicant's unreasonable conduct in the course of proceedings has caused the other party to incur costs;
- Where an applicant is successful and the court has found that a respondent has engaged in discriminatory conduct or sexual harassment, the respondent will be liable to pay the applicant's costs; and
- Where an applicant is unsuccessful, each party will bear their own costs.

This model recognises and seeks to remedy the significant inequality in power and resources that often exists between applicants and respondents in discrimination and harassment matters of all kinds. It not only ensures greater access to justice for marginalised communities, but also encourages more discrimination matters of public interest and value to be brought before the courts for judicial consideration.

Increased judicial consideration of meritorious matters has the ability to contribute to better up-front compliance with the law in all areas of public life where discrimination and harassment may occur.

The equal access model would also ensure that applicants can continue to secure solicitors and counsel who are willing to act on a 'no-win no-fee' basis, as the applicant's legal team will recoup their costs if the case is successful. This will increase access to justice for victim-survivors of discrimination and harassment.

...[T]he public interest is also served when victim-survivors of unlawful discrimination exercise their rights and take steps to ensure that the discrimination is publicly censured and stopped.

This is especially important as the federal anti-discrimination system relies on the willingness of individual victim-survivors to act and enforce their rights and reduce harassment and discrimination in public life, a benefit which is ultimately enjoyed by the wider community. This

¹³ PIAC, Submission to 2012 review (n 1) 34; PIAC, Submission to 2018 review (n 1) 7.

¹⁴ Attorney-General's Department, Review into an appropriate cost model for Commonwealth anti-discrimination laws (Consultation Paper, February 2023) 6-7.

is an extraordinary burden for individual victim-survivors to bear, particularly as we know that harassment and discrimination disproportionately affect people experiencing social and economic disadvantage.

The equal access model seeks to remedy this imbalance for the benefit of victim-survivors of unlawful discrimination, and society as a whole. The system must do more to support the individuals taking action to vindicate their rights, a process which ultimately furthers Parliament's aim of eliminating discrimination. In order for federal anti-discrimination legislation to be effective and enforceable, costs risks should not be a barrier preventing applicants from bringing their meritorious discrimination claims to court.¹⁵

These considerations apply to matters concerning breaches of the Transport Standards as they do to all other discrimination and sexual harassment matters. PIAC strongly supports the adoption of the 'equal access' costs model for all federal discrimination proceedings.

Recommendation 8 - The Australian Human Rights Commission Act 1986 (Cth) be amended to introduce an 'equal access' costs model for all discrimination and harassment matters

The Australian Human Rights Commission Act 1986 (Cth) be amended to insert a cost determination model in which:

- *Applicants will not be liable for adverse costs unless their claim is found to be vexatious, or they have acted unreasonably in the course of proceedings and so caused the other party to incur costs; and*
- *Where a court finds a respondent has engaged in unlawful discriminatory conduct, the respondent will be liable to pay the applicant's costs.*

3.3 Reforming enforcement of the Transport Standards

3.3.1 Limitations of an individual complaints-driven process

Another issue we raised in previous submissions is the current reliance on individual complaints for enforcement of the Transport Standards, and the limitations of that process.¹⁶ Rather than relying solely on individual actions, we recommend a robust enforcement regime be established to assess and achieve compliance with the Transport Standards.

Reliance on a complaints-driven process requires individuals who experience discrimination to hold discriminators to account. This places a significant burden on individuals to press complaints and litigation that are time-consuming, financially risky, and potentially stressful and humiliating; and who often obtain limited benefit from doing so. Individuals also face a significant power imbalance pursuing complaints against well-resourced transport operators and providers.

¹⁵ Grata Fund and PIAC, *Joint Submission to the Attorney-General's Department's review into an appropriate cost model for Commonwealth anti-discrimination laws* (14 April 2023), 4-5 <<https://piac.asn.au/2023/04/14/joint-submission-to-the-attorney-generals-departments-review-into-an-appropriate-cost-model-for-commonwealth-anti-discrimination-laws/>>.

¹⁶ PIAC, *Submission to 2018 review* (n 1) 5-6; PIAC, *Submission to Stage 1 reforms* (n 1) 10-11; PIAC, *Submission to Stage 2 reforms* (n 1) 13-14.

In PIAC's experience, this means many instances of discrimination do not result in a complaint to the Commission. This results in underreporting of issues, lack of accountability and lack of meaningful action to improve the accessibility of public transport.

Even where a discrimination complaint is made and resolved before the Commission, settlements are binding only between the parties to the complaint. Therefore, even if a settlement includes systemic outcomes such as training or policy changes, only the complainant who is a party to the settlement agreement can enforce it if a transport operator or provider fails to fulfil its obligations. Enforcing a settlement agreement in court requires additional significant resources.

In addition, settlement agreements commonly require the terms of the settlement to remain confidential. This means outcomes or improvements resulting from the complaint cannot be disclosed or used by other potential complainants as a precedent to seek improvements.

If conciliation before the Commission is not successful, and a complainant proceeds to a hearing in the federal courts, they face additional obstacles – including the significant cost and financial risks of bringing litigation (discussed further below), a need for legal representation, and the intensive and time-consuming nature of litigation.

If a complainant succeeds in court, the outcome will generally be a declaration of unlawful discrimination and a modest award of compensation. These remedies are often inadequate to eliminate discriminatory practices. Respondents may still avoid implementing systemic changes, arguing a declaration of unlawful disability discrimination only relates to the specific facts of that case. Although many complainants want the respondent not to continue or repeat the unlawful conduct, courts are generally reluctant to make orders requiring ongoing supervision.

In previous submissions, we recommended the AHRC Act and *Federal Court of Australia Act 1976* (Cth) be amended to give standing to organisations to pursue representative complaints about systemic discrimination at the Federal Court. This recommendation was effectively implemented by last year's *Anti-Discrimination and Human Rights Legislation Amendment (Respect at Work) Act 2022* (Cth). PIAC welcomes this change; but we stress it does not resolve the underlying issues of relying solely on a complaints-based mechanism to address systemic problems.

3.3.2 The Commission as a regulator to monitor and enforce compliance

An external body is needed to provide independent oversight and monitoring of the information provided by transport operators and providers. This independent oversight mechanism will encourage upfront compliance from transport operators and providers, and assist people with disability to have confidence that self-reporting is accurate.

Given the existing functions of the Commission under section 11 of the *Australian Human Rights Commission Act 1986* (Cth) (**AHRC Act**), the role of the Disability Discrimination Commissioner and the expertise of the Commission, the Commission should be given a mandate to provide this independent oversight. This position is consistent with the Commission's *Free & Equal Position*

Paper 2021, which said '[c]onsideration should...be given to the Commission having an oversight role with regulatory powers to enforce compliance' of the disability standards under the DDA.¹⁷

In this role, the Commission would provide monitoring and reviews of transport provider compliance with the Transport Standards. It would also perform enforcement functions; to do so, we suggest the Commission be given a full suite of compliance powers to enforce the Transport Standards. These should include powers to:

- proactively and directly observe all modes of transport to monitor practical compliance with the Transport Standards;
- conduct reviews or audits of compliance relating to systemic issues with the Transport Standards;
- investigatory powers to inquire into potential breaches of the Transport Standards by operators and providers and provide recommendations to achieve compliance;
- issue fines for breaches of the Transport Standards (even in the absence of a complaint);
- issue compliance notices specifying the action an operator or provider must take, or refrain from taking, to comply with the Transport Standards;
- apply to the federal courts for an order to direct compliance with the compliance notice; and
- enter into enforceable undertakings with operators and providers.

These are similar to the powers conferred on the Commission to enforce the positive duty to eliminate unlawful sexual discrimination,¹⁸ which recognises a similar need to proactively regulate human rights. Empowering the Commission with these compliance tools would shift the burden of enforcement of the Transport Standards away from individuals. It would also focus on *preventing* breaches.

Establishing an effective framework to monitor and enforce implementation of the Transport Standards as we suggest would discharge the positive obligation in Article 33 of the CRPD.

In light of the inadequacies with the current approach to compliance, and the importance of these new enforcement functions, it is also vital the Commission is sufficiently funded to carry out each of the above functions.

Recommendation 9 – The Australian Human Rights Commission be funded to provide independent oversight of industry compliance with the Transport Standards

The Australian Human Rights Commission provide independent oversight of reported compliance and Action Plans of transport operators and providers.

The Commission should be adequately funded to carry out this oversight function.

Recommendation 10 – The Australian Human Rights Commission be empowered and funded to enforce the Transport Standards

The Australian Human Rights Commission be empowered to enforce the Transport Standards, including to:

- *proactively and directly observe all modes of transport to monitor compliance;*

¹⁷ Australian Human Rights Commission, *Free & Equal: A reform agenda for federal discrimination laws* (December 2021), 141.

¹⁸ *Anti-Discrimination and Human Rights Legislation Amendments (Respect at Work) Act 2022* (Cth).

- *conduct reviews or audits of compliance relating to systemic issues;*
- *investigate and inquire into potential breaches and provide recommendations to achieve compliance;*
- *issue fines for breaches of Transport Standards;*
- *issue compliance notices specifying the action an operator or provider must take, or refrain from taking, to comply;*
- *apply to the federal courts for an order to direct compliance with the compliance notice; and*
- *enter into enforceable undertakings with operators and providers.*

The Commission should be adequately funded to carry out these enforcement functions.

4. Rideshare services

The Transport Standards do not provide a definition of what constitutes a ‘taxi’. Ridesharing services like Uber are increasingly more prominent in Australia, and often provide a cheaper or more convenient alternative to regular taxi services. However, it is not clear whether or how the Transport Standards apply to rideshare services.

This lack of clarity has contributed to ongoing issues faced by people with disability that inhibit their equal access to rideshare services. In particular, submissions to the last review of the Transport Standards raised concerns that ‘people who require a wheelchair accessible vehicle and passengers who travel with a guide dog frequently report being refused service or unable to access services’.¹⁹ Media reporting has continued to highlight ongoing refusals of rideshare drivers to carry people with dog guides and other assistance animals, and denials of access to rideshare for people with wheelchairs.²⁰

The Transport Standards should be amended to explicitly clarify they apply to rideshare services. This clarification is an important means to provide people with disability with a greater range of services.

Importantly, this clarification should consider the fact many rideshare businesses are structured differently to traditional taxi services. Most Australian taxi services operate under a ‘bailment’ arrangement, whereby a taxi company owns the taxi vehicles and allows drivers to operate them

¹⁹ Department of Infrastructure, Transport, Regional Development and Communications, Reforms of the Disability Standards for Accessible Public Transport 2022 - Stage 2 RIS Consultation Statement (March 2022) 46.

²⁰ See, for instance, Caitlyn Sheehan, Craig Zonca and Loretta Ryan, Alicia Nally, ‘Brisbane Uber drivers repeatedly refuse blind man service because of his guide dog’, *ABC Radio Brisbane* (online, 15 February 2023), <<https://www.abc.net.au/news/2023-02-15/brisbane-uber-refuses-blind-man-service-because-of-his-guide-dog/101975254>>; Neil Mitchell, ‘Blind woman left stranded after Uber driver refuses to take her guide dog’, *3AW.com.au*, (online, 22 July 2022), <<https://www.3aw.com.au/blind-woman-left-stranded-after-uber-driver-refuses-to-take-her-guide-dog/>>; ‘Paralympian refused Uber ride because of guide dog’, *ABC News* (online, 6 January 2023), <<https://www.abc.net.au/news/2023-01-06/paralympian-refused-a-uber-ride-because-of-guide-dog/101831984>>; Student Journalist, ‘Uber causing anger throughout disabled community’, *Project Open Doors* (online, 20 September 2017), <<https://projectopendoors.org/2017/09/20/uber-causing-anger-throughout-disabled-community/>>; and in relation to the US, ‘Uber to pay \$2.2m to disabled riders over wait fees’, *BBC News*, (online, 18 July 2022), <<https://www.bbc.com/news/business-62214567>>.

for a cost and subject to specific conditions.²¹ This provides substantial control for a company over the delivery of the services by drivers, so when passengers raise concerns with the taxi company directly, the company is likely to take responsibility for addressing the issue. The availability of these systemic responses can be seen by the conciliation records from the Commission, which show taxi companies have taken responsibility for their drivers refusing to carry dog guides and been willing to respond by fining their drivers, paying compensation, and developing disability awareness training for drivers.²²

By contrast, rideshare services typically involve the driver supplying their own vehicle, and accepting bookings through an electronic app. This structure provides less certainty about the responsibilities of the rideshare service. Notably, successive decisions of the Fair Work Commission have concluded drivers are not employees of the rideshare service,²³ while Uber describes itself as a 'limited payment collection agent' for drivers.²⁴ Further, the requirement for drivers to supply their own vehicle may contribute to greater reluctance to carry dog guides, and lower rates of wheelchair accessible vehicles.

Accordingly, the Transport Standards should make clear rideshare companies, in addition to drivers, have responsibility to ensure access for people with disability. This would require rideshare companies to bear a share of compliance costs (such as arranging disability training), and would allow systemic discrimination to be addressed at a structural level rather than requiring people to separately complain about each individual incident and driver.

One way this could be done is by extending obligations that currently apply to taxis to 'rideshare services'; and defining 'rideshare services' as including 'a private entity that is primarily engaged in a business providing point-to-point transport to people' (or words to that effect). Adopting a definition that centres a business' provision of this kind of transport would mimic the regulatory framework adopted by the European Union (EU) and United States (US), which have successfully required rideshare companies to address disability access concerns within their services.²⁵

The delay to date in explicitly incorporating rideshare services in the Transport Standards highlights the failings of the five-yearly review process to respond to developments in modes of transport. In 20 years, despite three prior reviews, no changes have been made to the Transport Standards, despite the dramatic developments in technology and the rise in rideshare services. This underscores the need for more regular and intensive legislative evaluation of the Standards, as set out in our Recommendation 1.

²¹ *Federal Commissioner of Taxation v Deluxe Red and Yellow Cabs Co operative Trading Society Limited* [1998] FCA 361.

²² See 'Conciliation Register', *Australian Human Rights Commission*, (website, 2023) <<https://humanrights.gov.au/complaints/conciliation-register>>; 'Conciliated cases: transport', *Australian Human Rights Commission*, (website, October 2009), <<https://humanrights.gov.au/our-work/disability-rights/conciliated-cases-transport>>

²³ *Kaseris v Rasier Pacific V.O.F* [2017] FWC 6610, *Janaka Namal Pallage v Rasier Pacific Pty Ltd* [2018] FWC 2579, *Rajab Suliman v Rasier Pacific Pty Ltd* [2019] FWC 4807, *Amita Gupta v Portier Pacific Pty Ltd* [2019] FWC 5008.

²⁴ *Kaseris v Rasier Pacific V.O.F* [2017] FWC 6610, [19].

²⁵ *United States v. Uber Technologies, Inc.*, 3:21-cv-08735, (N.D. Cal. 2016); *Lisa Irving v Uber Technologies Inc* (AAA Case No. 01-18-0002-7614) (18 March 2021); *Equal Rights Centre v Uber Technologies Inc*, F. Supp. 3d --- 2021 WL 981011 (15 March 2021); *Asociacion Profesional Elite Taxi v Uber Systems Spain SL* (C-434/15) (20 December 2017).

Recommendation 11 – Make clear the Transport Standards apply to rideshare services

The Transport Standards be amended to explicitly include rideshare services, and to make both rideshare companies and drivers responsible for complying with the Standards. This should be done by defining 'rideshare service' in the Transport Standards as including private entities that are primarily engaged in a business providing point-to-point transport to people.

5. Air transport

The Transport Standards and Schedule 1 of the Transport Standards describe outcomes that providers of *all* modes of transport are expected to achieve over specified time periods. However, air transport is not comparable to other modes of transport. It is a unique mode of transport, with specific accessibility requirements that must be reflected in the Transport Standards.

5.1 The Transport Standards are not fit for purpose for air travel

In contrast to other modes of transport regulated by State, Territory and local government agencies, air transport is federally regulated by the Department. Additionally, the Department of Home Affairs is responsible for establishing security standards and requirements at airports. However, a lack of oversight and enforcement mechanisms have resulted in the inconsistent application of accessibility standards by airlines and airports. Inconsistencies between air travel services limits choice for consumers. As we previously submitted, this lack of regulation and an absence of clear guidance reduces access to air transport for people with disability.²⁶

Air travel encompasses a number of elements including booking a ticket, checking-in, transportation of mobility devices, security screening, moving within the terminal, boarding and disembarking aircraft. Each of these elements can present access difficulties for people with disability. The Transport Standards fail to adequately account for and address all these elements of air travel, and the level of complexity passengers with a disability encounter when travelling by air. For example, the Transport Standards do not:

- ensure airline ticket booking processes are accessible to people with disability;
- establish minimum standards of assistance to be provided to people with disability moving through the airport, or to/from the aircraft; or
- outline the circumstances in which it will be unlawful to refuse air travel to people with disability.

By failing to address the specific features of air transport the Transport Standards do not remove discrimination and are not fit for purpose.

5.2 Specific standards for air transport

The deficiencies in the legal framework in Australia should be addressed through the introduction of specific enforceable minimum standards for operators and providers of air transport. The most obvious way to do this is by amending the Transport Standards to include a Schedule with specific detailed provisions relating to air transport, and to implement appropriate monitoring and enforcement mechanisms.

²⁶ PIAC, Submission to 2007 review (n 1) 28; PIAC, Submission to Stage 2 reforms (n 1) 22.

5.2.1 Appropriate design of a framework for air travel access

Any regulatory framework must be developed through co-design processes, involving people with disability and representative organisations from start to finish. This approach underpins all our further submissions on the subject.

Against this starting point, we consider legal frameworks in comparable overseas jurisdictions can provide helpful guidance for an Australian system. The US,²⁷ EU,²⁸ Canada,²⁹ and United Kingdom (UK)³⁰ each have regulatory frameworks to achieve equal access to air travel for people with disability. As outlined below, of these jurisdictions PIAC considers the US standards most comprehensively define disability rights in air transport, and should be used to inform the development of similar Australian legislative standards.

In the US, the *Air Carrier Access Act (ACAA)* prohibits discrimination on the basis of disability in air travel.³¹ To supplement and implement the ACAA, in 1990 the US Department of Transportation (DOT) issued a rule defining the rights of passengers and obligations of airlines (DOT Rule).³² In the more than 30 years since it was issued, the DOT Rule has been amended 'approximately 15 times' to continually improve access to air transport for people with disability.³³ These regular updates reflect an appropriate focus on responding to changes in technology and continuously improving accessibility.

To ensure the Rule reflected the barriers and lived experiences of people with disability, DOT developed the Rule in consultation and negotiation with representatives of the disability community and the airline industry.³⁴ Additionally, in 2022 the DOT published the *Airline Passengers with Disabilities Bill of Rights*.³⁵ While the Bill of Rights does not establish any policy, it describes in a more accessible format the fundamental rights of passengers with disability under the ACAA and the DOT Rule, reflecting the understanding that any framework must be accessible and empowering to the people with disability who it concerns.

In contrast to the Transport Standards, the DOT Rule sets specific minimum standards for accessibility requirements across the different elements involved in air travel, including:

- information for passengers;
- accessibility of airport facilities;
- accessibility of aircraft and service animals on aircraft;

²⁷ *Air Carrier Access Act of 1986*, 49 USC § 41705; *Nondiscrimination on the Basis of Disability in Air Travel*, 14 CFR Part 382.

²⁸ *Regulation (EC) No 1107/2006 of the European Parliament and of the Council of 5 July 2006 concerning the rights of disabled persons and persons with reduced mobility when travelling by air.*

²⁹ *Canada Transportation Act*, SC 1996, c 10; *Accessible Transportation for Persons with Disabilities Regulations* (SOR/2021-9); *Aircraft Accessibility for Persons with Disabilities: Code of Practice for Fixed-Wing Aircraft with 30 or More Passenger Seats.*

³⁰ *Civil Aviation Act 1982* (UK), *Civil Aviation (Access to Air Travel for Disabled Persons and Persons with Reduced Mobility) Regulations 2014* (UK).

³¹ *Air Carrier Access Act of 1986*, 49 USC § 41705.

³² *Nondiscrimination on the Basis of Disability in Air Travel*, 14 CFR Part 382.

³³ US Department of Transportation, '36th Anniversary of the Air Carrier Access Act' *Passengers with Disabilities* (Web Page, 29 November 2022) <<https://www.transportation.gov/airconsumer/passengers-disabilities>>.

³⁴ *Ibid.*

³⁵ US Department of Transportation, *Airline Passengers with Disabilities: Bill of Rights* (July 2022) <https://www.transportation.gov/sites/dot.gov/files/2022-07/508_Airline_Passengers_with_Disabilities_Bill_of_Rights_07072022_ADA.pdf>.

- seating accommodations;
- boarding, deplaning and connecting assistance;
- services on aircraft; and
- stowage of wheelchairs, other mobility aids and other assistive devices.

Notably, the DOT Rule specifies *in detail* the obligations on operators and providers to prohibit discrimination against passengers with disability. To illustrate, the following are some examples of the prohibited discriminatory practices and specific accessibility requirements under the DOT Rule:

- airlines may not require advance notice that a person with a disability is travelling (except in limited circumstances);
- airlines may not limit the number of people with disability on a flight;
- airlines may not require a person with disability to travel with another person (except in limited circumstances);
- airlines must allow a service animal to accompany a passenger with disability;
- web sites marketing air transportation to the general public must be accessible to people with disability and conform to a specific standard of accessibility;
- new twin-aisle aircraft must have accessible toilets; and
- new aircraft with 30 seats or more must have movable aisle armrests on half the aisle seats.

The frameworks in the EU, Canada and UK are not as detailed as the US. In particular the EU and UK frameworks are not as prescriptive, which can lead to inconsistent application of standards by air transport operators and providers.³⁶ Inconsistent application of standards does not achieve equal access. For these reasons we consider the US framework provides the best foundation for similar Australian standards.

Recommendation 12 – Specific standards for air travel should be co-designed

The Transport Standards be amended to include a Schedule with specific standards for accessibility relating to air travel. These standards should be co-designed with people with disability and representative organisations. In developing specific standards for air travel, the Department should refer to the US regulatory framework, as a starting point for the appropriate level of detail.

5.2.2 Compliance and enforcement mechanisms

It is not enough for specific legislation or standards to be developed – they must be monitored for compliance and enforced. In the overseas jurisdictions examined, civil society and people with disability have consistently stressed the importance of effective enforcement mechanisms,

³⁶ See, for example, Berin Riđanović, *Passenger with Reduced Mobility (PRM) – Regulation 1107/2006 – Airport Duties – Limits to its adequate implementation* (Conference Paper, IX World Airport Lawyers Conference, Bologna, January 2017), available at https://www.researchgate.net/publication/317012683_Passenger_with_Reduced_Mobility_PRM_-_Regulation_11072006_-_Airport_Duties_-_Limits_to_its_adequate_implementation; Roberto Castiglioni, 'Amsterdam Schiphol Airport PRM Manager Calls on EU to Act on Abuse', *Reduced Mobility Rights* (online, 8 July 2022), available <<https://www.reducedmobility.eu/20220708768/TheNews/schiphol-prm-manager-calls-on-eu-to-act-on-abuse>>.

without which any framework is rendered ineffective.³⁷ This accords with our broader views on the current Transport Standards as expressed above at [3.2].

While, as discussed above, the contents of the US framework are comprehensive and appropriate, the US experience offers a warning about the importance of effective enforcement. Within that system, the general form of redress for a traveller is to file an individual complaint with the DOT. This reliance on an individual complaints mechanism is attended by similar problems to the current Australian system. The DOT itself warns responding to complaints is not a timely process, which means complainants are subjected to lengthy and stressful delays while awaiting redress.³⁸ Further, the remedies available from DOT complaints are limited, and centre on resolving the individual complaint rather than systemic reforms. US disability stakeholders have complained the current enforcement powers are ineffectual and result in ongoing breaches of the regulations by air transport providers without adequate redress.³⁹

Similar criticisms about the lack of effective enforcement capabilities have been raised with the UK framework.⁴⁰ While the Canadian framework appears to be relatively effective and fit-for-purpose, it relies heavily on the body responsible for responding to complaints (the Canadian Transportation Authority) conducting binding arbitration and making compensation and compliance orders, which it then has the power to enforce. A similar approach, despite its potential effectiveness, would be constitutionally invalid in Australia.⁴¹

Instead, as we suggest above at [3.2], the Transport Standards – including as we recommend the additional standards specifically relating to air travel – should be proactively enforced by the Commission, which should be given the powers and mandate of a regulator. This would include:

- collecting detailed industry data on compliance with the Transport Standards;
- conducting inquiries into potential breaches;
- issuing fines;
- issuing compliance notices;
- entering enforceable undertakings with operators and providers; and
- publicising expectations for compliance to set norms for other providers.

This regulatory approach would complement, rather than replace, the existing individual complaints mechanism under the DDA.

³⁷ See for example, Hannah Sampson, 'More wheelchairs are being damaged on planes. Travelers want action', *The Washington Post* (online, 24 August 2022) <<https://www.washingtonpost.com/travel/2022/08/24/wheelchair-flying-airlines-disability/>>; Steve Wood, 'Is aviation an enabler or barrier for disabled passengers? A review of disability rights and policy for airline passengers in the EU and UK' (2022) 1(2) *Journal of Airline Operations and Aviation Management* 42; Office of the Auditor General of Canada, *Accessible Transportation for Persons With Disabilities* (Report 1, 2023).

³⁸ US Department of Transportation, 'Complaints Alleging Discriminatory Treatment Against Disabled Travelers Under The Air Carrier Access Act and 14 CFR Part 382' (Web Page, 7 January 2015) <<https://www.transportation.gov/airconsumer/complaints-alleging-discriminatory-treatment-against-disabled-travelers>>.

³⁹ Hannah Sampson, 'More wheelchairs are being damaged on planes. Travelers want action', *The Washington Post* (online, 24 August 2022) <<https://www.washingtonpost.com/travel/2022/08/24/wheelchair-flying-airlines-disability/>>.

⁴⁰ Reduced Mobility Rights Limited, 'UK CAA Enforcement Powers Campaign Gaining Momentum' (Web Page, 23 February 2023) <<https://www.reducedmobility.eu/20230223790/TheNews/uk-cao-enforcement-powers-campaign-gaining-momentum>>; Disability Rights UK, 'The Campaign' (Web Page, 2022) <<https://www.disabilityrightsuk.org/rights-flights>>.

⁴¹ See *Brandy v HREOC* (1995) HCA 10.

The Commission would require specific funding to carry out this new role. It is vital the Commission be adequately resourced for these functions as any reform will be of limited effect without active and meaningful enforcement.

Recommendation 13 – The Australian Human Rights Commission be empowered and funded to enforce the specific standards for air travel

As set out in Recommendation 10, the Australian Human Rights Commission be empowered as a regulator, with its remit to include the new specific standards for air travel described at Recommendation 12. The Commission should be adequately funded to carry out its enforcement functions.

Appendix A

Endorsements of this submission from other organisations

This submission has been endorsed by the following organisations and individuals:

- Australian Centre for Disability Law
- Australian Disability Rights Network
- Blind Citizens Australia
- Canberra Community Law
- Disability Discrimination Legal Service
- National Inclusive Transport Advocacy Network
- People with Disability Australia
- Physical Disability Council of NSW
- Simon Rice
- Spinal Cord Injuries Australia
- Sussex Street Community Law Service

Endorsements of submissions of other organisations

PIAC endorses submissions to the 2022 Review of the Transport Standards made by the following organisations:

- Blind Citizens Australia
- National Inclusive Transport Advocacy Network
- People with Disability Australia, in particular recommendations 1, 3 and 4 in that submission