



public interest
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**Flight still closed? Response to the Allen
Consulting Group on *Review of the
Disability Standards for Accessible Public
Transport: Draft Report***

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Introduction

The Public Interest Advocacy Centre

PIAC is an independent, non-profit law and policy organisation that identifies public interest issues and works co-operatively with other organisations to advocate for individuals and groups affected. It seeks to promote a just and democratic society by making strategic interventions on public interest issues.

In making strategic interventions on public interest issues PIAC seeks to:

- expose unjust or unsafe practices, deficient laws or policies;
- promote accountable, transparent and responsive government;
- encourage, influence and inform public debate;
- promote the development of law—both statutory and common—that reflects the public interest; and
- develop community organisations to pursue the interests of the communities they represent.

Established in July 1982 as an initiative of the Law Foundation of New South Wales, with support from the NSW Legal Aid Commission, PIAC was the first, and remains the only, broadly based public interest legal centre in Australia. Financial support for PIAC comes primarily from the NSW Public Purpose Fund and the Commonwealth and State Community Legal Centre Funding Program. PIAC also receives funding from the NSW Government Department of Water and Energy for its work on utilities, and from Allens Arthur Robinson for its Indigenous Justice Program. PIAC also generates income from project and case grants, seminars, consultancy fees, donations and recovery of costs in legal actions.

1. Summary

The Allen Consulting Group (ACG) on behalf of the Federal Government, released the *Review of the Disability Standards for Accessible Public Transport: Draft Report* (the Draft Report) in January 2008. The Public Interest Advocacy Centre (PIAC) and the NSW Disability Discrimination Legal Centre, supported by a coalition of disability organisations, produced *Flight Closed*¹; which was submitted to the Inquiry in August 2007. *Flight Closed* is based on an analysis of 110 case studies provided by passengers with disabilities who described their experience of accessing air travel. PIAC representatives also appeared at a hearing conducted by the reviewers during the period of public consultation in August 2007.

This response to the Draft Report considers that report from the perspective of how access to air travel would be effected by the recommendations contained in the Draft Report. Comments are focussed on the general quality of the analysis of the Draft Report, particularly the adequacy of the information sources, level of analysis and whether the evidence, support the recommendations in the Draft Report.

In general, the analysis and lack of independent evaluation of the claims of those making submissions and quoted as evidence in the Draft Report is disappointing. There is a lack a coherent application of methodologies for the analysis and selection of material on which ACG bases the recommendations. For example, the Productivity Commission evaluation framework² for assessing effectiveness is referred to but, as the reviewers point out, there is little quantitative data, so it is not clear how this framework is applied. Since the basis on which the recommendations are made in the Draft Report is not fully substantiated, it follows that many of the conclusions fail to answer the concerns raised by people with disabilities who experience problems accessing air and other travel.

The authors of the Draft Report fail to acknowledge the differences between air travel and other modes of transport. Much of the analysis fails on close inspection when applied to air travel. For example, Option 6C about compliance reporting recommends that State and Territory Government ‘would be responsible for collecting the required information in their jurisdiction’. State and Territory Governments can probably collect such data in relation to ground-based public transport, as they either own or license train, bus or taxi services. It is less clear what authority they would have in ensuring reporting compliance from airlines that are licensed by a national authority under Federal legislation.

The Draft Report sets out clearly in Chapter 8 the need for Government regulation to continue. It is highly unlikely that co-regulation arrangements would result in the capital investment required to meet the requirements of the *Disability Standards for Accessible Public Transport 2002* (Cth) (the Transport Standards). However, ACG rejects the option of mode-specific regulation, even though it acknowledges the difficulties in implementing a ‘one size fits all’ standard. Instead the authors favour the development mode-specific guidelines.³ It is encouraging that the reviewers found that implementing a standard that is based on components of a system of travel, rather than the mode of transport, is difficult for providers.

¹ Brenda Bailey, *Flight Closed: Report on the experiences of People with Disabilities in Domestic Airline Travel in Australia* (2007).

² Allen Consulting Group, *Review of the Disability Standards for Accessible Public Transport: Draft Report* (2008), 11.

³ *Ibid* 162.

The Draft Report⁴ lists guidance or codes of practice material as non-regulatory, however it would be detrimental if the code or guidance notes were seen as optional. The codes of practice should be incorporated into the legislative framework. Carriers providing a service to people with disabilities and meeting the Standard are competing with companies who do not invest in the necessary infrastructure, equipment or service staff to provide a similar level of non-discriminatory service.

Draft Recommendation 6 makes significant recommendations about the complaint process to empower the Human Rights and Equal Opportunity Commission (HREOC) to refer cases of the Transport Standards directly to the Federal Court. The recommendation does not go far enough. HREOC should have the powers to instigate cases in the Federal Court where it identifies broader or systemic non-compliance; and to notify prospective representative complainants of what is required by the Federal Court or Federal Magistrates Court in relation to representative proceedings.

The Draft Recommendations (1, 4, 5, 7, 9) rely too heavily on the currently structured Accessible Public Transport Jurisdictional Committee (APTJC) and its subcommittees. The reviewers make the point that the Accessible Public Transport Jurisdictional Committee has been working on developing a standard reporting mechanism and has not succeeded in reaching agreement to a preferred approach. The lack of effectiveness of the APTJC gives stakeholders little confidence that it will fulfil the many recommendations of the review that rely on the Committee's effectiveness.

Unless otherwise stated, all page and section references are from the Draft Report.

⁴ Ibid 98.

2. Adequacy of Information Sources

The Draft Report notes throughout the lack of available data to analyse and evaluate the effectiveness of the Standards. The reviewers were unable to determine to what extent the regulated transport entities had complied with the Transport Standards. This section outlines several concerns about the approach the reviewers have taken to accessing information.

2.1 Compliance with the Transport Standards

The Draft report points out⁵ that there is no mechanism for reporting action plans or monitoring compliance against those plans and the Transport Standards. The HREOC website posts action plans that are voluntarily submitted by service providers; however, there are no plans from airlines posted on the website. This lack of information is a fundamental problem of the Review. The reviewers list a number of reasons as to why the collection of compliance data is difficult, but fail to focus on the fact that it is simply not a requirement to report compliance.

2.2 Literature review

The reviewers did not obtain literature from an independent source on the background to the airline industry, view action plans or review data on accessibility for airline travel. The Draft Report does not include a review of international standards, analysis of information on the average number of passengers on a flight, the income generated by airlines or the capacity for additional carriage of passengers. There is no indication that the reviewers sought information to understand the background to the airline industry.

2.3 Available data

The Draft Report states that the reviewers relied on qualitative data for their conclusions. There is no indication on whether the reviewers identified the type of information that would have been useful to the review or whether such information was requested. This indicates that a body with the power of review and authority to demand information for the purposes of the review would be more effective.

The Draft Report notes the limited data on how airport infrastructure meets the Transport Standards. An audit of the infrastructure of airports, either through providers self-assessing or by contracting an audit to a relevant organisation would have been feasible and greatly assisted the review process.

2.4 Data on patronage

The reviewers accept the view presented by transport entities that collecting information about their passengers would be a personal intrusion.⁶ This ignores the fact that airline booking processes, which require passengers to self identify and respond to questions in order to purchase a ticket are extremely intrusive. Airlines already collect data from people who self identify as having a disability through the booking system. The de-identification of data along the lines the reviewers describe, using ABS collection tools, does not seem beyond the capacity of providers; nor would the providers of such information be in breach of legal obligations under privacy laws.

⁵ Ibid 8.

⁶ Ibid 81.

3. Analysis

The reviewers uses the Regulatory Impact Statement (RIS) undertaken at the time the Standard was introduced⁷ to inform the review and recommendations. The costs and benefits referred to in the RIS are listed but not assessed as to their current relevancy or accuracy. It also ignores, until much later in the report (Chapter 10⁸) that the RIS never considered the costs and benefits for the aviation industry. If the RIS is to be relied upon to assist in determining the value of the recommendations, the current value of the RIS should have been determined.

The reviewers refer to significant restrictions applying only in rural areas. It is misleading to suggest that significant problems in accessing air travel are limited to small aircraft in rural areas. Most of the examples in *Flight Closed* are of people travelling to the most populated cities: Brisbane, Melbourne and Sydney; and mostly with major carriers.

The Draft Report refers to the requirements in the Transport Standards⁹ that, if met, should provide non-discriminatory access at each stage of the journey (booking, embarking and so on). This aspect of the Draft Report ignores the question of how the airlines have interpreted and applied the Transport Standards, and does not respond to the gaps in the Transport Standards outlined in Appendix B of *Flight Closed*. Most of section 6.2 of the Draft Report simply repeats what is in the Transport Standards and the compliance timetable. Since there is no monitoring of access to airline travel, the reviewers cannot state whether any of these standards or the timetable were met and how the airlines interpreted their obligations under the Transport Standards.

In describing improvements¹⁰, the reviewers could point to only one improvement: the introduction of lifting devices. The Draft Report ignores the case studies of passengers describing the sometimes inappropriate use of such devices, or untrained staff causing distress and injury to passengers.

The Draft Report¹¹ provides evidence about access to airlines, in doing so the reviewers:

- Support the independent travel criteria, referring to one person with a disability who gave evidence that supported the view that the policy was reasonable. There is no questioning of why there is a discrepancy in policies between airlines—why can one person travel safely and independently with one airline, but not another—or comparison of how such policies are implemented internationally and in Australia.
- Refer to the size of seating in planes as if this is something that can never be changed when aircraft are refitted, or new aircraft are commissioned. Consideration and involvement of people with disabilities at design and fit-out stage, or refurbishment may find engineering solutions to meet the needs of staff and passengers. For example, simple solutions such as arm-rests that can be raised on 50 percent of seats would improve accessibility.

Airlines refusing to carry an aid on the same flight as the passenger or charging for that carriage of the aid is described by the reviewers without commenting on Part 30 of the Transport Standards and *Disability Standards for Accessible Public Transport Guidelines 2004* (Cth) (the Guidelines), which give direction about the responsibility of the airline to carry aids. The reviewers fail to question how and in what circumstances this

⁷ Ibid 9-10.

⁸ Ibid 125.

⁹ Ibid 61.

¹⁰ Ibid, Section 6.3, 62.

¹¹ Ibid 63.

policy is applied by the airlines. For example, sporting equipment such as golf clubs do not attract the same restrictions and costs if the total weight of baggage is within the weight limit for the individual.

The Draft Report does not question the basis of airline policies that restrict access and, importantly, how such policies are applied. For example, the Draft Report fails to challenge Virgin Blue on its attendant care policy, in regard to:

- How the Independent Travel Criteria is not applied to minors who could experience difficulties following directions?
- Why the Independent Travel Criteria is applied to passengers with disabilities who live independently in every other aspect of their lives?
- Why the Independent Travel Criteria applies to people who have an obvious intellectual disability and not to other passengers who may have difficulty understanding instructions in English?
- What skills the staff have in assessing a passenger's understanding, and whether their disability will prevent them from putting on a mask or safety vest?
- What assistance is provided to help people with disabilities to overcome these barriers, for example, assisting people with intellectual disabilities with training to undertake independent travel?
- How such vague criteria are applied to everyone with a disability, and how are front-line staff expected to interact and assess every type of disability?

In regard to assistance animals¹², the Draft Report notes the concerns of airlines about carrying assistance animals that are not sufficiently trained. The review fails to consider the complex requirements the airline insists upon to prove that a dog has been adequately trained. The reviewers should compare requirements with other jurisdictions.

Airlines are reported to claim that passengers do not provide enough notice of their needs.¹³ There is evidence from passengers that providing advance notice makes very little difference in the availability of assistance. The reviewers do not discuss when advance notice is reasonable and when it becomes an additional barrier to travel, or what responsibility the airline should have in acting upon the information provided in advance. For example, passengers often refer to airlines failing to provide priority seating, which is provided for in Part 31 of the Transport Standards. The reviewers also fail to note the experience of passengers who receive incorrect information from the airlines about bookings or who face intrusive personal questioning that is not relevant to their ability to travel.

The Allen Consulting Group in the *Review of the Disability Standards for Accessible Public Transport: Issue Paper* (the Issues Paper) released for this review process asks: are there gaps in the coverage of requirements?¹⁴ The inclusion of this question for public comment makes the reviewer's statement that the care of mobility aids in transit and the disrespect and humiliation passengers experience is outside the Transport Standards framework very surprising and somewhat beside the point. Reviewing the gaps in the Transport Standards should not be outside the review. The scope of the terms of reference include a requirement to make recommendations for amendments to the Transport Standards, it does not limit the recommendations to amend only what is currently in the Transport Standards.

¹² Ibid 64.

¹³ Ibid 66.

¹⁴ Allen Consulting Group, *Review of the Disability Standards for Accessible Public Transport: Issue Paper* (2007) Question 23, 16.

While many of the 110 case studies in *Flight Closed* refer to the treatment and attitude of staff, in no case is this separate from the delivery of a service. For example, a staff member ignores a vision impaired passenger with the result of a missed flight, the attitude towards a passenger with an intellectual disability results in the passenger being removed from the plane, or the airlines' lack of concern for quality service leads potential passengers to avoid travel by air. The approach of the reviewers is also at odds with providers such as the Queensland Transport Department, which stated that the delivery of 'respectful, non confrontational and unimposing' delivery of public transport is central to the 'spirit of the Transport Standards'.¹⁵ The training of personnel to ensure quality customer service is also part of the Transport Standards framework, as it is included in the Guidelines (Part 37).

Most international standards include requirements about carriage of aids and provide for compensation for damage.¹⁶ The application of the Transport Standards and the consequences of implementation, such as the carriage of aids, should be an essential part of the review. These aspects of travel are also part of the 'whole of journey' concept, which the reviewers describe in section 7.6 of the Draft Report.¹⁷ Finding a mobility aid at the end of flight in working order is a central element of this concept.

4. Contradictory conclusions

Chapter 6 concludes that 'people with disability are generally able to access air travel'.¹⁸ This directly contradicts the case studies in the PIAC submission and individuals giving evidence at public hearings. Do the reviewers doubt the experience and authenticity of these accounts? By 'generally' do they mean everyone who has a disability except those who are vision impaired, travel with an assistance animal, in a motorised wheelchair, have difficulty walking or an intellectual disability? Perhaps they are referring to those who do travel but experience substandard treatment and risk damage to themselves and their mobility equipment in the process without complaint.

This conclusion is also surprising given that the reviewers note in the Draft Report that: a common view (at hearings and submissions) was that air travel accessibility for people with disability has gone backwards over the last five years.¹⁹

The reviewers state that access to air travel is 'constrained' rather than being inaccessible. This implies a minor inconvenience; that somehow passengers can change the weight and size of their wheelchair, or that it is acceptable to travel more often at inconvenient times, to have tickets cancelled at short notice or to go to the added expense of travelling with an attendant. The Draft Report also states that 'measures are in place to facilitate access' without describing what measures exist and in what airlines. This statement does not seem to take into account the experience of such 'measures' described in *Flight Closed*. Passengers describe airline assistance as inconsistent, often poorly executed by untrained or overworked staff, or not available with every airline. The description of 'constrained' ignores and discounts the experiences of people who can no longer travel by air due to the lack of assistance or application of airline policies. Discrimination law is about equal opportunity not semi-equal or constrained equal opportunity.

¹⁵ Allen Consulting Group, above n2, 82.

¹⁶ *Disability Standards for Accessible Public Transport Guidelines 2004* (Cth) Part 37.

¹⁷ Allen Consulting Group, above n2, 75-76.

¹⁸ *Ibid* 60.

¹⁹ *Ibid* 62.

The Draft Report also contradicts its general conclusion about improvements in access by describing the difficulties in accessing taxis outside and information within the terminal, of negotiating security screening, and of accessing 'meet and assist' services.

The reviewers conclude that the Transport Standards have improved access.²⁰ This claim is made even though earlier in the report they acknowledge that: 'there are particular issues that are specific to air travel which are causing confusion and uncertainty for both providers and passengers'.²¹ Following this over-optimistic summary, the reviewers conclude that access to airline travel is 'stalled' and acknowledge the lack of reliable data.

5. Evaluation of Key Issues

The reviewers conclude with the assessment of the key issues identified in the Draft Report by considering options for each issue, on which they base their recommendation. The options are assessed against five criteria, four of the five criteria take the perspective of the service provider. In assessing the recommendations against the likelihood of removing discrimination—the one customer-focussed criteria—the focus appears to be on the costs to the provider and government of implementing the Transport Standards. The following comments on the key issues identified by the reviewers consider the implications from the perspective of their impact on airline travel.

5.1 Key issue: incorrect or inappropriate prescription in the Transport Standards²²

The Draft Report concludes that inappropriate prescription is 'applied across a number of modes of transport, but which is not appropriate for all modes'.²³ The preferred option to amend the technical standards should be reconsidered to ensure:

- Consumer input is integrated into all processes from identification, development to implementation. This includes consumer input into the 'Expert Group' as described in this option.
- The amendments allow for mode-specific regulations and codes of practice.
- The Passenger Transport Group, which is identified as the group that should be responsible for developing the report's recommendations, is unlikely to be welcome by consumers in its current form.
- Associated entities such as the Federal authorities responsible for airline travel should be party to the process to avoid the blame shifting that is occurring with the current arrangements.

5.2 Key issue: uncertainty around implementation and compliance²⁴

The option to develop guidance material specific to the mode of transport is supported. However, this should not result in weakening of the legislative framework as the reviewers suggest. There are examples, such as the Occupational Health and Safety legislative framework where Australian Standards, codes of practice and other

²⁰ Ibid 82.

²¹ Ibid 73.

²² Ibid 157.

²³ Ibid 157.

²⁴ Ibid 160.

guidance material is integrated into a performance-based approach. This approach allows for prescriptive regulations in high-risk areas.

5.3 Key issue: gaps in information for providers in operating accessible public transport²⁵

The assessment of options for the issue of management of carriage of mobility aids and assistance animals needs further consideration. The reviewers should consider:

- Arrangements for dismantling and folding aids.
- International codes of practice that refer to the responsibility for removing batteries and re-assembling aids.
- Aids that are needed during the flight but require security clearance.
- How a limited list of registered animal trainers will limit access.

Consulting with stakeholders, PIAC found there is little belief that a sub-committee dominated by industry will have the authority to direct airlines to carry particular aids. Airlines may continue to argue that carriage conflicts with Civil Aviation Safety Authority (CASA) requirements, security and occupational concerns.

The experience from stakeholders is that even when an airline has approved the carriage of an aid, it does not mean that staff assisting with boarding will allow its carriage. A sub-committee without authority to direct providers to ensure access will have little or no effect on the internal practices of airlines.

5.4 Key issue: reliance on individual complaints process to ensure compliance

The reviewers' analysis of the difficulties in achieving system changes through the complaints system reflects the issues raised in the PIAC submission, particularly:²⁶

- That having individual complaints as the only way to ensure compliance with the Disability Standards is an issue.
- That one of the reasons this is an issue is that this places too large a responsibility and financial risk on people with disability.
- That the individual complaints process focuses on individual complaints and not systemic issues.
- That there are impediments to individuals making and following through with complaints.
- That there is a lack of certainty around rights and obligations in relation to the Transport Standards.

PIAC does not agree with the statement in the Draft Review that the problem is 'not so much with the role of the complaints process in managing individual complaints, but a lack of precedent and certainty around obligations'.

While there may be issues with a lack of precedent and certainty around obligations, PIAC considers that a more fundamental problem exists in relation to the complaints process, and that is the lack of effective representative complaints mechanism beyond HREOC.

²⁵ Ibid 162.

²⁶ Ibid 165.

Currently, representative complaints in relation to unlawful discrimination may be made to the Human Rights and Equal Opportunity Commission under section 46PB of the *Human Rights And Equal Opportunity Commission Act 1986* (Cth) (HREOC Act), which states:

Conditions for lodging a representative complaint

- (1) A representative complaint may be lodged under section 46P only if:
 - (a) the class members have complaints against the same person; and
 - (b) all the complaints are in respect of, or arise out of, the same, similar or related circumstances; and
 - (c) all the complaints give rise to a substantial common issue of law or fact.
- (2) A representative complaint under section 46P must:
 - (a) describe or otherwise identify the class members; and
 - (b) specify the nature of the complaints made on behalf of the class members; and
 - (c) specify the nature of the relief sought.
- (3) In describing or otherwise identifying the class members, it is not necessary to name them or specify how many there are.

A representative complaint may be lodged without the consent of class members.

5.5 Limitations on who may make a representative complaint

If a representative complaint is terminated by HREOC, section 46PO of the HREOC Act enables an application to be made to the Federal Court or Federal Magistrates Court. However, the meaning of representative proceedings in the Federal Court or Federal Magistrates Court is more restrictive than the definition contained in the HREOC Act.

Under section 46P(c) of the HREOC Act a complaint can be made 'by a person or trade union on behalf of one or more other persons aggrieved by the alleged unlawful discrimination'. However, under section 46PO(1) in order to proceed beyond HREOC to the Federal Court or the Federal Magistrates' Court with such a complaint only an individual 'who was an affected person in relation to the complaint' may make a complaint.

In order to proceed in the court, a member of the representative class must commence the proceedings and be able to name at least seven members of the class who consent. This removes the option of a representative body taking the role as litigant. This means that the intent of the legislation to enable systemic issues to be dealt with through representative organisations representing the class of people affected has been severely undermined.

This has resulted, in at least one case of which PIAC is aware, in proceedings being dismissed by the Federal Court for a lack of standing of the applicant.

While the appropriate and ideal resolution is to bring the Federal Court processes into line with the HREOC Act, in the interim, at least, a similar situation of systemic breach litigation failing late in the process and purely for technical rather than substantive reason can be avoided by notification by HREOC to prospective representative complainants of what is required by the Federal Court or Federal Magistrates Court in relation to representative proceedings.

The reference to a 'lack of precedent and certainty' is not correct. The HREOC Website contains information and

references to recent court decisions. It also doesn't follow that if there are legal precedents that the focus on individual complaints would be reduced.

Another significant barrier to the establishment of precedent is the risk of adverse cost order. The current rules dealing with the discretion to cap costs in public interest proceedings or to not award costs must be changed to ensure that the presumption is in favor of the costs cap and against adverse costs, and in favor of finding cases alleging non-compliance of standards are cases brought in the public interest.

PIAC strongly urges supports the establishment of mechanisms to:

- (a) enable representative complaints to proceed in the Federal Court and Federal Magistrates' Court in a manner consistent with section 46P(c) of the HREOC Act;²⁷
- (b) enable the HREOC to initiate proceedings for systemic standards non-compliance in the Federal Court and Federal Magistrates' Courts.

5.6 Lack of a Transport Standards compliance reporting framework and data on patronage²⁸

The reviewers should note that the preferred option refers to data collection by State and Territory Governments. This is not appropriate for airlines, which are governed by Federal legislation.

The option, which uses the Australian Bureau of Statistics to collect data, would facilitate collection across modes of transport.

It is unlikely that information will be delivered by the providers unless it is mandatory to do so, and that it should be up to the regulators to determine what that reporting should include in order to determine whether compliance with the Transport Standards is being achieved. To date, airlines have not co-operated with a voluntary arrangement to provide action plans to HREOC for inclusion on its website.

Conclusion

The Draft Report fails to adequately address the issues raised in *Flight Closed* or, indeed, the question of whether or not the Transport Standards have been an adequate and effective mechanism to achieve compliance with the relevant provisions of the *Disability Discrimination Act 1992* (Cth). Further, the Draft Report fails to effectively identify how the Transport Standards could be amended to achieve greater understanding of obligations and rights, to achieve more consistent and effective implementation, and to achieve what they were designed to achieve: non-discriminatory access to public transport for people with disabilities.

Sixteen years after the *Disability Discrimination Act 1992* was enacted by the Federal Parliament, we are—as a developed nation—well overdue to take the systemic steps needed to ensure people with disabilities can enjoy the right to dignity and respect in using public transport, whether it be land-based, water-based or airborne.

²⁷ This could be achieved through amendments to the relevant legislation to ensure continuity of the HREOC Act provisions, or through the establishment of a mechanisms whereby named advocacy or representative groups that support identified equality-seeking groups would be granted standing as of right to bring complaints of systemic breaches of standards.

²⁸ Ibid 168.