



**Get On Board!**

**2012 Review of the Disability Standards  
for Accessible Public Transport**

**31 May 2013**

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# Summary of recommendations

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## **Recommendation 1 – Purpose of the Transport Standards**

Division 1.1 of the Transport Standards should be amended to acknowledge that accessible public transport and equal access to public transport are essential to ensuring that people with disabilities are able to fully participate in economic, social and cultural life.

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## **Recommendation 2 – Enhancing coordination, monitoring and implementation**

The Department of Infrastructure and Transport should be appropriately resourced to promote, monitor, coordinate and facilitate the implementation of the Transport Standards.

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## **Recommendation 3 – Independent data on accessibility of public transport**

The Federal Government should establish a process for the collection of current data and evidence on the extent to which people with disabilities are able to access public transport on an equal basis.

Data collected should include organisational data, data from complaints and submissions, research, consultation with staff and consultation with customers.

The data collected by the Government should be compiled into a report and made publicly available.

A report on the data collected by the Government should be prepared immediately following the current review. Subsequent reports should be finalised no earlier than one year prior to each five-year review of the Transport Standards, to inform each review.

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## **Recommendation 4 – Collection of data from patrons**

The Federal Government should request that the Australian Bureau of Statistics include questions on public transport patronage in their disability surveys, to assist in assessing the extent to which public transport is accessible to persons with disabilities.

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## **Recommendation 5 – Access to operator and provider data on compliance**

The Transport Standards should be amended to require public transport operators and providers to make publicly available data that sets out the extent to which they comply with the Transport Standards. Such data should be provided in accessible formats, and should be accompanied by plain English explanations prepared by the transport operator or provider.

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## **Recommendation 6 – Consistent and regular reporting on compliance**

The Federal Government should establish a national framework for the consistent and regular reporting of Action Plans by public transports operators and providers. Action Plans should be required to report on the extent to which operators and providers comply with the Transport Standards, as well as the steps that they are taking and intend to take to comply with the Transport Standards.

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### **Recommendation 7 – including additional modes of transport in the Transport Standards**

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- a) The Transport Standards should be amended to include the following modes of transport in the Transport Standards:
- School buses;
  - Community transport;
  - Charter boats; and
  - Limousines.
- b) Transport operators and providers of the modes of transport set out in Recommendation 9(a) above must not be provided with a timeframe to comply with any relevant standards within the Transport Standards, which is longer than the timeframes that modes of transports are currently required to meet under Schedule 1 of the Transport Standards.
- c) If a transport operator or provider of one of the modes of transport set out in Recommendation 9(a) above has only than one vehicle or conveyance (ie, one bus, one boat or one community taxi), the Transport Standards should require that one vehicle or conveyance to be fully compliant with the relevant Transport Standards.

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### **Recommendation 8 – A breach of the Transport Standards should be unlawful**

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A provision should be added to the Transport Standards to confirm that a breach of the Transport Standards is unlawful.

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### **Recommendation 9 – A breach of the Transport Standards should be unlawful**

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A provision should be added to the Transport Standards to confirm that a person may lodge a stand-alone complaint alleging a breach of the Transport Standards in the AHRC.

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### **Recommendation 10 – Exemptions**

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- a) The ability to apply for a temporary exemption or exception from the DDA should not apply to transport operators and providers. Similarly, Part 33A of the Transport Standards, which provides that operators and providers may apply for a temporary exemption to the Transport Standards, should be repealed.
- b) If the ability to apply for temporary exemptions from the Transport Standards is retained, the Transport Standards should be amended so that temporary exemptions are assessed in accordance with the following criteria:
- the application must be specific and specify what provisions the applicant is seeking exemption from, and for how long the exemption is sought;
  - the application should produce evidence as to why the exemption is required;
  - the proposed exemption must be consistent with the objects of the Act;
  - the proposed exemption must be necessary;
  - the proposed exemption impinges to the minimum extent necessary on the relevant right or rights to equal treatment;
  - whether there have been genuine attempts to comply with the provisions of the Act;
  - whether the applicant has an action plan in which to ensure compliance with the Act, following the expiration of the temporary exemption; and

- whether it is appropriate to grant the exemption subject to any terms or conditions.

The Transport Standards should also specify that matters raised in any submission to the AHRC regarding a particular exemption application should be considered by the AHRC in determining whether to grant an exemption application.

- c) If the ability to apply for temporary exemptions from the Transport Standards is retained, the Transport Standards should be amended so that the temporary application process includes the following features:
- all applications should be published on the AHRC's website;
  - all applications should be subject to a period of public consultation, in which submissions are invited;
  - the AHRC's temporary exemption decisions should be published on the its website and in the Gazette;
  - temporary exemptions should be granted for a period of no more than five years; and
  - temporary exemption application decisions should be reviewable by the Administrative Appeals Tribunal.

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#### **Recommendation 11: Incorporation of the Transport Standards into existing legislation, government contractual arrangements and transport accreditation processes**

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The Transport Standards be incorporated into existing legislation, government contractual arrangements and transport accreditation processes, and monitored and enforced accordingly.

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#### **Recommendation 12: Standing**

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The Australian Human Rights Commission Act 1986 (Cth) should be amended to include a provision allowing organisations to bring a complaint in relation to the Standards on behalf of a person to both the Commission and the federal courts. The Act should provide the courts with residual power to refuse to allow standing for an organisation on public interest grounds.

The Australian Human Rights Commission Act 1986 (Cth) should provide open standing to allow anyone to bring a complaint to enforce a breach of the Standards. The provision should be modelled on s 123 of the Environmental Planning and Assessment Act 1979 (NSW).

Alternatively, organisations should have standing to bring discrimination complaints in relation to breach of the Standards to the Australian Human Rights Commission and to the federal courts in their own right. In order to satisfy this standing test, an organisation or group would need to show either:

- that a significant portion of the membership of the organisation or group is affected by the conduct in question; or
- the alleged discriminatory conduct relates to the objects or purposes of the organisation or group.

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#### **Recommendation 13: Litigation costs**

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A costs provision should be inserted into the Transport Standards in relation to applications that are made to the Federal Courts. This provision should reflect the wording of clause 133 of the

Exposure Draft Human Rights and Anti Discrimination Bill 2012. A costs provision inserted into the Transport Standards should also enable courts to make an order as to costs where the complaint is successful and the matter is classed by the court as a public interest matter.

#### **Recommendation 14: Enabling the federal courts to award additional damages for breach of the Transport Standards**

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That a provision similar to s 115(4) of the Copyright Act 1968 (Cth) be inserted into the Transport Standards allowing for the court to award additional damages which have the purpose of discouraging the particular operator or providers, or other operators or providers, from continuing to provide services that breach the Transport Standards.

#### **Recommendation 15: Establishment of an effective complaints system**

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The Guidelines to the Transport Standards should be amended to encourage the establishment of an industry-based complaints process that is accessible to all consumers and can provide timely outcomes and result in systemic improvements to service delivery.

#### **Recommendation 16 – Staff training**

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The Guidelines to the Transport Standards should specifically require application of competency-based training for all public transport staff, with refresher courses provided at regular intervals.

## **Introduction**

The Public Interest Advocacy Centre (**PIAC**) welcomes the opportunity to provide this submission to the Minister for Infrastructure and Transport, and the Attorney-General, to inform the 2012 review of the *Disability Standards for Accessible Public Transport 2002* (Cth) (**Transport Standards**).

In accordance with section 31 of the Transport Standards, reviews of the Transport Standards are conducted every five years. However, the 2012 review is particularly pertinent, as the Australian Government, transport providers and operators, and the Australian public, will be considering the operation of the Transport Standards in a year that also marks 20 years since the *Disability Discrimination Act 1992* (Cth) (**DDA**) came into effect.

The development and implementation of the Transport Standards are among the most significant practical steps that have been taken to implement the DDA in the past 20 years. Their establishment recognises how accessible public transport is vitally important to enable full participation in public life for people with disabilities, their families and carers. The Transport Standards have attempted to clarify what milestones transport operators and providers are required to meet over time, to ensure compliance with the DDA. These milestones have also provided assurance to people with disabilities regarding the extent to which transport operators and providers will make changes to enhance accessibility over time.

Whilst there is no doubt that on the whole the Transport Standards have been instrumental in changing the way transport operators and providers engage with and accommodate people with disability to date, there are still many obstacles to achieving the goal of removing discrimination

against people with disabilities in the provision of public transport. PIAC's submission identifies some of these obstacles, the most significant of which is a poor compliance framework that relies on individual complaints to enforce the Transport Standards, which we view as placing an unfair and heavy burden on people with disabilities, and in turn creating a low level of compliance with the Transport Standards across some modes of transport generally.

PIAC's submission does not address every aspect of the Transport Standards. Rather PIAC's submission focuses on areas relevant to PIAC's expertise and experience – especially in providing legal advice and assistance to people with disability.

The recommendations that are made by PIAC in this submission are aimed at increasing compliance with and enforcement of the Transport Standards among government, transport operators and providers. PIAC proposes a legislative framework that requires government, transport operators and providers to engage more actively with the Transport Standards and the DDA.

## **The Public Interest Advocacy Centre**

PIAC is an independent, non-profit law and policy organisation that works for a fair, just and democratic society, empowering citizens, consumers and communities by taking strategic action on public interest issues.

PIAC identifies public interest issues and, where possible and appropriate, works co-operatively with other organisations to advocate for individuals and groups affected. PIAC seeks to:

- expose and redress unjust or unsafe practices, deficient laws or policies;
- promote accountable, transparent and responsive government;
- encourage, influence and inform public debate on issues affecting legal and democratic rights; and
- promote the development of law that reflects the public interest;
- develop and assist community organisations with a public interest focus to pursue the interests of the communities they represent;
- develop models to respond to unmet legal need; and
- maintain an effective and sustainable organisation.

Established in July 1982 as an initiative of the (then) 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 Services Program. PIAC also receives funding from the NSW Department of Trade and Investment, Regional Infrastructure and Services for its work on energy and water, and from Allens for its Indigenous Justice Program. PIAC's Senior Solicitor (Strategic Litigation) position is funded through a seed grant from IMF (Australia) Ltd and a consortium of donors. PIAC also generates income from project and case grants, seminars, consultancy fees, donations and recovery of costs in legal actions.

## PIAC's work on the Disability Standards for Accessible Public Transport

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 work on the review of the *Disability Standards for Accessible Public Transport (2002) Cth (the Transport Standards)*, with a focus on the experiences of people with disability in relation to airline travel, resulting in the report *Flight closed: the experiences of people with disabilities in domestic airline travel in Australia*.<sup>1</sup>

PIAC has previously represented Maurice Corcoran and Tom Ferguson in a disability discrimination complaint against Virgin Blue. The applicants' complaints against Virgin Blue were resolved when Virgin Blue agreed to change its Independent Travel Criteria, which stated that people who could not fast their seatbelt, put on an oxygen mask or put on a lifejacket without assistance had to travel with a paying companion. In October 2009, Virgin Blue released its revised Independent Travel Criteria so that Mr Corcoran, Mr Ferguson and other people with a disability could travel without having to pay for a travelling companion. The new Independent Travel Criteria were enshrined in orders made by the Federal Court with the consent of the parties.

PIAC also represented Greg Killeen in a Transport Standards complaint against the NSW Department of Transport and Infrastructure (Transport NSW) and two large taxi companies regarding wheelchair accessible taxis. Mr Killeen claimed the respondents had breached the Transport Standards by licensing (in the case of Transport NSW) and owning and operating (in the case of the companies) taxis that were unsafe, uncomfortable and in some cases unusable.<sup>2</sup> In late 2011, Transport NSW announced the introduction of new rules to address the problem, which increased the minimum amount of useable space within wheelchair accessible taxis.

More recently, PIAC represented Julia Haraksin, who made a complaint pursuant to the Transport Standards in the Federal Court against the bus company, Murrays Australia Ltd (**Murrays**).<sup>3</sup> The Federal Court found that Murrays was in 'flagrant disregard' of the Transport Standards at the time Ms Haraksin attempted to book her bus trip from Sydney to Canberra, in 2009, when it could not accept her booking because it did not have any wheelchair accessible buses. Justice Nicholas made an order that until 12 April 2015, Murrays must ensure at least 55% of its fixed route services between Sydney and Canberra are wheelchair accessible, unless its failure to do so is attributable to causes beyond Murrays' control.

PIAC also acted for Graeme Innes AM in a Transport Standards case before the Federal Circuit Court against Rail Corporation New South Wales (**Railcorp**).<sup>4</sup> The court found that there had

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<sup>1</sup> Public Interest Advocacy Centre, *Flight Closed: Report on the experiences of people with disabilities in domestic airline travel in Australia* (2007)

<sup>2</sup> *Killeen v Combined Communications Network Pty Ltd* [2011] FCA 27.

<sup>3</sup> *Haraksin v Murrays Australia Ltd (No 2)* [2013] FCA 217.

<sup>4</sup> *Innes v Rail Corporation of NSW (No 2)* [2013] FMCA 36.

been a breach of both the Transport Standards and the DDA and ordered \$10,000 be paid in compensation to Mr Innes.

Most recently, PIAC represented the ParaQuad Association of Tasmania, which opposed an application by Tasmanian Redline Coaches for exemption from a key provision of the Transport Standards.<sup>5</sup> The parties to that matter negotiated a successful outcome in the Administrative Appeals Tribunal.

In PIAC's view, advocating for accessible public transport falls squarely in the public interest. Ensuring that there is equal access to essential services, which facilitate engagement in employment and social and recreational activities, is a key goal that we as a society should prioritise. In addition, as the Australian Bureau of Statistics projects, Australia's population is rapidly ageing, with a 165% increase in the number of people aged over 85 years in the last two decades.<sup>6</sup> This increase in the proportion of older people in the population will be accompanied by a sharply increasing number of older people with disability, who require accessible public transport to allow them to fully participate in society.

## 1. The costs of inaccessibility

The social and economic costs of non-compliance are high, particularly in terms of preventing people with disability returning to the workforce, forcing reliance on expensive private transport, and contributing to social isolation. This is borne out by the available research, and is an issue continually raised with PIAC by the disability organisations, advocates and clients with whom we work.

Currently, the reliance on taxis as the primary means of transport presents a significant financial burden both on people living with physical disabilities on pensions or reduced income, and on the Government's disability support funding. The NSW Taxi Transport Subsidy Scheme provides a 50% subsidy to fares up to \$60. This subsidy has not increased since 1999, despite the cost of taxi transport having increased by 50% in this time.<sup>7</sup> A parallel scheme in Victoria provides a 50% subsidy for fares up to \$120, and a cross-party parliamentary inquiry into the issue in NSW recommended an increase of the scheme to a 50% subsidy for trips up to \$100.<sup>8</sup>

According to the Productivity Commission, 25% of people (76,000) with significantly reduced functioning cannot use public transport at all, in addition to 12% of people categorised in the 'early intervention group' (eg, in the early stages of multiple sclerosis).<sup>9</sup>

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<sup>5</sup> *Paraquad Tasmania and Tasmanian Redline Coaches* [2012] AATA 4276.

<sup>6</sup> The Australian Bureau of Statistics, *4102.0 Australian Social Trends, March 2009* (23 December 2009) <<http://www.abs.gov.au/AUSSTATS/abs@.nsf/Lookup/4102.0Main+Features10March%202009>>.

<sup>7</sup> Jacob Saulwick, *NSW urged to lift taxi subsidies for disabled* (20 April 2013) Sydney Morning Herald <<http://www.smh.com.au/nsw/nsw-urged-to-lift-taxi-subsidies-for-disabled-20130419-2i5r7.html>>.

<sup>8</sup> Select Committee on the NSW Taxi Industry, *Inquiry into the NSW Taxi Industry* (1 June 2010) <[http://www.parliament.nsw.gov.au/Prod/parliament/committee.nsf/0/1d2003f0722bef88ca257735001a4b5c/\\$FILE/1006%20Final%20report.pdf](http://www.parliament.nsw.gov.au/Prod/parliament/committee.nsf/0/1d2003f0722bef88ca257735001a4b5c/$FILE/1006%20Final%20report.pdf)>.

<sup>9</sup> Australian Government Productivity Commission, *Disability Care and Support*, Inquiry Report No 54 (2011) 774.

The average transport cost per person for the government, including the taxi subsidy schemes of NSW and Victoria, is up to \$1500 per person, when allowing for one \$30 taxi trip per week. The estimated annual cost of transportation is up to \$110 million per annum.<sup>10</sup> There are calls from a number of disability advocacy groups to increase the subsidy to a maximum of \$50 per taxi fare, taking the annual figure to almost \$200 million.<sup>11</sup> However, longer term, better compliance with the Transport Standards could see reliance on private transport and taxis reduced for people with disability, freeing up much needed funds for other disability support services.

The rising costs of taxi transport and a lack of access to affordable public transport is also contributing to the social isolation of disabled people, and is often a key factor preventing them from returning to work.<sup>12</sup> The Australian Council of Social Services has reported that 620, 600 people with a disability are living in poverty in Australia. They also have reported that, since welfare changes in 2006, people assessed as having a 'partial work capacity' (ability to work part-time) have had their disability support payments reduced by up to \$150 a week.<sup>13</sup> The report highlights the need to lift 'languishing unemployment rates' with disability employment in the Australian Public Service dropping from 5.8% in 1992 to just 2.9% in 2012.

National Disability Services Australia has estimated that if 4% of people currently on the Disability Support Pension were employed, it would create an economic impact of \$5 billion.<sup>14</sup> Closely linked to these figures is the finding that social exclusion and negative social attitudes are being widely cited as critical issues for the disabled population.<sup>15</sup> Reports have shown that 18% of people living with a profound disability had not had social contact in the last three months.<sup>16</sup> Ensuring that public transport adequately meets the needs of people with disability is critical in enabling people with disability to return to the workforce, increase their economic participation and contribute positively to a high quality of life.

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<sup>10</sup> Australian Government Productivity Commission, above n 9, 775.

<sup>11</sup> Select Committee on the NSW Taxi Industry, *Inquiry into the NSW Taxi Industry* (1 June 2010) <[http://www.parliament.nsw.gov.au/Prod/parliament/committee.nsf/0/1d2003f0722bef88ca257735001a4b5c/\\$FILE/1006%20Final%20report.pdf](http://www.parliament.nsw.gov.au/Prod/parliament/committee.nsf/0/1d2003f0722bef88ca257735001a4b5c/$FILE/1006%20Final%20report.pdf)>. xviii.

<sup>12</sup> Jacob Saulwick, *NSW urged to lift taxi subsidies for disabled* (20 April 2013) Sydney Morning Herald <<http://www.smh.com.au/nsw/nsw-urged-to-lift-taxi-subsidies-for-disabled-20130419-2i5r7.html>>; Mark Tonga, *High taxi fares a burden on disabled* (2 April 2013) Illawarra Mercury <<http://www.illawarramercury.com.au/story/1397739/blog-high-taxi-fares-a-burden-on-disabled/>>.

<sup>13</sup> Australian Council Of Social Services, 'Wake up call for the nation: More than 620,000 people with disability living in poverty,' (Media Release, 22 March 2013) <[http://www.acoss.org.au/media/release/wake\\_up\\_call\\_for\\_the\\_nation\\_more\\_than\\_620\\_000\\_people\\_with\\_disability\\_living](http://www.acoss.org.au/media/release/wake_up_call_for_the_nation_more_than_620_000_people_with_disability_living)>.

<sup>14</sup> Australian Government Productivity Commission, above n 9, 965.

<sup>15</sup> Australian Government Department of Families, Housing, Community Services and Indigenous Affairs, *Shut Out: The Experience of People with Disabilities and their Families in Australia*, National Disability Strategy Consultation Report (2009) 3.

<sup>16</sup> Australian Government Productivity Commission, above n 9, 114.

PIAC submits that the Transport Standards should include an acknowledgement that accessible public transport and equal access to public transport are essential to ensuring that people with disability are able to fully participate in economic, social and cultural life.

### ***Recommendation 1 – Purpose of the Transport Standards***

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*Division 1.1 of the Transport Standards should be amended to acknowledge that accessible public transport and equal access to public transport are essential to ensuring that people with disabilities are able to fully participate in economic, social and cultural life.*

## **2. The Transport Standards**

### **2.1 The Disability Standards for Accessible Public Transport 2002**

The Transport Standards are a legislative instrument created under section 31 of the DDA<sup>17</sup> The Transport Standards and the *Disability Standards for Accessible Public Transport Guidelines 2002 (the Transport Standard Guidelines)* were introduced 10 years after the enactment of the DDA to provide guidance to public transport operators and providers on how to meet their obligations to provide equal access to public transport under the DDA, and to assist public transport providers to remove discrimination from their services.<sup>18</sup>

#### **2.1.1 The Transport Standards**

The Australian Transport Council approved the Transport Standards in 2002, in recognition that the establishment of minimum accessibility requirements would assist persons with disabilities and providers and operators of public transport conveyances to understand the requirements of the DDA.

The Transport Standards specify a wide range of requirements for access paths, manoeuvring areas, ramps and boarding devices, allocated spaces, doorways, controls, symbols, signs, waiting areas, boarding points, allocated spaces, doorways, controls, toilets, Tactile Ground Surface Indicators, alarms, lighting, controls, furniture and fittings, street furniture, gateways, payment of fares, hearing augmentation listening systems, information provisions, booked services, food and drinks services, belongings and priority arrangements.

#### **2.1.2 Who is required to comply with the Transport Standards**

The relevant duty holders are ‘providers’ and ‘operators’<sup>19</sup>. A provider of public transport is responsible for the supply and maintenance of transport infrastructure (such as local government), and an operator is a person or organisations that provides a public transport service to the public.

The Transport Standards set out requirements for providers and operators that apply to the following modes of transport or ‘conveyances’:

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<sup>17</sup> Section 31 of the DDA provides that the Minister may, by legislative instrument, formulate standards, to be known as disability standards, in relation to any area in which it is unlawful under the DDA for a person to discriminate against another person on the basis that that person has a disability.

<sup>18</sup> *Disability Standards for Accessible Public Transport 2002*, s 1.2(2).

<sup>19</sup> *Ibid*, ss 1.20 and 1.22

- aircraft;
- buses or coaches;
- ferries;
- taxis; and
- trains, trams, light rail, monorails and rack railways.

### 2.1.3 Timetable for compliance

Schedule 1 of the Transport Standards sets out a timetable for compliance, providing transport operators and providers with a realistic and clear time frame in which changes under the Transport Standards must be made. The timetable creates progressive compliance targets in five year increments, spanning from December 2007 to December 2032, providing a realistic framework that takes into account costs associated with compliance, and the specific changes needed to be made to achieve accessibility for each particular transport mode. For example, the 2017 target requires 90% compliance to be reached in terms of resting points, street furniture, allocated space and boarding, for all modes of transport except buses, for which the required compliance rate is 80% by 2017. The 2022 target date requires full compliance with all the relevant standards in relation to all aspects not specified in clause 4.2, for all modes of transport except trains and trams, which must comply with *all* the Transport Standards by this time.

## 2.2 International standards

The rights of people with disabilities to live without discrimination and to enjoy full economic, social and cultural rights on an equal basis with others are set out in various international instruments, including the International Covenant on Economic, Social and Cultural Rights (**ICESCR**),<sup>20</sup> the International Covenant on Civil and Political Rights (**ICCPR**)<sup>21</sup> and the Convention on the Rights of Persons with Disability (**CRPD**).<sup>22</sup>

The Transport Standards are an important mechanism by which Australia seeks to comply with its international legal obligation to establish a process to eliminate discrimination against persons with disability, and a means by which Australia can also enable the realisation of other internationally recognised human rights that are afforded to persons with disability.

The ICESCR and the CRPD afford the following rights to persons with disabilities:

- the right to work;<sup>23</sup>
- the right to education;<sup>24</sup>

<sup>20</sup> *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 November 1976, ratified by Australia 10 December 1975).

<sup>21</sup> *International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976, ratified by Australia 13 August 1980).

<sup>22</sup> *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008, ratified by Australia 17 July 2008).

<sup>23</sup> *International Covenant of Economic, Social and Cultural Rights*, art 6; *Convention on the Rights of Persons with Disabilities*, art 27.

<sup>24</sup> *International Covenant of Economic, Social and Cultural Rights*, art 13.

- the right to participate in cultural life;<sup>25</sup> and
- the right to the highest attainable standards of physical and mental health.<sup>26</sup>

Each of the above rights is intrinsically linked to access to affordable and safe public transport. More specifically, the CRPD contains the following rights directly aimed at addressing access to public transport for people with disabilities:

- Article 9 of the CRPD, which requires Australia to ensure equal access to the physical environment, transportation and other services provided to the public.<sup>27</sup> Article 9 also requires that Australia implement minimum standards for the accessibility of public services.<sup>28</sup>
- Article 19 creates a right to independent living and community inclusion, and requires Australia to facilitate the full inclusion and participation of people with disabilities in the community. In particular, community services must be available to people with disabilities and be responsive to their needs.
- Article 20 creates a right to personal mobility, and requires Australia to ensure for people with disabilities personal mobility with the greatest possible independence, by facilitating their mobility in the manner and at the time of their choice, at an affordable cost.<sup>29</sup>

### 2.3 Article 33 of the CRPD and the Transport Standards

The DDA creates general obligations. For instance, section 24 makes it unlawful to provide services in a way that discriminates against a person on the ground of disability.<sup>30</sup> The DDA does not contain specific transport provisions or an implementing framework, and therefore is extremely limited in implementing Australia's international law obligations. By contrast, the Transport Standards clarify exactly what targets transport operators must meet in order to fulfill their DDA obligations. In doing so, they represent an important mechanisms by which Australia actively implements the framework referred to in Article 33 of the CRPD.

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 Convention into 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.<sup>31</sup>

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<sup>25</sup> Ibid, art 15(1)(a).

<sup>26</sup> Ibid, art 12.

<sup>27</sup> *Convention on the Rights of Persons with Disabilities*, art 9(1).

<sup>28</sup> Ibid, art 9(2).

<sup>29</sup> Ibid, art 20.

<sup>30</sup> *Disability Discrimination Act 1992 (Cth)*, s 24.

<sup>31</sup> *Convention on the Rights of Persons with Disabilities*, art 33.

Similarly, under the ICESCR, each State is required to take steps to provide individuals with the rights that are protected in the convention to the greatest extent that it is able in relation to the resources available, with a view to achieving full realisation of the rights contained in the convention by all appropriate means, including particularly the adoption of legislative measures.<sup>32</sup>

It is important to note that while the timetable at Schedule 1 of the Transport Standards sets out a compliance framework, the Transport Standards nevertheless fall short of meeting the obligations of Article 33 of the CRPD, as they are not supported by focal points within government to manage their implementation.

The Transport Standards are oriented towards clarifying goals that must be met by transport providers and operators. To facilitate compliance with the Transport Standards, and to enhance compliance with international law and the CRPD, the Transport Standards should be supported by an appropriately resourced government agency tasked with promoting, monitoring, coordinating and managing their implementation.

### ***Recommendation 2 – Enhancing coordination, monitoring and implementation***

*The Department of Infrastructure and Transport should be appropriately resourced to promote, monitor, coordinate and facilitate the implementation of the Transport Standards.*

## **3. The 2007 review of the Transport Standards**

### **3.1 The 2007 review of the Transport Standards**

Part 24 of the Transport Standards requires that they be reviewed periodically to assess whether discrimination has been removed, as far as possible, according to the requirements for compliance set out in Schedule 1 of the Transport Standards. The first review of the Transport Standards commenced in 2007 and was conducted by the Allen Consulting Group (**ACG**).

The review indicated that while some progress has been made, there were significant shortfalls in meeting compliance targets. Enforcement of the Transport Standards relies on individuals to identify breaches of the Transport Standards and bring complaints to the Australian Human Rights Commission (**AHRC**). As the review noted, this system places the burden on people with disabilities rather than operators, and fails to provide an effective incentive for operators to implement the Transport Standards. Furthermore, the report indicated significant difficulties in collecting compliance data, and data about the patronage of people with disabilities on public transport.<sup>33</sup> PIAC noted that a key factor behind this lack of data is a lack of Transport Standards compliance reporting framework, including mandatory reporting.<sup>34</sup> Other key issues raised both in the 2007 review, and PIAC's 2008 'Flight Still Closed?' submission include a continued lack of

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<sup>32</sup> *International Covenant of Economic, Social and Cultural Rights*, art 2(1).

<sup>33</sup> Allen Consulting Group, *Review of the Disability Standards for Accessible Public Transport 2002*, Issues Paper (2007) 303-306.

<sup>34</sup> Public Interest Advocacy Centre, *Flight Still Closed? Response to the Allen Consulting Group on Review of the Disability Standards for Accessible Public Transport: Draft Report* (2008) 11.

certainty over compliance and implementation of the Transport Standards by public transport providers.<sup>35</sup>

### 3.2 PIAC's submissions to the 2007 Review of Transport Standards

PIAC, in collaboration with the National Accessible Airlines Steering Group and with the assistance of many disability groups, submitted a report to the 2007 review of the Transport Standards titled 'Flight Closed: Report on the experiences of People with Disabilities in Domestic Airline Travel in Australia' (**Flight Closed**).

In April 2008, PIAC submitted a response to the *Review of the Disability Standards for Accessible Public Transport: Draft Report (the Draft Report)*, titled 'Flight Still Closed? Response to the Allen Consulting Group on *Review of the Disability Standards for Accessible Public Transport: Draft Report*' (**Flight Still Closed**). PIAC also appeared at a hearing conducted by the ACG in August 2007.

Flight Closed, Flight Still Closed and PIAC's oral evidence all drew on PIAC's then recent casework experience regarding access to airline travel for people with disability.<sup>36</sup> Flight Closed also drew on findings from 110 case studies of people with disabilities who had accesses, or tried to access, airline travel, as well as the collective experience of PIAC and the disability groups involved.

The barriers faced by people with disabilities to accessing airlines at the time of those submissions ranged from difficulty in obtaining accurate information about conditions of travel,<sup>37</sup> and poor service from staff during travel,<sup>38</sup> to lack of communication and understanding,<sup>39</sup> and inflexible policies which undermined people's dignity and independence. There were also fundamental issues with the Transport Standards themselves, including lack of concrete standards for airlines,<sup>40</sup> and difficulties in enforcing existing standards.<sup>41</sup>

Flight Closed made recommendations to address these problems, including several that airlines could implement without government intervention. These included recommendations relating to service delivery and training as well as recommendations for giving responsibility for compliance, monitoring and standards for airlines to an airline specific agency.<sup>42</sup>

The Draft Report addressed some of these issues; however, there were also several notable deficiencies. In particular, the Draft Report failed to properly assess the information sources it used and did not apply a consistent, transparent and reasoned approach to analysis of that

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<sup>35</sup> Ibid 8.

<sup>36</sup> *Corcoran & Ferguson v Virgin Blue Airlines Pty Ltd* [2008] FCA 864.

<sup>37</sup> Public Interest Advocacy Centre, above n 1, 13, 24.

<sup>38</sup> Public Interest Advocacy Centre, above n 1, 12, 14, 16-19.

<sup>39</sup> Public Interest Advocacy Centre, above n 1, 15, 17, 19, 23-25.

<sup>40</sup> Public Interest Advocacy Centre, above n 1, 26, 28.

<sup>41</sup> Public Interest Advocacy Centre, above n 1, 29-30.

<sup>42</sup> Public Interest Advocacy Centre, above n 1, 5-11.

information.<sup>43</sup> The Draft Report did not appear to understand or address the fact that access to air transport was a unique situation with specific requirements and issues,<sup>44</sup> and did not address the practical information and service issues that caused great difficulties for people with disability attempting to travel by air.<sup>45</sup>

### **3.3 The 2009 Final Report**

In October 2009, The ACG released the *Review of the Disability Standards for Accessible Public Transport: Final Report (Final Report)*.

The Final Report identified 10 key systemic issues in its assessment of the Transport Standards.<sup>46</sup> Some of these were issues that PIAC had identified in Flight Closed and Flight Still Closed, such as the general lack of data on progress and patronage by which to assess the Transport Standards,<sup>47</sup> and the reliance on individual complaints in order to enforce compliance.<sup>48</sup> The Review also identified that the references to the Australian Standards in drafting the Transport Standards limited the ability of people with disability to understand the outcomes required by the Transport Standards, and that it could be difficult both for people with disability and public transport operators to identify compliant mobility aids. However, many of the other issues focused on trouble for the operators in applying and complying with the Transport Standards, including a lack of flexibility in the Transport Standards to accommodate different modes of transport and the cost of upgrades delaying implementation.

The Final Report made recommendations which included developing better mechanisms for the collection of information, establishing relevant working groups to assess information and formulate more specific standards and guidelines, establishing a 'best practice clearing house' and encouraging better support for both service providers and complainants in meeting and enforcing the standards.<sup>49</sup> While these recommendations were notable, they did not necessarily go far enough towards addressing fundamental issues, including the issue of reliance on individuals to enforce compliance, which PIAC maintains would be better solved by the establishment of a regulatory body with powers of enforcement.

### **3.4 The importance of reviews of the Transport Standards**

It is essential that the results of each review of the Transport Standards are properly considered, and that appropriate amendments to the Transport Standards and other related changes are made to improve the operation of the Transport Standards.

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<sup>43</sup> Public Interest Advocacy Centre, above n 34, 4.

<sup>44</sup> Public Interest Advocacy Centre, above n 34, 5-6.

<sup>45</sup> Public Interest Advocacy Centre, above n 34, 5-6.

<sup>46</sup> Allen Consulting Group, *Review of the Disability Standards for Accessible Public Transport Final Report* (2009).

<sup>47</sup> Ibid 9.

<sup>48</sup> Allen Consulting Group, above n 46, 172, 177.

<sup>49</sup> Allen Consulting Group, above n 46, 16.

This is particularly important because section 34 of the DDA confirms that, where a person complies with a disability standard, they are also complying with the DDA. That is, it is not possible for a person to lodge a complaint alleging that someone has contravened the DDA when a person has complied with a disability standard. In light of this section, we submit that it is essential that the Transport Standards are not diminished and that they are continually reviewed and updated to ensure that they are meeting the highest possible standard

One of the terms of reference for the current review is to assess the progress of the implementation of the Federal Government's response to the 2007 review. The Federal Government, in its response to the 2009 Final Report, supported all recommendations in principle.<sup>50</sup> However, work on those recommendations was generally deferred to the Australian Transport Council (ATC), the Council of Australian Governments Ministerial Council with responsibility for transport issues.<sup>51</sup> It appears that most, or possibly all, of the recommendations proposed in 2007 have not been implemented. PIAC is concerned that the failure to implement recommendations from the 2007 review of the Transport Standards has diminished the effectiveness of the Transport Standards, as well as the threshold of what will constitute unlawful discrimination under the DDA.

PIAC hopes that the recommendations which flow from the current review will be taken up by the Commonwealth Government in a manner that ensures their effective and timely implementation.

## **4. Compliance mechanisms**

### **4.1 Data on compliance**

Collection of data from transport providers and operators, from government, and from people with disabilities, is necessary in order to assess progress on the Transport Standards' goal of eliminating discrimination against persons with disabilities, as far as possible, in the area of transport services. Unfortunately, there is currently no reliable data regarding the extent to which transport operators and providers are meeting the compliance targets that are set out in the Transport Standards.

PIAC has previously identified a failure to obtain sufficient data regarding compliance with the Transport Standards. 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. In addition, there should be a process by which compliance data provided from operators and providers is independently verified.

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 experienced of people with disabilities. Collection of such data is essential given that the

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<sup>50</sup> Australian Government Department of Infrastructure and Transport and Attorney General's Department, *Review of the Disability Standards for Accessible Public Transport 2002; Commonwealth Government Response* (2011) 7-15.

<sup>51</sup> As of February 2011, this has been replaced with the Standing Council on Transport and Industry (SCOTI)

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 reporting of data regarding compliance would prompt transport operators and providers to be more proactive in carrying out their functions in a non-discriminatory way. It would prompt organisations to take steps to implement the Transport Standards and would require organisations to ensure that their policies and practices do not have an adverse impact upon people with disabilities. It would also assist to ensure that equality performance was part of the planning and accountability frameworks of the organisation. Operators and providers would benefit from the collection of this information as well, and could use this material to support any defence of unjustifiable hardship, where appropriate.

PIAC agrees with recommendation 2 of the Final Report that the Federal Government should request that the Australian Bureau of Statistics (**ABS**) include questions on public transport patronage in their disability surveys.<sup>52</sup>

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### ***Recommendation 3 – Independent data on accessibility of public transport***

*The Federal Government should establish a process for the collection of current data and evidence on the extent to which people with disabilities are able to access public transport on an equal basis.*

*Data collected should include organisational data, data from complaints and submissions, research, consultation with staff and consultation with customers.*

*The data collected by the Government should be compiled into a report and made publicly available.*

*A report on the data collected by the Government should be prepared immediately following the current review. Subsequent reports should be finalised no earlier than one year prior to each five-year review of the Transport Standards, to inform each review.*

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### ***Recommendation 4 – Collection of data from patrons***

*The Federal Government should request that the Australian Bureau of Statistics include questions on public transport patronage in their disability surveys, to assist in assessing the extent to which public transport is accessible to persons with disabilities.*

## **4.2 Reporting on compliance**

There is currently no national reporting framework for transport operators and providers. Operators and providers should be required to make data regarding the extent to which they comply with the Transport Standards publically available.

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<sup>52</sup> Allen Consulting Group, above n 46, 21.

Reporting on compliance is essential not only for the purpose of government monitoring compliance, but also because providing people with disabilities with clear information on the extent to which a provider or operator complies with the Transport Standards would have a very practical impact on the day-to-day travel and use of public transport services by people with disability.

PIAC proposes the development of a mechanism for publicly reporting Action Plans and monitoring compliance against those plans and the Transport Standards. Currently, Action Plans may be voluntarily submitted by transport providers and operators to the AHRC for publication on its website. However, there is no requirement for transport providers or operators to submit such plans, nor is there any requirement for such plans to be consistent with the compliance targets that are set out in the Transport Standards. Importantly, there is no independent regulator to monitor whether Action Plans have been implemented, nor are public transport operators or providers required to publicly self report on the extent to which they have complied with the Transport Standards.

PIAC submits that there should be a national framework for the consistent and regular reporting of Action Plans by public transport operators and providers. An essential part of this framework would be to provide an appropriate agency with the funding to allow that agency to monitor levels of compliance with the Transport Standards, and to develop a body of data on the accessibility of public transport, consistent with the Transport Standards.

PIAC supports the provision of Action Plans that set out the extent to which an organisation complies with the Transport Standards, as a means of providing information about the level of accessibility offered by a particular service.

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#### ***Recommendation 5 – Access to operator and provider data on compliance***

*The Transport Standards should be amended to require public transport operators and providers to make publicly available data that sets out the extent to which they comply with the Transport Standards. Such data should be provided in accessible formats, and should be accompanied by plain English explanations prepared by the transport operator or provider.*

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#### ***Recommendation 6 – Consistent and regular reporting on compliance***

*The Federal Government should establish a national framework for the consistent and regular reporting of Action Plans by public transport operators and providers. Action Plans should be required to report on the extent to which operators and providers comply with the Transport Standards, as well as the steps that they are taking and intend to take to comply with the Transport Standards.*

## **5. Effectiveness of the Transport Standards**

### **5.1 Scope of the Transport Standards**

The Transport Standards do not apply to dedicated school buses and certain community transport services. They also do not apply to charter boars or limousines. Whilst these providers remain subject to the requirements of the DDA, there is no requirement for transport providers

and operators to meet particular accessibility levels by a particular time period in respect of these modes of transports.

Despite these modes of transport not being included in the Transport Standards to date, operators and providers of these modes of transport have been required to comply with the DDA since it was introduced in 1992. That is, for the past 20 years, it has been unlawful for transport operators and providers of these modes of transports to discriminate against persons because of their disability in the provision of transport, unless they are able to prove that they would suffer an unjustifiable hardship by providing equal access to transport to persons with disabilities. Operators of the excluded modes of transports have also been able to apply for an exemption to the Transport Standards if they have taken all reasonable steps to comply with the Transport Standards, but there are cogent reasons why they cannot.

It is for these reasons that PIAC submits that if the above modes of transport, which are currently excluded from the Transport Standards, are included within the Transport Standards, they must not be provided with a timeframe to comply which is any longer than the timeframes which other modes of transport are currently required to meet under Schedule 1 of the Transport Standards. PIAC believes that, ultimately, it would be beneficial to include these modes of transport in the Transport Standards, but only if doing so does not provide these modes of transport with additional time to become accessible, as compared with other modes already included in the Transport Standards. To do otherwise would operate against the objectives of the DDA.

Despite our submissions above, PIAC submits that if a transport operator or provider only has one school bus, or one community transport vehicle, the Transport Standards should require that one vehicle to be fully compliant with the accessibility requirements in the Transport Standards.

### ***Recommendation 7 – including additional modes of transport in the Transport Standards***

- a) *The Transport Standards should be amended to include the following modes of transport in the Transport Standards:*
  - *School buses;*
  - *Community transport;*
  - *Charter boats; and*
  - *Limousines.*
- b) *Transport operators and providers of the modes of transport set out in Recommendation 9(a) above must not be provided with a timeframe to comply with any relevant standards within the Transport Standards, which is longer than the timeframes that modes of transports are currently required to meet under Schedule 1 of the Transport Standards.*
- c) *If a transport operator or provider of one of the modes of transport set out in Recommendation 9(a) above has only than one vehicle or conveyance (ie, one bus, one boat or one community taxi), the Transport Standards should require that one vehicle or conveyance to be fully compliant with the relevant Transport Standards.*

## 5.2 A breach of the Transport Standards should be unlawful

PIAC considers that the Transport Standards should be amended to clearly state that a breach of the Transport Standards is unlawful.

In our view it is clear that the legislature intended that a breach of the Transport Standards would be unlawful. Section 32 of the DDA states that a breach of any disability standards developed under the DDA is unlawful. The Explanatory Memorandum to the DDA confirms that a breach of a disability standard is unlawful. It provides for a person to lodge a complaint to the Australian Human Rights Commission under Section 69 of the DDA where a disability standard is breached.<sup>53</sup> There is no requirement for a complaint regarding a breach of the Transport Standards to be accompanied by a complaint alleging a breach of the DDA. In essence, a breach of the Transport Standards results in a breach of the DDA.

This view is supported by the AHRC publication 'Federal Discrimination Law',<sup>54</sup> which states that:

It is unlawful for a person to contravene a disability standard. The exemption provisions (Part II Division 5) generally do not apply in relation to a disability standard. However, if a person acts in accordance with a disability standard the unlawful discrimination provisions in Part II do not apply to the person's act.<sup>55</sup>

The terms of the Transport Standards themselves do not confirm that a breach of the Transport Standards is unlawful. In our view, this has created some confusion about whether a breach of the Transport Standards is unlawful in the absence of a breach, or at least a complaint alleging a breach, of the DDA. For example, in *Haraksin v Murrays Australia* [2013] FCA 217, Nicholas J stated that:

Non-compliance with the Standards does not of itself provide a sufficient basis for a person to lodge a complaint under s46P or to commence a proceeding under s46PO(1). This is because non-compliance with the Standards does not of itself constitute unlawful discrimination.<sup>56</sup>

In our respectful view, this legal assessment by Nicholas J in *Haraksin* is incorrect, as it appears to take the view that there can be no independent cause of action or finding of discrimination on the basis of a breach of the Transport Standards alone.

PIAC considers that the decision in *Haraksin* may result in complainants being required to lodge complaints claiming a breach of both the DDA and the Transport Standards. This will create some practical difficulties for claimants who would otherwise lodge a complaint alleging a breach of the Transport Standards only. This is because the DDA contains legal requirements that do not exist in the Transport Standards. For example, the DDA requires complainants to make an allegation of indirect or direct discrimination, to show that they were treated less favourably because of their disability and grapple with concepts such as reasonable adjustments. By

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<sup>53</sup> Explanatory Memorandum, Disability Discrimination Act 1992 (Cth).

<sup>54</sup> Australian Human Rights Commission, *Federal Discrimination Law* (2011)

<sup>55</sup> *Ibid*, Chapter 5, Page 64

<sup>56</sup> *Haraksin v Murrays Australia* [2013] FCA 217, 86.

contrast, a complaint alleging a breach of the Transport Standards merely needs to show that the Transport Standards were not complied with. The requirement for complainants to deal with the DDA in addition to the Transport Standards when lodging a complaint to the AHRC would create an added hurdle for complainants who already bear a heavy burden when it comes to taking steps towards enforcing compliance with the Transport Standards.

PIAC recommends that a provision be added to the Transport Standards to confirm that a breach of the Transport Standards is unlawful. PIAC recommends that this provision confirm that a person may lodge a stand-alone complaint alleging a breach of the Transport Standards in the AHRC.

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***Recommendation 8 – A breach of the Transport Standards should be unlawful***

*A provision should be added to the Transport Standards to confirm that a breach of the Transport Standards is unlawful.*

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***Recommendation 9 – A breach of the Transport Standards should be unlawful***

*A provision should be added to the Transport Standards to confirm that a person may lodge a stand-alone complaint alleging a breach of the Transport Standards in the AHRC.*

### **5.3 Exemptions**

PIAC has participated in a number of public consultations relating to the temporary exemption provisions of the DDA and Transport Standards. PIAC has also acted as the legal representative for a peak disability organisation that intervened in an application by a transport provider and operator to the Administrative Appeals Tribunal to review the decision of the AHRC not to provide an exemption.

PIAC considers that the ability for organisations to apply for temporary exemptions under Part 33A of the Transport Standards limits the effectiveness of the Transport Standards. The option of applying for temporary exemptions discourage operators and providers from striving to fully comply with the timetable for compliance set out in Schedule 2 of the Standards.

Given how long disability discrimination laws have been in place in Australia, and that the Transport Standards have been law since 2002, PIAC believes that exceptions and exemptions should not apply to the Transport Standards. If a transport operator or provider is unable to comply with the requirements of the Transport Standards, the defence of unjustifiable hardship is a sufficient protection.

In the event that the ability to apply for exemptions in relation to the Transport Standards is retained, PIAC submits that the DDA should set out the specific process and criteria for granting exemptions, rather than leaving the process to be developed in guidelines produced by the Commission, as is the current position. This would provide greater clarity and certainty for duty holders and affected persons regarding how the temporary exemptions provisions are intended to apply and operate. We believe that embodying the requirements for the granting of an exemption within the Transport Standards is important in light of the significance of temporary exemptions

within anti-discrimination legislations, which is that essentially they provide authorisation to discriminate.

PIAC submits that the process for granting temporary exemptions should include that:

- all temporary exemption applications should be published on the Commission's website;
- all applications are subject to a period of public consultation, in which submissions are invited;
- the Commission's temporary exemption decisions should be published on the Commission's website and in the *Gazette*;
- temporary exemptions should be granted for a period of no more than five years; and temporary exemption application decisions should be reviewable by the Administrative Appeals Tribunal.

PIAC submits that the following criteria, many of which are currently used by the Commission in assessing applications,<sup>57</sup> should be included in the Act and be taken into account by the Commission in determining whether to grant an exemption application:

- the application must be specific and specify what provisions the applicant is seeking exemption from and for how long the exemption is sought;
- the application should produce evidence as to why the exemption is required;
- the proposed exemption must be consistent with the objects of the Act;
- the proposed exemption must be necessary;
- the proposed exemption impinges to the minimum extent necessary on the relevant right or rights to equal treatment;
- whether there have been genuine attempts to comply with the provisions of the Act;
- whether the applicant has an action plan in which to ensure compliance with the Act, following the expiration of the temporary exemption; and
- whether it is appropriate to grant the exemption subject to any terms or conditions.

The Transport Standards should also specify that matters raised in any submission to the AHRC regarding a particular exemption application should be considered by the AHRC in determining whether to grant an exemption application.

### ***Recommendation 10 – Exemptions***

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- d) *The ability to apply for a temporary exemption or exception from the DDA should not apply to transport operators and providers. Similarly, Part 33A of the Transport Standards, which provides that operators and providers may apply for a temporary exemption to the Transport Standards, should be repealed.*
- e) *If the ability to apply for temporary exemptions from the Transport Standards is retained, the Transport Standards should be amended so that temporary exemptions are assessed in accordance with the following criteria:*
  - *the application must be specific and specify what provisions the applicant is seeking exemption from, and for how long the exemption is sought;*

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<sup>57</sup>

Australian Human Rights Commission, *Temporary exemptions under the Disability Discrimination Act* (11 December 2012) <<http://www.hreoc.gov.au/legal/exemptions/index.html>>.

- *the application should produce evidence as to why the exemption is required;*
- *the proposed exemption must be consistent with the objects of the Act;*
- *the proposed exemption must be necessary;*
- *the proposed exemption impinges to the minimum extent necessary on the relevant right or rights to equal treatment;*
- *whether there have been genuine attempts to comply with the provisions of the Act;*
- *whether the applicant has an action plan in which to ensure compliance with the Act, following the expiration of the temporary exemption; and*
- *whether it is appropriate to grant the exemption subject to any terms or conditions.*

*The Transport Standards should also specify that matters raised in any submission to the AHRC regarding a particular exemption application should be considered by the AHRC in determining whether to grant an exemption application.*

- f) *If the ability to apply for temporary exemptions from the Transport Standards is retained, the Transport Standards should be amended so that the temporary application process includes the following features:*
- *all applications should be published on the AHRC's website;*
  - *all applications should be subject to a period of public consultation, in which submissions are invited;*
  - *the AHRC's temporary exemption decisions should be published on the its website and in the Gazette;*
  - *temporary exemptions should be granted for a period of no more than five years; and*
  - *temporary exemption application decisions should be reviewable by the Administrative Appeals Tribunal.*

## **5.4 Inclusion of Standards in existing legislation**

PIAC submits that an effective method of ensuring compliance with the Transport Standards would be to incorporate the Transport Standards into existing legislative and licensing arrangements. This would shift the burden of enforcing the Standards to transport operators and regulators who are best placed to monitor their implementation.

The Transport Standards could be integrated into existing legislative and licensing frameworks in a range of ways, including insertion of accessible transport as an object of legislation and transport agencies; insertion into licensing and accreditation; reporting requirements and safety requirements.

There is international precedent for existing federal or state based agencies to enforce and regulate Standards or legislation in relation to accessibility.

For example, the Canadian Transportation Agency is an independent administrative body of the Government of Canada. As a quasi-judicial tribunal, it resolves a range of commercial and consumer transportation-related disputes, including accessibility complaints by persons with disability. As an economic regulator, it makes determinations and issues authorities, licences and

permits to transportation carriers under federal jurisdiction. It also conducts periodic surveys to monitor the implementation of transport codes of practice.<sup>58</sup>

The USA Architectural and Transportation Barriers Compliance Board operates a similar model.<sup>59</sup> It is an independent federal agency devoted to accessibility for people with disability. The Board develops and maintains design criteria for the built environment, transit vehicles, telecommunications equipment, and electronic and information technology. It also provides technical assistance and training on these requirements and on accessible design and enforces accessibility standards that cover federally funded facilities. The Board is structured to function as a coordinating body among federal agencies and to directly represent the public, particularly people with disability.

## 5.5 Insertion of accessibility as an object into existing legislation

Transport legislation should include the aims and objects of the DDA to communicate their importance to operators and the community. For example, the *Transport Integration Act 2010* (Vic) sets out 'social and economic inclusion' as an object and identifies the 'principle of equity' as a decision making principle.<sup>60</sup> These considerations are taken into account in all transport decision-making.<sup>61</sup> Although the Act allows decision makers to determine the weight of the considerations which risks limiting their practical effect,<sup>62</sup> the Victorian model promotes the value of accessibility.

In NSW, the *Transport Administration Act 1988* (NSW) governs transport agencies including Transport for NSW, RailCorp, Country Rail Infrastructure Authority, State Transit Authority, Sydney Ferries, Roads and Maritime Services, and the Independent Safety Regulator. Section 2B of the *Transport Administration Act 1988* (NSW) sets out common objectives and service delivery priorities of public transport agencies, which could include accessibility.

## 5.6 Insertion of the Transport Standards into contractual agreements

Adherence to the Transport Standards should be included as a contractual condition between state and territory governments and transport operators, and then monitored and enforced. Current contracts between state governments and transport operators provide performance targets and service standards. Compliance with the Transport Standards should be specifically included in these requirements. Where contracts make detailed provision for particular services, these obligations should be consistent with relevant Standards. For instance, requirements for a reservation service could incorporate the Transport Standards on booked services in compliance with Part 28 of the Standards.

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<sup>58</sup> Canadian Transportation Agency, *About the Agency* (9 March 2011) <<http://www.cta-otc.gc.ca/eng/agency>>.

<sup>59</sup> Federal Register, *Architectural and Transportation Barriers Compliance Board* (6 March 2013) <<http://www.federalregister.gov/agencies/architectural-and-transportation-barriers-compliance-board>>.

<sup>60</sup> *Transport Integration Act 2010* (Vic) s 8, 17.

<sup>61</sup> State Government Victoria Department of Transport, *Legislation & regulation* (19 April 2013) <<http://www.transport.vic.gov.au/about-us/legislation>>.

<sup>62</sup> *Transport Integration Act 2010* (Vic) s 26-27.

In Victoria, for example, some contracts include provisions requiring compliance with the Standards. Part 6 of the *Transport Integration Act 2010* (Vic) established transport corporations, Victorian Rail Track, V/Line Corporation and the Linking Melbourne Authority (responsible for road projects), to deliver transport services.

The responsibilities of Victorian train and tram operators are set out in Public Transport Partnership Agreements.<sup>63</sup> The contracts set out that operators are responsible for running daily operations to performance standards, customer service, management of staff and maintenance of vehicles, tracks and stations; while the State Government is responsible for safety regulation, funding, coordinating timetables, strategic planning and developing a new ticketing system.<sup>64</sup>

Public Transport Victoria requires operators to meet 'minimum standards of service' specified in the 'public transport partnership agreements'.<sup>65</sup> These standards largely relate to reliability and punctuality and operators are liable to pay passenger compensation for breaches.<sup>66</sup> Performance reports are regularly published and incentive payments are available for meeting certain targets. Similar measures should be adopted to promote and assess compliance with the Transport Standards.

One example of such an agreement is that made with V/Line. V/Line is the largest regional transport operator in Australia and provides train and coach services. The V/Line Franchise agreement states that a passenger's charter reflecting key performance indicators should be adopted and implemented (cl 8.1).<sup>67</sup> The franchisee must use 'reasonable endeavors to secure a continuous improvement in overall customer satisfaction' (cl 8.5), tested through regular surveys and enforced through customer compensation (cl 8.6-8.7).

The contract contains a detailed clause on the Standards (cl 8.8). The franchisee 'acknowledges and agrees that it is bound' by the DDA and the Standards, and must lodge an 'action plan' within six months detailing a program for achieving at least the minimum compliance for the target dates, and undertake a 'compliance status audit' of 'all conveyances, premises and infrastructure' every one to three years as requested by the Director. The Transport Standards could be further integrated throughout contracts such as this.

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<sup>63</sup> The current contracts are available at: Public Transport Victoria, *Public Transport partnership agreements* (2012) <<http://corp.ptv.vic.gov.au/managing-victoria-s-public-transport-network/operators/public-transport-partnership-agreements/>>.

<sup>64</sup> Ibid.

<sup>65</sup> Public Transport Victoria, above n 63.

<sup>66</sup> Public Transport Victoria, *Customer service charters* (2012) <<http://corp.ptv.vic.gov.au/managing-victoria-s-public-transport-network/operators/customer-service-charters/#opc>>.

<sup>67</sup> Allens Arthur Robinson, *Deed of Amendment and Restatement – Franchise Agreement – V/Line* (8 April 2011) <<http://corp.ptv.vic.gov.au/assets/Franchise-Agreement-V-Line.pdf>>.

Under the contract between Metro Trains and Public Transport Victoria,<sup>68</sup> the franchisee must meet fixed and flexible performance benchmarks relating to reliability and customer satisfaction (cl 4.5). The Standards are addressed in clause 8.8 in a similar manner to the V/Line Franchise Agreement. The franchisee acknowledges that it is bound by the DDA and the Transport Standards, and must prepare and lodge with the AHRC an action plan, 'consistent' with the Transport Standards and the Victorian Government Action Plan, for the implementation of 'at least the minimum level of compliance' for the Standard's 2012 target. The plan must include: works and activities to be implemented, prioritised according to cost effectiveness; proposed staff training and customer service programs on disability awareness; discrimination complaints procedures, and an 'effective means of monitoring performance against and compliance with the requirements of the DDA Action Plan'. The franchisee must annually provide a schedule of proposed works to meet the targets in the Action Plan, and undertake a 'Compliance Status Audit'.

## 5.7 Insertion of Standards into accreditation mechanisms

In addition, prospective transport operators seeking accreditation should be required to show how they will comply with the Standards in addition to existing matters such as financial viability. Ongoing accreditation should be conditional on satisfactory compliance with the Transport Standards.

For example, in NSW, the *Passenger Transport Act 1990* (NSW) applies to 'public passenger service vehicles', defined as bus, ferry, taxi and other vehicles as deemed by the regulations (section 3); requires 'accreditation or authorisation' of operators and drivers by Transport NSW (section 4); and provides for contracts between Transport NSW and rail, ferry and bus service providers (section 4). The objectives of the *Passenger Transport Act 1990* (NSW) include to 'encourage public passenger services that meet the reasonable expectations of the community for safe, reliable and efficient passenger transport services' (section 4).

The Transport Standards could be incorporated into the *Passenger Transport Act 1990* (NSW) by including the provision of accessible transport as an object of the Act, and requiring that 'the accredited person has demonstrated the capacity to meet' the Standards in addition to prescribed standards of financial viability, safety and vehicle maintenance (section 7). The *Passenger Transport Act 1990* (NSW) provides for different standards for different classes of services and operators (section 7(3)(c)), which would accommodate the Transport Standards specifications for different conveyances.

Failure to meet the conditions of accreditation is an offence (section 9B), and Transport NSW may vary, cancel or suspend accreditation at any time (section 10). If the Disability Standards were incorporated into the accreditation conditions, these outcomes would provide a greater incentive for compliance.

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<sup>68</sup> Allens Arthur Robinson, *Franchise Agreement – Train* (29 August 2009) <<http://corp.ptv.vic.gov.au/assets/PTV/PTV%20docs/Partnership-agreements/Train-Franchise-Agreement-Vol-1-of-2.pdf>>.

Part 4C of the Act provides for the investigation and enforcement of safety requirements. Operators must provide safety information reasonably required by the regulator including measures taken to promote safety (section 46A). Inspectors may investigate safety incidents (section 48BA) and conduct transport safety inquiries (section 48B). Compliance with the Disability Standards should be integrated into the powers and functions regarding safety.

## 5.8 Reporting

Reporting on the Transport Standards could also be integrated into existing legislative regimes. Existing legislative and contractual requirements for operators to provide information to regulators could be amended to compel reporting on the Standards. This would address the data deficiency identified by the review.<sup>69</sup> Publication would also increase the incentive to meet the Transport Standards.

## 5.9 Safety

The Transport Standards could also be incorporated into existing safety requirement regimes. The Transport Standards have numerous provisions that are critical to ensuring the safety of people with disability. Expanding the remit of existing safety regulators to include enforcing the Standards would be an efficient means of increasing compliance and would emphasise that accessible public transport is not merely an aspiration but a condition precedent to achieving safety.

The Australian Transport Safety Bureau (**ATSB**) is an example of an existing Commonwealth agency that currently monitors compliance with safety regimes, although it currently primarily responds to specific incidents. The ATSB is an independent Commonwealth government statutory agency established under the *Transport Safety Investigation Act 2003*. Its functions include investigating safety breaches, recording safety data and promoting safety in aviation, marine and rail transport within the Commonwealth's jurisdiction.<sup>70</sup>

The Civil Aviation Safety Authority (**CASA**) is another existing federal agency. CASA regulates the safety, security and operational requirements of airlines. CASA is an independent statutory authority established in 1995 to regulate civil air operations in Australia and Australian aircraft overseas. It is also responsible for safety education and training.<sup>71</sup> The *Civil Aviation Act 1988* (Cth) sets out CASA's functions including (section 9):

- developing and promulgating appropriate aviation standards;
- developing effective enforcement strategies;
- conducting comprehensive aviation industry surveillance; and
- monitoring safety performance.

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<sup>69</sup> Allen Consulting Group, above n 46, 9.

<sup>70</sup> Australian Government Australian Transport Safety Bureau, *Overview of the ATSB* (14 December 2012) <[http://www.atsb.gov.au/about\\_atsb/overview.aspx](http://www.atsb.gov.au/about_atsb/overview.aspx)>.

<sup>71</sup> Australian Government Civil Aviation Safety Authority, *About CASA* (5 May 2013) <[http://www.casa.gov.au/scripts/nc.dll?WCMS:STANDARD::pc=PC\\_91621](http://www.casa.gov.au/scripts/nc.dll?WCMS:STANDARD::pc=PC_91621)>.

Given CASA's status as a key regulatory body and its extensive powers, expanding its remit to include enforcing the Transport Standards' requirements regarding aircraft and airports could be an effective and efficient means of ensuring compliance.

In the performance of its functions CASA must regard air safety navigation as the paramount consideration, but it must also avert to the protection of the environment (section 9A). Accessibility could be included as another consideration.

Accessibility could be incorporated into safety requirements or addressed by an additional form of certification that an aircraft meets the Transport Standards. The certification and airworthiness requirements of the CAA and the *Civil Aviation Safety Regulations 1998* could include safety aspects of the Standards, such as the use of boarding devices and alarms (Parts 8 and 19 of the Transport Standards).

***Recommendation 11: Incorporation of the Transport Standards into existing legislation, government contractual arrangements and transport accreditation processes***

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*The Transport Standards be incorporated into existing legislation, government contractual arrangements and transport accreditation processes, and monitored and enforced accordingly.*

## **6. Enforcement of the Transport Standards**

### **6.1 Enforcement relies on individuals**

A fundamental problem with the Transport Standards is the lack of enforcement mechanisms other than through individual complaints. The current individual complaints-based process is not appropriate for adequately and equitably addressing the implementation of Standards. There are a number of limitations on the use of the legal process by individuals to enforce compliance with the Transport Standards.

PIAC's experience in assisting people with disability suggests that individual complaints should not act as a monitoring process to regularly ensure compliance with the Transport Standards, and indeed such an ad hoc process could not possibly achieve effective monitoring in any event. If, however, legal action remains the only mechanism to enforce compliance with the Transport Standards, PIAC submits that amendments should be made to the existing complaints system, and in particular the process for bringing a complaint through the federal courts.

Taking legal action to enforce the Transport Standards involves significant commitment and risk by individual litigants, often for limited personal gain. It is time-consuming, financially risky and can be stressful and embarrassing. If resolved at conciliation, settlements are binding only between the parties to the complaint. Therefore, while a settlement may provide for systemic outcomes, such as training or policy changes, only the complainant who is a party to that settlement agreement can enforce it if the respondent fails to fulfill its obligations.

In addition, conciliated agreements are often resolved on the basis that they be kept confidential. This means that the substance of the improvements that result from the complaint, even if it is merely to enforce the current legal standards, remains confidential and cannot be used by other people as a precedent to seek improvements more generally. If conciliation fails, and the

complainant proceeds to a hearing, they face many obstacles. If the complainant succeeds at hearing, the outcome will generally be a declaration of unlawful discrimination and a modest award of compensation. As such, the available remedies are often inadequate in fully eliminating discriminatory practices.

### **6.1.1 Case study – *Innes v Rail Corporation NSW* [2013] FMC 36**

Mr Innes, who happens to be the Commonwealth Disability Discrimination Commissioner, is blind. He relies regularly on train travel. In 2011 he made 35 complaints to the AHRC (in his personal capacity) concerning 35 train trips that he made on trains between March and September that year, regarding either the lack of audible announcements, or the lack of consistency or inaudibility of on train announcements. Mr Innes' matter was not resolved at conciliation, and he decided to pursue the matter in the Federal Circuit Court.

Mr Innes alleged that Rail Corporation NSW (RailCorp) had discrimination against him because of his disability. He also alleged that RailCorp had breached parts 27.1 and 27.4 of the Transport Standards, which state that:

#### **27.1 Access to information about transport services**

General information about transport services must be accessible to all passengers.

#### **27.4 Access to information about location**

All passengers must be given the same level of access to information on their whereabouts during a public transport journey.

The Court looked at the totality of the complaints and found that in 18 to 20 percent of them, Transport Standard 27.4 had been breached. The Judge also found that RailCorp had breached the DDA, and that the failure to make audible announcements on trains was unlawful discrimination. Whilst the Court accepted that clear, audible announcements could not be provided 100 percent of the time, it held that a failure rate of 18-20 percent was in excess of what would constitute compliance.

The Judge found that RailCorp's manual on-train next stop announcements systems were 'reactive and haphazard rather than proactive and planned'.<sup>72</sup> In addition, the Judge said that the requirement to provide information to people in an effective way, was obvious:

It would appear startlingly obvious to the lay observer that passengers travelling upon trains need to know where to get off. It would be equally obvious that this information should be provided in a way that was effective for all passengers.<sup>73</sup>

PIAC considers that if there were more effective systems in place to enforce compliance with the Transport Standards, this matter would not have had to go to court. Six months prior to lodging the complaints to the AHRC, Mr Innes consulted directly with RailCorp and told them that in his

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<sup>72</sup> *Innes v Rail Corporation NSW (No 2)* [2013] FMCA 36, 110

<sup>73</sup> *Ibid*, at 168

view, in order to comply with the Transport Standards, RailCorp should have been making announcements that could be understood on all trains by December 2007.

Whilst Mr Innes was awarded \$10,000 in damages, the Court made no orders requiring RailCorp to comply with the particular Transport Standards in the future.

### **6.1.2 Case study – *Haraksin v Murrays Australia Ltd* [2013] FCA 217**

Julia Haraksin is reliant on a wheelchair for mobility. Murrays Australia Ltd, operates an Australia wide bus service. On 14 August 2009 Ms Haraksin telephoned Murrays Australia (**Murrays**) and tried to book a seat on a wheelchair accessible bus travelling from Sydney to Canberra for a work conference. The staff member at Murrays who took her call told Ms Haraksin that they did not have any wheelchair accessible buses that she could travel on.

Ms Haraksin made a complaint of direct discrimination, indirect discrimination under the DDA, as well as a complaint of a breach of the Transport Standards. The complaint was not resolved at conciliation at the AHRC. Ms Haraksin filed proceedings in the Federal Court of Australia on 22 July 2010 and the Hearing took place in November 2011.

Justice Nicholas found that Murrays discriminated against Ms Haraksin on the basis of her disability for the purposes of section 5(2) of the DDA, because Murrays did not accept Ms Haraksin's booking, as it did not have any vehicles equipped with wheelchair access. His Honour had also found that there was a breach of the Transport Standards.

Justice Nicholas made an order that until 12 April 2015, Murrays Australia is to ensure that at least 55% of its fixed route services between Sydney and Canberra (which percentage is to be calculated on a monthly basis) are to be provided by coaches fitted with a wheelchair lifter unless the failure to so ensure is attributable to a cause or causes beyond its control.

Such an order is quite unusual in discrimination cases, where Courts generally do not make orders for compliance. In this matter, the order made by Nicholas J will ensure that Murrays Australia does not breach the Transport Standards in respect of the fixed route service that Ms Haraksin travelled on for a particular period of time. While Ms Haraksin was ultimately successful in her claim of discrimination and breach of the Transport Standards, the case was run at great personal cost to her in terms of the time and effort that was required, and the case took over four years to resolve.

## **6.2 Individual complaints to the federal courts**

The Government's response to Recommendation 8 of the 2007 Review was that the AHRC be tasked to provide greater support for representative complaints on behalf of people with disability, reducing the legal cost burden on individuals. The issues paper for the current review said that it would consider this recommendation in the context of the Federal Government's Inquiry into the consolidation of the Commonwealth anti-discrimination legislation.<sup>74</sup>

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<sup>74</sup> Australian Government Department of Infrastructure and Transport *2012 Review of the Disability Standards for Accessible Public Transport 2002 (Transport Standards) Issues paper* (2012), 21.

The Federal Government's Inquiry into the consolidation of Commonwealth anti-discrimination, which has been progressed over several years, resulted in the release of the exposure draft of the Human Rights and Anti-Discrimination Bill 2012 (**HRAD Bill**). On 21 November 2012, the Senate referred the HRAD Bill to the Senate Legal and Constitutional Affairs Committee for inquiry and report. The Committee released its report on 21 February 2013. On 20 March 2013 the Government announced that the Attorney-General's department will continue working on this project but the HRAD Bill would not be introduced before the autumn sitting of Parliament.<sup>75</sup> It now seems unlikely that this Bill will be introduced before the 2013 federal election.

PIAC submits that consideration should be given to addressing the current limitations of the process of lodging complaints of unlawful discrimination in the federal courts as part of the 2012 Review of the Transport Standards.

PIAC made a number of recommendations regarding amendment of the complaints process in our submission to the 2007 Review,<sup>76</sup> and in our response to the Draft report of the 2007 Review, relating to the process of making individual complaints in the federal courts generally.<sup>77</sup> PIAC also made a submission to the Commonwealth Attorney-General's Department in relation to the drafting of the consolidated anti-discrimination legislation in February 2012,<sup>78</sup> and contributed to the submissions made by the National Association of Community Legal Centres (**NACLC**) to the Attorney-General's Department in relation to the consolidation of anti-discrimination in March 2010, April 2010 and February 2012.<sup>79</sup>

PIAC's main recommendations in relation to the HRAD Bill,<sup>80</sup> which would impact on persons seeking to bring a complaint regarding a breach of the Transport Standards, include:

- allowing organisations to bring a complaint on behalf of a person to both the AHRC and the federal courts, and to provide the courts with residual power to allow standing for an organisation on public interest grounds;
- that the burden of proof for direct discrimination be shared between the parties. Currently, the burden of proof falls almost entirely on the complainant. The onus is only on the respondent to provide the existence of a defence or an exception or exemption if the complainant has proved the discrimination. This causes a number of difficulties for complainants as usually all evidence of the reason for the action lies with the respondent; and

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<sup>75</sup> Attorney-General for Australia and Minister for Finance and Deregulation, 'New anti-discrimination laws to cover sexual orientation, gender identity and intersex status' (Media release, 20 March 2013) <<http://www.attorneygeneral.gov.au/Mediareleases/Pages/2013/First%20quarter/20March2013-Newantidiscriminationlawstocoversexualorientationgenderidentityandintersexstatus.aspx>>.

<sup>76</sup> Public Interest Advocacy Centre, above n 1

<sup>77</sup> Public Interest Advocacy Centre, *Flight Still Closed? Response to the Allen Consulting Group on Review of the Disability Standards for Accessible Public Transport: Draft Report* (2008).

<sup>78</sup> Equality Law Reform Project, *Submission* (2011) <<http://www.equalitylaw.org.au/elrp/submissions/>>.

<sup>79</sup> Ibid.

<sup>80</sup> Public Interest Advocacy Centre, *Aligning the pieces: consolidating a framework for equality and human rights, Submission to the Senate Legal and Constitutional Affairs Committee on the exposure draft Human Rights and Anti-Discrimination Bill*, (2012)

- that the federal courts should be a costs free jurisdiction, so that each party pays their own costs in a matter (cl 133(3) of the HRAD Bill). PIAC also submitted that in a costs free jurisdiction, that the courts should be able to make an order as to costs where the complaint is successful and the court as a public interest matter classes the matter.

### **6.3 Standing to bring a complaint for breach of the Transport Standards**

In the absence of other measures designed to achieve systemic change and compliance with the Transport Standards, it is left to individuals to challenge discrimination on a case-by-case basis.

One possible remedy to reliance on individual complaints based enforcement and the heavy burden of responsibility it places on people with disability is consideration of amendments to the standing provisions under the *Australian Human Rights Commission Act 1986* (Cth) (**AHRC Act**), to allow organisations to bring representative complaints to federal courts on behalf of a group of individuals.

Currently, there is inconsistency regarding the rules of standing to bring a complaint to the AHRC and a complaint to the relevant federal courts. Complaints to the AHRC can be made by or on behalf of a 'person aggrieved' (section 46P(2) of the AHRC Act). However, only an 'affected person' (section 46PO(1)) can bring proceedings in the courts if the complaint does not resolve at conciliation. This means that an organisation, such as a disability advocacy organisation, can bring a complaint on behalf of an individual to the AHRC, but if the matter does not settle then only the individual with the disability can bring the complaint to court, as only the individual is an 'affected person'.

In PIAC's experience, the inconsistencies in standing can create problems. PIAC recently advised a disability organisation that had brought complaints on behalf of a number of individuals around Australia regarding access to a particular service. PIAC advised that, given the inconsistencies between ss 46P(2) and 46PO(1), it would be difficult for the organisation to continue acting on behalf of the individuals in the Federal Court. Given the individual complaints related to the same service, it would have made sense for the complaints to be heard together and brought by the organisation on behalf of the individuals.

It is PIAC's view that, given the difficulties in pursuing a discrimination complaint in the courts, including the financial, time and emotional resources required, it is important that organisations be able to bring such complaints to court on behalf of individuals, who are often vulnerable or marginalised, as they are generally better equipped to do so.

PIAC submits that standing be extended in the AHRC Act to allow organisations to have standing to bring such complaints on behalf of individuals. The courts should also have residual power to refuse to allow an organisation to have standing on public interest grounds. In considering whether an organisation should be refused standing, the court should be permitted to take into account the relationship between the individual and the organisation.

Additionally, PIAC submits that organisations should be able to bring complaints, in their own right, as opposed to on behalf of individual members.

### **6.3.1 Case Study: Access for All Alliance (Hervey Bay) Inc v Hervey Bay City Council (2007) 162 FCR 313 (Access for All)**

PIAC represented Access for All Alliance (Hervey Bay) Inc. (**AAA**) in a disability discrimination action against Hervey Bay City Council regarding a breach of the Standards, relating to inaccessible bus stop infrastructure. AAA, an incorporated association, was established to ensure equitable and dignified access to premises and facilities for all members of the community. Justice Collier dismissed the complaint on the basis that AAA was not a 'person aggrieved' within the terms of section 46P and therefore did not have sufficient standing to bring the complaint. Although the applicant was an organisation that represented people with disability, the Court found that the applicant itself was not affected by inaccessible public transport infrastructure to an extent greater than an ordinary member of the public. The Court found that the applicant needed to establish that it was a 'person aggrieved in its own right'.

This decision appears to have inhibited other organisations making complaints about systemic discrimination. The test outlined in *Access for All*, which applies to the standing of an organisation to bring a discrimination complaint, is very limited and hampers the ability of organisations to bring actions to address systemic discrimination.

PIAC submits that the AHRC Act should be amended and should adopt a liberal approach to the question of standing. PIAC recommends the AHRC Act include open standing for discrimination complaints that involve a breach of the Transport Standards. This could be drafted in similar terms to section 123 of the *Environmental Planning and Assessment Act 1979* (NSW).

In PIAC's experience, open standing provisions would be particularly useful to bring actions in the area of disability discrimination relating to breaches of the Transport Standards. PIAC has represented a number of individuals, who at great personal cost have brought proceedings in the Federal Court against public transport operators in relation to inaccessible transport.<sup>81</sup> In each case, the problems identified about access not only affected the individuals involved, but also affected many other people with disability. In this sense, they were cases of genuine public interest. An open standing provision would have allowed a disability organisation, or an organisation such as PIAC, to bring the proceedings, rather than the individuals.

An open standing provision would make it easier for organisations to bring proceedings to address systemic breaches of the Transport Standards, taking the pressure off individuals who are often less equipped to bringing such claims. Courts already have the power to dismiss an action that is frivolous or has no reasonable prospects of success. In PIAC's view, this power would be sufficient to address any concerns that open standing would result in a flood of unmeritorious claims being brought before the courts.

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<sup>81</sup> See *Killeen v Combined Communications Network Pty Ltd & Ors* [2011] FCA 27; *Haraksin v Murrays Australia Ltd* [2011] FCA 1133; *Haraksin v Murrays Australia* [2013] FCA 217; *Corcoran v Virgin Blue Airlines Pty Ltd* [2008] FCA 864.

PIAC submits that if an open standing provision is not inserted into the AHRC Act, consideration should be given to a test for standing for organisations or groups, in particular incorporated organisations, to bring proceedings in relation to breaches of the Transport Standards.

In order to satisfy this standing test, an organisation or group would need to show either:

- that a significant portion of the membership of the organisation or group is affected by the conduct in question; or
- the alleged discriminatory conduct relates to the objects or purposes of the organisation or group.

The first criterion finds some support in obiter comments in decisions regarding the standing of bodies corporate to bring complaints where all (or some) of its members have been affected by alleged discriminatory conduct.<sup>82</sup> The second criterion derives from s 27(2) of the *Administrative Appeals Tribunal Act 1975* (Cth), an uncontroversial provision, which PIAC submits should be extended to this context. PIAC notes that in 2012 the Administrative Review Council proposed a similar provision be added to the *Administrative Decisions (Judicial Review) Act 1977* (Cth).<sup>83</sup>

PIAC submits that these criteria should be inserted into the AHRC Act to provide guidance on standing for groups and organisations.

### ***Recommendation 12: Standing***

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*The Australian Human Rights Commission Act 1986 (Cth) should be amended to include a provision allowing organisations to bring a complaint in relation to the Standards on behalf of a person to both the Commission and the federal courts. The Act should provide the courts with residual power to refuse to allow standing for an organisation on public interest grounds.*

*The Australian Human Rights Commission Act 1986 (Cth) should provide open standing to allow anyone to bring a complaint to enforce a breach of the Standards. The provision should be modelled on s 123 of the Environmental Planning and Assessment Act 1979 (NSW).*

*Alternatively, organisations should have standing to bring discrimination complaints in relation to breach of the Standards to the Australian Human Rights Commission and to the federal courts in their own right. In order to satisfy this standing test, an organisation or group would need to show either:*

- *that a significant portion of the membership of the organisation or group is affected by the conduct in question; or*

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<sup>82</sup> See *Access for All Alliance (Hervey Bay) Inc v Hervey Bay City Council* (2007) 162 FCR 313, 60, where Collier J left open the prospect of an incorporated association having standing if all of its members were aggrieved by the conduct; *IW v City of Perth* (1997) 191 CLR 1, where Toohey J (at 30) and Kirby J (at 77) found that the appellant was a person aggrieved and had standing; and *Executive Council of Australian Jewry v Scully* (1998) 79 FCR 537, 548-549, where the applicant was held to be a person aggrieved as its members were affected by the discriminatory conduct.

<sup>83</sup> Administrative Review Council, *Federal Judicial Review in Australia*, Report No 50, (2012) Recommendation 10.

- *the alleged discriminatory conduct relates to the objects or purposes of the organisation or group.*

## 6.4 Litigation costs

The 2007 Review of the Transport Standards identified the financial risk for individuals in pursuing individual complaints through the federal courts. PIAC is well aware of the extent and nature of this risk. Our work in representing individuals, who are frustrated about the lack of compliance with the Transport Standards, has required us to advise them of the significant costs risks in running a case of unlawful discrimination, which alleges a breach of the Transport Standards, in the federal courts.

Litigation costs are a significant barrier to accessing justice in pursuing complaints under the Transport Standards. The current costs regime of the Federal Court and the Federal Circuit Court, where costs follow the event, represents a significant impediment to pursuing discrimination complaints.

PIAC believes that it is a significant injustice that the enforcement of the Transport Standards is reliant on litigation commenced by persons with disability, many of whom are amongst the most economically disadvantaged people in Australia. Claimants can incur significant legal costs, frequently in the tens or hundreds of thousands of dollars, depending on the nature of the matter. It is not unusual for respondents to complaints of discrimination to retain large law firms and senior and junior counsel to represent them, increasing the costs risks.

Due 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.

The HRAD Bill provides that, for discrimination proceedings in the federal courts, each party would bear their own costs.<sup>84</sup> This proposal was supported by the Senate Legal and Constitutional Affairs Report.<sup>85</sup> Clause 133 of the HRAD Bill states:

- 1) Subject to subsection (2), in proceedings under this Part in the Federal Court or the Federal Magistrates Court, each party is to bear that party's own costs.
- 2) If the court concerned considers that there are circumstances that justify it in doing so, the court may make such order as to costs, and security for costs, whether by way of interlocutory order or otherwise, as the court considers just.
- 3) In considering whether there are circumstances justifying the making of an order under subsection (2), the court must have regard to the following matters:
  - (a) the financial circumstances of each of the parties to the proceedings;
  - (b) any party to the proceedings is receiving assistance under section 130, or is receiving assistance by way of legal aid (and, if a party is receiving any such assistance, the nature and terms of that assistance);

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<sup>84</sup> *Human Rights and Anti-Discrimination Bill 2012* s 133.

<sup>85</sup> Senate Legal and Constitutional Affairs Committee, *Exposure Draft of the Human Rights and Anti-Discrimination Bill 2012*, Report (2013).

- (c) the conduct of the parties to the proceedings (including any conduct of the parties in dealings with the Commission);
- (d) whether any party to the proceedings has been wholly unsuccessful in the proceedings;
- (e) whether any party to the proceedings 1 has made an offer in writing to another party to the proceedings to settle the proceedings and the terms of any such offer;
- (f) any other matters that the court considers relevant.

As noted above, PIAC submissions to this reform process recommended that this provision should be retained, and that it should be extended to enable the courts to make an order as to costs where the complaint is successful and the matter is classed by the court as a public interest matter.

PIAC supports a mechanism that provides for each party bearing their own costs in relation to a claim for breach of the Transport Standards, as it would enable greater access to justice.

### ***Recommendation 13: Litigation costs***

*A costs provision should be inserted into the Transport Standards in relation to applications that are made to the Federal Courts. This provision should reflect the wording of clause 133 of the Exposure Draft Human Rights and Anti Discrimination Bill 2012. A costs provision inserted into the Transport Standards should also enable courts to make an order as to costs where the complaint is successful and the matter is classed by the court as a public interest matter.*

## **6.5 Enhancing damages for breach of the Transport Standards**

The award of general damages for breaches of Commonwealth anti-discrimination laws in Australia, including the Transport Standards, have generally been very modest, and amounts of \$7,5000 - \$20,000 are common.<sup>86</sup> PIAC believes that damages in discrimination matters are generally low because Courts have found it difficult to quantify the effect that discrimination has on an individual. In discrimination matters, the approach taken to damages is usually to ‘compare the position the complainant might have been in if had the discriminatory conduct not taken place’.<sup>87</sup>

PIAC submits that in cases where there has been a continuous or repeated breach of the Transport Standards, the Courts should be empowered to award damages which have the purpose of discouraging the particular operator or providers, or other operators or providers, from continuing to provide services that breach the Transport Standards. In *Innes v Rail Corporation NSW*, Judge Raphael commented that:

No claim has been made here for exemplary or punitive damages, and there does not exist, within this legislation, the ability to award damages that might serve to discourage others from conduct of this nature, such as is found in s.115(4) of the *Copyright Act 1968* (Cth). It is perhaps for this reason that damage awards for breach of any of the Commonwealth anti-discrimination Acts have generally been conservative.<sup>88</sup>

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<sup>86</sup> *Shields v James* [2000] FMCA 2, 79.

<sup>87</sup> *Hall v Sheiben* (1989) 20 FCR 17, 239.

<sup>88</sup> *Innes v Rail Corporation NSW (No 2)* [2013] FMCA 36, 60.

The Court may use its discretion to apply section 115(4) of the Copyright Act 1968 (Cth) in situations where a person or corporation had acted in a manner that showed 'flagrant disregard' for an individuals rights in committing the relevant offence, refusing to acknowledge the infringement of the rights and amounted to a breach of the corporation's or individual's own undertakings. Such conduct is conduct that needs to be deterred

to reflect the flagrancy of the infringements, the need to deter similar infringements and the need to mark the court's disapproval of the conduct.<sup>89</sup>

Such damages are *additional* damages, and are provided only when other compensatory damages are awarded. The courts have held that damages under s 115(4) are of a punitive kind and are *sui generis*, but are established by looking at similar factors to whether a party is entitled to aggravated or exemplary damages.<sup>90</sup>

Such kinds of damages are also found in anti-discrimination legislation overseas. The United States Civil Rights Act 1992 authorises compensatory and punitive damages in cases of intentional discrimination,<sup>91</sup> as does the United States Americans with Disabilities Act 1990.<sup>92</sup>

PIAC submits that it is appropriate that a provision similar to the kind found in s 115(4) of the Copyright Act 1968 (Cth) be inserted into the Transport Standards. Such a provision would be particularly useful in circumstances where there is no other mechanism to compel transport operators and providers to comply with the Transport Standards. In addition, the relatively inconsequential amount of damages that are likely to be awarded against transport operators and providers in cases that concern a breach of the Transport Standards are likely to have little deterrent effect on their own. PIAC also submits that it's use would be appropriate where a breach of the Transport Standards is considered to be 'flagrant', in circumstances where it is proven that a breach of the Standards is systemic, or where transport operators or providers have failed to show that they have taken reasonable steps to comply with the Standards.

***Recommendation 14: Enabling the federal courts to award additional damages for breach of the Transport Standards***

*That a provision similar to s 115(4) of the Copyright Act 1968 (Cth) be inserted into the Transport Standards allowing for the court to award additional damages which have the purpose of discouraging the particular operator or providers, or other operators or providers, from continuing to provide services that breach the Transport Standards.*

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<sup>89</sup> *Facton v Rifai Fashions Pty Ltd* (2012) 199 FCR 569, 53.

<sup>90</sup> *Facton v Rifai Fashions Pty Ltd* (2012) 199 FCR 569, 33.

<sup>91</sup> *Civil Rights Act 1991 (USA)* s 1977A.

<sup>92</sup> Title 1 of the *Americans with Disabilities Act 1990 (USA)* incorporates the punitive damage provisions of the *Civil Rights Act 1991 (USA)*.

## 7. Staff training and industry based complaint systems

### 7.1 Establishment of an effective complaints system

PIAC submits that the Transport Standards should encourage transport operators and providers to develop an effective complaint-handling system at an industry-wide level in relation to breaches of the Transport Standards. People who are experiencing inaccessibility, or who have concerns or a complaint regarding non-compliance with a Transport Standards, should be able to make a complaint at to a peak body at an industry wide level, to seek changes to transport infrastructure and practices based on compliance with the Standards. Having an industry based complaints process, and a central organisation within each industry to receive complaints, would assist to generate outcomes that are consistent across each particular industry.

The complaints process for each industry should be developed in consultation with customers and be widely available and promoted by public transport staff. This proposed complaints system should allow consumers to make general complaints regarding compliance with the Transport Standards, and not be developed as a system that requires an individual to complaint about a particular incident.

#### ***Recommendation 15: Establishment of an effective complaints system***

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*The Guidelines to the Transport Standards should be amended to encourage the establishment of an industry-based complaints process that is accessible to all consumers and can provide timely outcomes and result in systemic improvements to service delivery.*

### 7.2 Staff training

People with disabilities are required to undertake significant advocacy to protect their rights under the Standards, and to ensure that the Standards are complied with. However, PIAC is aware that the majority of this advocacy is undertaken by a small section of the Australian community of people with disability. We believe that it is likely that many other people with disabilities are unaware of their rights and of the obligations of operators or providers under the Standards. A community education program is required to ensure that consumers understand the rights and obligations of both consumers and the transport industry.

PIAC also recommends that transport providers and operators introduce mandatory training on the Transport Standards for their staff, many of whom will have responsibilities that are directly related to enforcing the Transport Standards. The ACG review identified that the level of public transport staff training and awareness can lead to different experiences for people with, even when using the same service, or with the operator.<sup>93</sup> In addition, the Transport Standards Guidelines state that staff orientation programs should enable staff to provide effective and appropriate assistance to people with disabilities,<sup>94</sup> and that customer service programs should include awareness education and training on the use of accessible equipment.<sup>95</sup> PIAC believes

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93 Allen Consulting Group, above n 33,101.

94 Disability Standards for Accessible Public Transport Guidelines 2004 (No. 3) pt 37.2.

95 Ibid pt 37.3.

that training on the Transport Standards should be made mandatory in the same way that training about work health & safety, and emergency procedures, are made mandatory by public transport providers and operators. This is particularly important given that the ACG report identified that people with disability reported a:

‘Range of negative experiences using public transport services that technically complied with the Transport Standards, but where public transport staff did not have enough expertise to implement the Transport Standards effectively’<sup>96</sup>.

***Recommendation 16 – Staff training***

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*The Guidelines to the Transport Standards should specifically require application of competency-based training for all public transport staff, with refresher courses provided at regular intervals.*

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<sup>96</sup> Allen Consulting Group, above n 33, 101.