

# Submission to the Aviation Green Paper

30 November 2023

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## About the Public Interest Advocacy Centre

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

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

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

Our priorities include:

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

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Public Interest Advocacy Centre



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## Recommendations

### ***Recommendation 1 – Specific standards for air travel should be co-designed***

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*The Department develop new Air Travel Standards, either as a separate Disability Standard or as a Schedule to the Transport Standards. The Air Travel Standards should be co-designed with people with disability and representative organisations. The Standards should be modelled on and developed with reference to the US regulatory framework.*

### ***Recommendation 2 – The Australian Human Rights Commission be funded to provide independent oversight of industry compliance with the Air Travel Standards***

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*The Australian Human Rights Commission provide independent oversight of compliance with the Air Travel Standards by transport operators and providers.*

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

### ***Recommendation 3 – The Australian Human Rights Commission be empowered and funded to enforce the Air Travel Standards***

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*The Australian Human Rights Commission be empowered to enforce the Air Travel Standards, including to:*

- collect detailed industry data on compliance with the Air Travel Standards;*
- publicise expectations for compliance to set norms for providers and operators;*
- proactively and directly observe the aviation industry to monitor compliance;*
- conduct reviews or audits of compliance relating to systemic issues;*
- investigate and inquire into potential breaches and provide recommendations to achieve compliance;*
- issue fines for breaches of Air Travel Standards;*
- issue compliance notices specifying the action an operator or provider must take, or refrain from taking, to comply;*
- apply to the federal courts for an order to direct compliance with the compliance notice;*  
*and*
- enter into enforceable undertakings with operators and providers.*

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

### ***Recommendation 4 – Comprehensive collection and publication of data***

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

***Recommendation 5 – Potential consumer remedies bodies, and the Air Travel Standards and enforcement mechanisms, be designed to interoperate smoothly***

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*Any potential consumer remedy body for customers of air travel, such as an aviation ombudsman, be designed to operate alongside and efficiently with the Air Travel Standards and enforcement functions of the Australian Human Rights Commission outlined above at Recommendations 1-4, including by:*

- *allowing customers to elect whether to complain to the ombudsman, or of a breach of the Air Travel Standards;*
- *providing mechanisms for the ombudsman and the Commission to work together, such as through cross-referrals and/or joint investigations;*
- *equipping the ombudsman with powers and resources to act quickly and implement binding remedies.*

***Recommendation 6 – Disability Access Facilitation Plans be co-designed***

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*Airports and airlines engage in a co-design process with people with disability to develop or review their Disability Access Facilitation Plans, and their methods and systems for publishing and distributing these Plans to the public.*

***Recommendation 7 - The Aviation Access Forum be restructured with a clearer mandate and powers***

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*The Aviation Access Forum be restructured to provide it with a clear mandate and structure, the power and resources to take specific actions (including potentially to engage a secretariat), and public accountability through publication of communiques or minutes of meetings.*

# 1. Introduction

The Public Interest Advocacy Centre ('PIAC') is a leading social justice law and policy centre. Our work focuses on tackling barriers to justice and fairness experienced by marginalised communities. We have a long history of involvement in public policy development and advocacy promoting the rights and equal participation of people with disability.

PIAC has extensive experience in disability discrimination litigation and public policy development related to public transport. Equal access to air travel is a current priority for PIAC's work on Disability Rights, and we consider that many incidents where equal access to air travel is denied to people with disability amount to unlawful disability discrimination. We have represented clients in disability discrimination matters against airlines and airports in the Australian Human Rights Commission ('AHRC') and in the Federal Court of Australia. We also work on related law reform in consultation with disability advocates and Disability Representative Organisations ('DROs').

As outlined in Annexure A, this submission has been endorsed by a number of organisations representing people with disability, consumers, and lawyers acting for people with disability.

Our submission addresses matters raised by the Aviation Green Paper in relation to disability access and the rights of consumers with disability. While this submission should be read as a whole, we summarise our views in relation to the following questions posed by the Green Paper as follows:

- Should the Australian Government look to revise current consumer protection arrangements and, if so, through existing or new mechanisms? **Yes, current consumer protection arrangements are insufficient to protect the rights of people with disability.**
- Would policies pursued in other jurisdictions – such as a Passenger Bill of Rights or a stronger ombudsman model – deliver benefits to Australia's aviation sector? **A Bill of Rights and/or ombudsman model could have significant benefits for Australian aviation consumers, subject to being designed compatibly with mechanisms for ensuring improved disability access.**
- What further improvements can be made to the Disability Standards for Accessible Public Transport to accommodate the unique requirements of air travel? **New Air Travel Standards dealing specifically with air travel, should be developed.**
- What improvements can be made to aviation accessibility that are outside the scope of the Disability Standards for Accessible Public Transport? **The AHRC should be empowered and resourced to proactively ensure disability access in air travel, including by enforcing our proposed Air Travel Standards, by acting as a regulator overseeing disability access for the industry.**
- How can Disability Access Facilitation Plans ('DAFPs') by airlines and airports be improved? **The content and distribution strategies for DAFPs should be co-designed with people with disability in each case.**
- How should the Aviation Access Forum ('AAF') be restructured to be more effective and better able to drive and enforce change to address issues faced by travellers living with disability? **The AAF should be given a clear mandate and structure, as well as powers and resources to take specific actions (including potentially to engage a secretariat). The AAF should be accountable to the public through the publication of communiques or minutes from meetings.**

- Would an analysis of future skills and workforce needs help position the aviation industry to pre-emptively respond to emerging needs? **Knowledge and skills for working well with customers with disability are essential to the aviation industry workforce for the future. All customer-facing staff in the aviation industry should undergo mandatory disability awareness training, delivered by organisations controlled by people with disability. This training should be given priority similar to that of work health and safety regimes.**

## 2. The scope of the problem

In November 2022, the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability ('Disability Royal Commission') held two online workshops to engage with the community about experiences of violence, abuse, neglect, and exploitation in air travel.<sup>1</sup> The workshops exposed discrimination, humiliation, violations of privacy and dignity, and physical and emotional neglect. People with disability also described being deprived of their independence, mobility, and access to services and facilities, due to acts and decisions of airlines and airports. These experiences prevent people with disability from equally accessing air travel in Australia and commonly contribute to discrimination, exclusion, personal injury, and damage to mobility devices.

These accounts to the Disability Royal Commission's workshops accord with what PIAC has heard and seen in our own casework and engagement with the community, Disability Representative Organisations and other stakeholders. We regularly hear from people with disability about barriers they encounter at all stages of air travel, from booking a ticket, checking in, passing through security, moving through airports, boarding and exiting an aircraft. These problems are serious and extensive, and in some cases lead to injury or significant property damage for people with disability. We have heard from people with disability who simply elect not to take trips they would otherwise take for work or recreation, to avoid the difficulties of flying.

Some of the issues we have seen include:

- People who use manual or electric wheelchairs may be required to check in their customised wheelchair at the check-in counter and transfer to an airline chair which must be pushed by someone else through the terminal to the boarding gate. This means people who use wheelchairs are denied independence and freedom of movement to access facilities within the airport including accessible toilets, shops, and food outlets. Additionally, people are at risk of injury due to being pushed and required to sit in an unsafe and unsuitable airline chair for extended lengths of time. On disembarking a flight, passengers may be pushed in an airline chair to the oversize luggage collection area to collect their customised wheelchair rather than their customised chair being brought to the arrival gate.
- Limits on the number of customers requiring wheelchair assistance on flights and limits on the number of electric wheelchairs that can be carried per flight affects accessibility and inclusion by preventing people from taking their preferred flight or flying with family, friends or colleagues who also use wheelchairs.
- People who are required to travel with an assistant or carer may not be able to book low cost or discount airline tickets.

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<sup>1</sup> *Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability* (Final Report, September 2023) vol 4, 340.



- Inadequate policies or staffing or equipment shortages mean assistance is not always provided to people who require assistance to transfer from their customised wheelchair to an airline chair. If assistance is not provided people may be denied service of the flight. Where assistance is provided, transfer methods may be unsafe and result in people experiencing discomfort or personal injury.
- People are required to give advance notice to airlines when travelling with a wheelchair despite already having a valid Dangerous Goods Certificate for the battery, which denies people who use wheelchairs the opportunity to fly at short notice.
- Wheelchairs are lost or broken by airlines leaving people stranded without access to an appropriate wheelchair for mobility and incurring financial expense to repair the damage.
- Assistance animals (for example psychiatric assistance dogs) may not be approved for travel in the aircraft cabin with their handler.
- Aircrafts without accessible toilets leave people who use wheelchairs feeling the need to deprive themselves of food and water for unsafe lengths of time.
- On board aircraft information and services may not be accessible to people who are blind or vision impaired (such as in-flight entertainment devices).
- People with disability may be subject to alternative airport screening measures involving the use of a handheld metal detector, an explosive trace detection test or a frisk search, despite preferring to use body scanners or walk-through metal detectors.

The severity and range of these problems show existing legal and regulatory systems are not working.

### **3. A new model for ensuring equal access to air travel**

The central reforms we propose involve significant changes to update the discrimination law frameworks and mechanisms that apply to air travel. These reforms are based on the most effective practices from comparable international jurisdictions, and PIAC's expertise in discrimination law.

#### **3.1 A new, specific, Disability Standard for air travel**

While the *Disability Standards for Accessible Public Transport 2002* (Cth) ('Transport Standards') apply to all modes of transport – including air travel – they do not adequately address the unique features of the aviation industry and passenger flight. Air transport is unique, with specific accessibility requirements that must be reflected in a separate set of standards.

The deficiencies in the legal framework in Australia should be addressed through the introduction of specific enforceable minimum standards for operators and providers of air transport by creating a new and specific disability standard to cover air travel. This could be done by the issuing of an entirely new Air Travel Disability Standard; or by amending the Transport Standards to include a Schedule with specific detailed provisions relating to air travel. Regardless of the ultimate form adopted, we refer to these proposed standards in this submission as the potential 'Air Travel Standards'.

##### **3.1.1 The Transport Standards do not adequately provide for air travel**

In contrast to other modes of transport regulated by State, Territory and local government agencies, air transport is federally regulated by the Department of Infrastructure, Transport,

Regional Development, Communications and the Arts ('Department'). Additionally, the Department of Home Affairs is responsible for establishing security standards and requirements at airports. However, a lack of oversight and enforcement mechanisms have resulted in the inconsistent application of accessibility standards by airlines and airports. Inconsistencies between air travel services limits choice for consumers. We previously submitted this lack of regulation and an absence of clear guidance reduces access to air transport for people with disability.<sup>2</sup>

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

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

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

### 3.1.2 International frameworks providing for disability access standards

We consider legal frameworks in comparable overseas jurisdictions can provide helpful guidance for an Australian system. The United States ('US'),<sup>3</sup> European Union ('EU'),<sup>4</sup> Canada,<sup>5</sup> and United Kingdom ('UK')<sup>6</sup> each have regulatory frameworks to achieve equal access to air travel for people with disability. As outlined below, of these jurisdictions PIAC considers the US standards most comprehensively define disability rights in air transport, and should be used to inform the development of similar Australian legislative standards.

In the US, the *Air Carrier Access Act* ('ACAA') prohibits discrimination on the basis of disability in air travel.<sup>7</sup> To supplement and implement the ACAA, in 1990 the US Department of Transportation ('DOT') issued a rule defining the rights of passengers and obligations of airlines ('DOT Rule').<sup>8</sup> In the more than 30 years since it was issued, the DOT Rule has been amended

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<sup>2</sup> PIAC, Submission to 2022 Review of the Transport Standards (30 June 2023) <<https://piac.asn.au/2023/07/05/submission-to-the-fourth-review-of-the-transport-standards/>> 16.

<sup>3</sup> *Air Carrier Access Act of 1986*, 49 USC § 41705; *Nondiscrimination on the Basis of Disability in Air Travel*, 14 CFR Part 382.

<sup>4</sup> *Regulation (EC) No 1107/2006 of the European Parliament and of the Council of 5 July 2006 concerning the rights of disabled persons and persons with reduced mobility when travelling by air.*

<sup>5</sup> *Canada Transportation Act*, SC 1996, c 10; *Accessible Transportation for Persons with Disabilities Regulations* (SOR/2021-9); *Aircraft Accessibility for Persons with Disabilities: Code of Practice for Fixed-Wing Aircraft with 30 or More Passenger Seats.*

<sup>6</sup> *Civil Aviation Act 1982* (UK), *Civil Aviation (Access to Air Travel for Disabled Persons and Persons with Reduced Mobility) Regulations 2014* (UK).

<sup>7</sup> *Air Carrier Access Act of 1986*, 49 USC § 41705.

<sup>8</sup> *Nondiscrimination on the Basis of Disability in Air Travel*, 14 CFR Part 382.

'approximately 15 times' to continually improve access to air transport for people with disability.<sup>9</sup> These regular updates reflect an appropriate focus on responding to changes in technology and continuously improving accessibility.

To ensure the Rule reflected the barriers and lived experiences of people with disability, DOT developed the Rule in consultation and negotiation with representatives of the disability community and the airline industry.<sup>10</sup> Additionally, in 2022 the DOT published the *Airline Passengers with Disabilities Bill of Rights*.<sup>11</sup> While the Bill of Rights does not establish any policy, it describes in a more accessible format the fundamental rights of passengers with disability under the ACAA and the DOT Rule, reflecting the understanding that any framework must be accessible and empowering to the people with disability who it concerns.

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

- information for passengers;
- accessibility of airport facilities;
- accessibility of aircraft and service animals on aircraft;
- seating accommodations;
- boarding, deplaning and connecting assistance;
- services on aircraft; and
- stowage of wheelchairs, other mobility aids and other assistive devices.

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

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

The frameworks in the EU, Canada and UK are not as detailed as the US. In particular the EU and UK frameworks are not as prescriptive, which can lead to inconsistent application of standards by air transport operators and providers.<sup>12</sup> Inconsistent application of standards does

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<sup>9</sup> US Department of Transportation, '36<sup>th</sup> Anniversary of the Air Carrier Access Act' *Passengers with Disabilities* (Web Page, 29 November 2022) <<https://www.transportation.gov/airconsumer/passengers-disabilities>>.

<sup>10</sup> Ibid.

<sup>11</sup> US Department of Transportation, *Airline Passengers with Disabilities: Bill of Rights* (July 2022) <[https://www.transportation.gov/sites/dot.gov/files/2022-07/508\\_Airline\\_Passengers\\_with\\_Disabilities\\_Bill\\_of\\_Rights\\_07072022\\_ADA.pdf](https://www.transportation.gov/sites/dot.gov/files/2022-07/508_Airline_Passengers_with_Disabilities_Bill_of_Rights_07072022_ADA.pdf)>.

<sup>12</sup> See, for example, Berin Ridanović, *Passenger with Reduced Mobility (PRM) – Regulation 1107/2006 – Airport Duties – Limits to its adequate implementation* (Conference Paper, IX World Airport Lawyers Conference,

not achieve equal access. For these reasons we consider the US framework provides the best foundation for similar Australian standards.

### 3.1.3 Process for developing and implementing new Air Travel Standards

While the US framework provides a useful starting point for the desired Air Travel Standards in Australia, its provisions will need to be adapted to the Australian context and specifically to address the barriers to equal access to air travel in Australia. Any Australian Air Travel Standards must be developed through co-design processes, involving people with disability and representative organisations from start to finish. It should also draw upon the submissions to, and findings of, existing inquiries, such as from the Disability Royal Commission.

For example, the Disability Royal Commission recommended the *Disability Discrimination Act 1992* (Cth) ('DDA') be amended to include a positive duty for all public- and private-sector entities covered by the DDA to 'take reasonable and proportionate measures to eliminate all forms of discrimination on the ground of disability'.<sup>13</sup> While these broader DDA reforms are beyond the scope of the Aviation White Paper, we consider future Air Travel Standards should be drafted to shape and define this positive duty.

In co-designing and drafting these Air Travel Standards, government should also ensure the Standards are consistent with the Convention on the Rights of Persons with Disabilities ('CRPD'). Additionally, the Air Travel Standards should comply with the eight Guiding Principles set out in *Australia's Disability Strategy 2021-2031*, which apply to developing policies and services by Governments, business and non-government sectors and the broader community.

Journeys including air travel involve other forms of transport to and from airports, such as trains, buses, taxis and private cars. The Transport Standards will continue to apply to many of these forms of public transport. As such, Air Travel Standards should be drafted to integrate with the existing Transport Standards, and assign duties clearly between transport providers and operators. For instance, where airports contain cab ranks and/or designated rideshare pickup areas, it must be clear who bears responsibility for accessibility (including providing assistance to passengers who need it) at each stage in a journey.

The disability community has been left frustrated by the lagging transition periods allowed for the Transport Standards, which allowed thirty years from the promulgation of the legislation to requiring full compliance by operators and providers. The access issues with aviation are such that this must not be repeated; transition periods for operators and providers to comply with new Air Travel Standards should be as expeditious as possible.

Air Travel Standards for Australia must be developed and implemented quickly. Undue delay will allow discrimination and unfair treatment of people with disability to continue.

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Bologna, January 2017), available at [https://www.researchgate.net/publication/317012683\\_Passenger\\_with\\_Reduced\\_Mobility\\_PRM\\_-\\_Regulation\\_11072006\\_-\\_Airport\\_Duties\\_-\\_Limits\\_to\\_its\\_adequate\\_implementation](https://www.researchgate.net/publication/317012683_Passenger_with_Reduced_Mobility_PRM_-_Regulation_11072006_-_Airport_Duties_-_Limits_to_its_adequate_implementation); Roberto Castiglioni, 'Amsterdam Schiphol Airport PRM Manager Calls on EU to Act on Abuse', *Reduced Mobility Rights* (online, 8 July 2022), available <<https://www.reducedmobility.eu/20220708768/TheNews/schiphol-prm-manager-calls-on-eu-to-act-on-abuse>>.

<sup>13</sup> *Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability* (Final Report, September 2023) vol 4, 310-315.

## ***Recommendation 1 – Specific standards for air travel should be co-designed***

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*The Department develop new Air Travel Standards, either as a separate Disability Standard or as a Schedule to the Transport Standards. The Air Travel Standards should be co-designed with people with disability and representative organisations. The Standards should be modelled on and developed with reference to the US regulatory framework.*

### **3.2 Compliance and enforcement**

It is not enough for new Air Travel Standards to be developed – they must be monitored for compliance and enforced. In the overseas jurisdictions PIAC examined, civil society and people with disability have consistently stressed the importance of effective enforcement mechanisms, without which any framework is rendered ineffective.<sup>14</sup>

#### **3.2.1 Limits of the current complaints-based process for discrimination under Australian law**

The current Transport Standards (and the broader disability discrimination legislative regime) relies on an individual complaints-based process for enforcement. Reliance on individual complaints is ineffective and inappropriate, A robust enforcement regime must be established to assess and achieve compliance with the Air Travel Standards.

The Disability Royal Commission found ‘existing individual complaints mechanisms are often not an accessible or practical option for many people with disability.’<sup>15</sup> It attributed this to the ‘lack of accessible information’, ‘complexity of navigating systems’, ‘overly formalistic processes’, ‘inability to address the significant power imbalances between complainants and respondents’, ‘inadequacy of remedies’, and ‘the ongoing stress and anxiety’ caused by the legal complaints process.<sup>16</sup>

PIAC agrees with these findings. In PIAC’s experience, the complexity and cost of the complaints-based process means many instances of discrimination do not result in a complaint to the AHRC. This results in underreporting of issues, lack of accountability and lack of meaningful action to improve the accessibility of public transport.

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

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<sup>14</sup> See for example, Hannah Sampson, ‘More wheelchairs are being damaged on planes. Travelers want action’, *The Washington Post* (online, 24 August 2022) <<https://www.washingtonpost.com/travel/2022/08/24/wheelchair-flying-airlines-disability/>>; Steve Wood, ‘Is aviation an enabler or barrier for disabled passengers? A review of disability rights and policy for airline passengers in the EU and UK’ (2022) 1(2) *Journal of Airline Operations and Aviation Management* 42; Office of the Auditor General of Canada, *Accessible Transportation for Persons With Disabilities* (Report 1, 2023).

<sup>15</sup> *Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability* (Final Report, September 2023) vol 4, 221.

<sup>16</sup> *Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability* (Final Report, September 2023) vol 4, 221-222.



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

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

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

### 3.2.2 Enforcement in the international context

International experiences similarly underline the limits to an individual complaints-based process for enforcing disability access standards for air travel.

While, as discussed above, the contents of the US framework are comprehensive and appropriate, the US experience offers a further warning about the importance of effective enforcement. Within that system, the general form of redress for a traveller is to file an individual complaint with the DOT. This reliance on an individual complaints mechanism is attended by similar problems to the current Australian system. The DOT itself warns responding to complaints is not a timely process, which means complainants are subjected to lengthy and stressful delays while awaiting redress.<sup>17</sup> Further, the remedies available from DOT complaints are limited, and centre on resolving the individual complaint rather than systemic reforms. US disability stakeholders have complained the current enforcement powers are ineffectual and result in ongoing breaches of the regulations by air transport providers without adequate redress.<sup>18</sup>

Similar criticisms about the lack of effective enforcement capabilities have been raised with the UK framework.<sup>19</sup> While the Canadian framework appears to be relatively effective and fit-for-purpose, it relies heavily on the body responsible for responding to complaints (the Canadian Transportation Authority) conducting binding arbitration and making compensation and compliance orders, which it then has the power to enforce. A similar approach, despite its potential effectiveness, would be constitutionally invalid in Australia.<sup>20</sup>

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<sup>17</sup> US Department of Transportation, 'Complaints Alleging Discriminatory Treatment Against Disabled Travelers Under The Air Carrier Access Act and 14 CFR Part 382' (Web Page, 7 January 2015) <<https://www.transportation.gov/airconsumer/complaints-alleging-discriminatory-treatment-against-disabled-travelers>>.

<sup>18</sup> Hannah Sampson, 'More wheelchairs are being damaged on planes. Travelers want action', *The Washington Post* (online, 24 August 2022) <<https://www.washingtonpost.com/travel/2022/08/24/wheelchair-flying-airlines-disability/>>.

<sup>19</sup> Reduced Mobility Rights Limited, 'UK CAA Enforcement Powers Campaign Gaining Momentum' (Web Page, 23 February 2023) <<https://www.reducedmobility.eu/20230223790/TheNews/uk-caa-enforcement-powers-campaign-gaining-momentum>>; Disability Rights UK, 'The Campaign' (Web Page, 2022) <<https://www.disabilityrightsuk.org/rights-flights>>.

<sup>20</sup> See *Brandy v HREOC* (1995) HCA 10.

### 3.2.3 The AHRC as a regulator

Given the above, a fresh approach is needed to ensure future Air Travel Standards are effectively enforced.

The Disability Royal Commission's final report noted that among the 'most significant weaknesses' of the current Transport Standards is 'the lack of a specific government entity to monitor compliance'.<sup>21</sup> We consider there should be an external body to provide independent oversight and monitoring of transport operator and provider compliance with the Air Travel Standards (and also with the existing Transport Standards). This independent oversight mechanism will encourage upfront compliance from transport operators and providers, and assist people with disability to have confidence the industry is doing the right thing by compiling and publishing data on compliance.

Given the existing functions of the AHRC under section 11 of the *Australian Human Rights Commission Act 1986* (Cth) ('AHRC Act'), the role of the Disability Discrimination Commissioner and the expertise of the AHRC, the AHRC should be given a mandate to provide this independent oversight. This position is consistent with the AHRC's *Free & Equal* Position Paper 2021, which said '[c]onsideration should...be given to the Commission having an oversight role with regulatory powers to enforce compliance' of the disability standards under the DDA.<sup>22</sup>

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

- collect detailed industry data on compliance with the Air Travel Standards;
- publicise expectations for compliance to set norms for providers and operators;
- proactively and directly observe all stages of air travel to monitor practical compliance with the Air Travel Standards;
- conduct reviews or audits of compliance relating to systemic issues with the Air Travel Standards;
- conduct inquiries into potential breaches of the Air Travel Standards by operators and providers and provide recommendations to achieve compliance;
- issue fines for breaches of the Air Travel Standards (even in the absence of a complaint);
- issue compliance notices specifying the action an operator or provider must take, or refrain from taking, to comply with the Air Travel Standards;
- apply to the federal courts for an order to direct compliance with the compliance notice; and
- enter into enforceable undertakings with operators and providers.

These are similar to the powers conferred on the AHRC to enforce the positive duty to eliminate unlawful sexual discrimination,<sup>23</sup> which recognises a similar need to proactively regulate human rights. They are also consistent with the recommendations of the Disability Royal Commission

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<sup>21</sup> *Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability* (Final Report, September 2023) vol 4, 340.

<sup>22</sup> Australian Human Rights Commission, *Free & Equal: A reform agenda for federal discrimination laws* (December 2021), 141.

<sup>23</sup> *Anti-Discrimination and Human Rights Legislation Amendments (Respect at Work) Act 2022* (Cth).

that the AHRC be empowered to conduct investigations and reviews aimed at identifying breaches of a potential positive duty to eliminate disability discrimination.<sup>24</sup>

This regulatory approach would complement, rather than replace, the existing individual complaints mechanism under the DDA. However, empowering the AHRC with these compliance tools would shift the burden of enforcement of the Air Travel Standards away from individuals. It would also focus on *preventing* breaches.

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

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***Recommendation 2 – The Australian Human Rights Commission be funded to provide independent oversight of industry compliance with the Air Travel Standards***

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*The Australian Human Rights Commission provide independent oversight of reported compliance with the Air Travel Standards by transport operators and providers.*

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

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***Recommendation 3 – The Australian Human Rights Commission be empowered and funded to enforce the Air Travel Standards***

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*The Australian Human Rights Commission be empowered to enforce the Air Travel Standards, including to:*

- *collect detailed industry data on compliance with the Air Travel Standards;*
- *publicise expectations for compliance to set norms for providers and operators;*
- *proactively and directly observe the aviation industry to monitor compliance;*
- *conduct reviews or audits of compliance relating to systemic issues;*
- *investigate and inquire into potential breaches and provide recommendations to achieve compliance;*
- *issue fines for breaches of Air Travel Standards;*
- *issue compliance notices specifying the action an operator or provider must take, or refrain from taking, to comply;*
- *apply to the federal courts for an order to direct compliance with the compliance notice; and*
- *enter into enforceable undertakings with operators and providers.*

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

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***Recommendation 4 – Comprehensive collection and publication of data***

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

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<sup>24</sup> Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability (Final Report, September 2023) vol 4, 314.



### 3.3 Compatibility with other regulatory approaches to consumer rights

The reforms proposed above specifically address issues of discrimination, exclusion, and lack of access faced by people with disability when travelling by air. Subject to future consideration and co-design of their content, it is likely that Air Travel Standards will not include general consumer rights protections that would apply to all travellers, such as rights to refunds for cancelled flights, compensation for flight delays, or creation of an aviation industry Ombudsman.

Nonetheless, effective consumer protections and remedies are of particular importance for people with disability travelling by air. For many people with disability, travelling by air requires additional arrangements and supports beyond those required by other passengers; as a result, disruptions caused by poor service provision can have particularly frustrating consequences. For instance, a passenger with disability whose flight is cancelled may face greater difficulty in re-booking if, for example, they need to arrange a support person to fly with them or are only able to take a limited number of flights due to the disability accommodations they require. Additionally, a passenger's customised electric wheelchair may be more susceptible to damage through mishandling by the airline than most other luggage items, and such damage could have far greater impacts and require more urgent remediation.

PIAC therefore supports reforms to provide passengers travelling by air with greater rights, and more rapid and effective remedies where those rights are breached.

One suggestion raised by the Green Paper is the creation of an aviation industry ombudsman. An aviation industry ombudsman could operate compatibly with our proposed Air Travel Standards and their enforcement by the AHRC as a regulator. We make three observations as to how this compatibility could be achieved.

First, poor treatment of customers with disability by an air travel operator or provider may be both a consumer issue *and* a breach of discrimination law including future Air Travel Standards. The remedies available through the AHRC and an ombudsman would be different, and aimed at different ends. Accordingly, in such circumstances, a consumer should be able to elect to pursue remedies for either or both causes with the AHRC and/or an ombudsman.

For instance, a passenger whose wheelchair is damaged by an airline while travelling on holiday may require immediate redress in the form of compensation, repairs, and/or a replacement wheelchair. These needs may be best met by an ombudsman who can address the issue quickly and provide rapid and practical remedies. The same passenger's experience may also raise broader issues around an airline's inadequate practices for handling fragile and disability-specific equipment that led to the damage, which could be best addressed by the AHRC as part of a longer investigation into possible non-compliance with the Air Transport Standards. The passenger should be able to raise the matter with either or both bodies, in whichever order they choose.

Second, and relatedly, an aviation industry ombudsman and the AHRC would need well-established and efficient pathways for communication and cross-referral. This could include mechanisms such as:

- cross-referral powers for the ombudsman to raise a matter with the AHRC where it considers a complaint may involve a breach of the Air Travel Standards;

- provision of information by the AHRC to complainants about their right to approach the ombudsman about consumer rights issues, and vice versa; and
- scope for the AHRC and ombudsman to conduct joint investigations into systemic issues concerning each of their functions, particularly where the AHRC's human rights and disability-specific expertise will assist the ombudsman.

Implementing such mechanisms will ensure complainants experience a 'no wrong door' approach and are not sent from body to body in search of comprehensive solutions.

Third, an ombudsman must have sufficient powers and adequate resources to act quickly and implement binding remedies. Where an ombudsman system places a burden on the individual to complain, tell their story and advocate for their rights and for systemic change, this burden is particularly frustrating and exhausting if the process does not lead to swift and effective responses. As a result, an aviation ombudsman must be able to investigate quickly and provide practical and just solutions.

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***Recommendation 5 – Potential consumer remedies bodies, and the Air Travel Standards and enforcement mechanisms, be designed to interoperate smoothly***

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*Any potential consumer remedy body for customers of air travel, such as an aviation ombudsman, be designed to operate alongside and efficiently with the Air Travel Standards and enforcement functions of the Australian Human Rights Commission outlined above at Recommendations 1-4, including by:*

- *allowing customers to elect whether to complain to the ombudsman, or of a breach of the Air Travel Standards;*
- *providing mechanisms for the ombudsman and the Commission to work together, such as through cross-referrals and/or joint investigations;*
- *equipping the ombudsman with powers and resources to act quickly and implement binding remedies.*

### **3.4 Potential inquiry into systemic discrimination by the AHRC**

Section 35L of the *Australian Human Rights Commission Act 1986* (Cth) gives the AHRC power to inquire into systemic unlawful discrimination. PIAC considers longstanding disability discrimination by airlines and airports in Australia requires thorough investigation with a view to a clear and comprehensive plan for reform. We support an inquiry by the AHRC into systemic discrimination in air travel.

PIAC considers the Department, having responsibility for the regulation of the aviation industry, should sufficiently resource the AHRC to conduct such an inquiry.

However, an inquiry by the AHRC should not delay the development and issue of proposed Air Travel Standards, and related enforcement mechanisms. The scope of the inquiry would be broad, and it could take a number of years to complete. People with disability must not be left waiting for change throughout that process.

Design and issue of new Air Travel Standards should occur simultaneously with the inquiry. The inquiry's functions will be more broad than simply consideration of regulation via a new set of Disability Standards. The inquiry would provide a valuable public account of systemic

discrimination and barriers encountered by people with disability, and recommend broader government action to remedy these. We further note a co-design process for these Standards and an inquiry would have mutual synergies; the co-design and AHRC inquiry processes would each generate valuable feedback and data for the other to consider. This would ensure the rights of people with disability to access air travel are protected as swiftly and comprehensively as possible.

## **4. Training and skills for the future aviation industry**

Many issues faced by people with disability in air travel stem from a lack of understanding of disability by airline and airport service staff. The Aviation White Paper should account for this. Industry staff must have the training to recognise and support the needs of people with disability, as with all other customers.

Air travel service providers and operators should be required to provide all customer-facing staff with disability awareness training. Such training is not an 'optional extra'; it is a vital part of delivering an inclusive service to all passengers. Accordingly, disability awareness training should be mandatory, and treated akin to workplace health and safety training. Airline and airport staff should be required to undertake regular refresher training, and staff members should only be asked to work if they have the skills to provide a safe and appropriate service to customers with disability.

Disability awareness training should, wherever possible, be delivered by organisations controlled by people with disability (ie, where a majority of members of the board or other governing body self-identify as having a disability). This will ensure the training reflects the lived experiences and needs of people with disability.

The above provisions should apply industry-wide. Given their nature, we suggest they be included in the Air Travel Standards we recommend above.

## **5. Disability Access Facilitation Plans**

If Air Travel Standards were developed and implemented as we recommend, the role of DAFPs would become less relevant. In other words, new Air Travel Standards would mean passengers with disability would already know the set of minimum standards they could expect from all Australian airports and airlines. Instead, DAFPs could focus on explaining how the airport/airline complies with the Air Travel Standards, and any areas where the airport or airline goes beyond the requirements of the Standards. This would provide a greater level of national consistency for DAFPs, and allow users to clearly compare the access measures available between different service providers.

At present, we often hear that DAFPs are not well known and have less reach and significance to consumers than they could do. A systematic way of addressing this, and ensuring DAFPs are accessible and useful to people with disability, would be to ensure DAFPs and their publication/distribution strategies are developed in consultation and/or co-design with people with disability who use the relevant service.

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**Recommendation 6 – Disability Access Facilitation Plans be co-designed**

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*Airports and airlines engage in a co-design process with people with disability to develop or review their Disability Access Facilitation Plans, and their methods and systems for publishing and distributing these Plans to the public.*

## **6. Aviation Access Forum**

The Green Paper observes 'AAF members have expressed dissatisfaction about the ineffectiveness of the AAF.' PIAC has heard similar feedback about the AAF. To underscore this point, we understand the AAF has not met in over 12 months since 10 October 2022, leaving it unable to achieve meaningful change.

There is clear value in a forum that brings together people with disability, government and industry to regularly discuss equal access to air travel. However, for the AAF to achieve this, it would require:

- a clear mandate and structure;
- power and resources to take specific actions (including potentially to engage a secretariat); and
- a level of public accountability through the publication of communiques or minutes of meetings.

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**Recommendation 7 - The Aviation Access Forum be restructured with a clearer mandate and powers**

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*The Aviation Access Forum be restructured to provide it with a clear mandate and structure, the power and resources to take specific actions (including potentially to engage a secretariat), and public accountability through publication of communiques or minutes of meetings.*

## **7. Conclusion**

There is acute need for change in the aviation industry to provide equal access to air travel for people with disability. While this change will require concerted efforts from airports, airlines, disability training organisations and others in the aviation sector, ultimately what is needed is governmental co-ordination to set minimum standards for access, and ensure private actors are held accountable for compliance with these standards. A new set of Air Travel Standards, enforced by the AHRC acting as a regulator, is the best and simplest way to implement these standards.

These new Air Travel Standards can and should work harmoniously with new consumer protection mechanisms and laws, and with reforms to the structure and purposes of the AAF and DAFFs. Each of these measures must be developed through consultation and co-design processes with people with disability, to ensure they reflect the lived experiences and priorities of those they are meant to serve.

## Annexure A – Endorsements

This submission has been endorsed by the following organisations:

1. People with Disability Australia



2. National Inclusive Transport Advocacy Network (NITAN)



3. Disability Advocacy Network Australia (DANA)



4. Spinal Cord Injuries Australia



5. Inclusion Australia



6. Blind Citizens Australia



7. Deaf Australia

8. First Peoples Disability Network



9. Physical Disability Council of NSW



10. Australian Centre for Disability Law

Australian Centre for  
**Disability Law**

11. Canberra Community Law



12. Disability Discrimination Legal Service



13. Australian Lawyers Alliance



## 14. CHOICE

# **CHOICE**

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