



Cairns Community Legal Centre Inc

24 August 2007

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SUBMISSION TO REVIEW OF THE DISABILITY STANDARDS FOR ACCESSIBLE PUBLIC TRANSPORT ('TRANSPORT STANDARDS')

Background to the Disability Discrimination Legal Service ('DDLS')

The DDLS is a legal service operated by the Cairns Community Legal Centre Inc ('CCLC'). The CCLC is a non-profit, community based organisation run by volunteers and paid workers with Commonwealth and State Government funding.

The DDLS provides legal advice and case work which relates to disability discrimination complaints under the *Disability Discrimination Act 1992* ('DDA') and the *Anti-Discrimination Act 1991* ('ADA').

Community education and awareness-raising activities as well as law reform work are also an important aspect of the DDLS.

Our interest in the review

In recent times we have received a number of enquiries and requests for assistance in matters relating to public transport, air travel in particular. The DDLS solicitor is also a member of the National Steering Committee for Accessible Airlines.

We therefore support the submission to the review prepared by the Public Interest Advocacy Centre ('PIAC') and rely on the evidence of the case studies presented in that submission ('case studies').

In addition we forward our own submission to reflect our separate views in this matter. Our submission is restricted to consideration of the Transport Standards with respect to air travel.

We express our views regarding the Government requirement for the review to be consistent with the Australian Government's Regulation Impact Statement framework, the relevance of the April 2004 Productivity Commission Inquiry Report No 30 ('Report') into the review of the *Disability Discrimination Act 1992* ('DDA') and the Australian Government Response to that Report.

We then comment on the key review issues identified by The Allen Consulting Group, and recommend changes to the Transport Standards.

Regulation Impact Statement ('RIS') framework

We note that in response to the Report of the Taskforce on Reducing Regulatory Burdens on Business released in January 2006, the Australian Government adopted a three tiered system to assess all regulatory and quasi-regulatory proposals. Compliance with procedures and processes outlined in the *Best Practice Regulation Handbook* ('Handbook') is mandatory for all Australian Government departments, agencies, statutory authorities and boards making, reviewing and reforming regulations.

According to the Handbook, the Government has mandated the IT-based Business Cost Calculator ('BCC') as the standard tool that departments and agencies must use to assess the business compliance costs of all regulatory proposals.

The BCC has nine categories of compliance tasks for which compliance costs are incurred by business:

- notification (required to report certain events)
- education (keeping abreast of regulatory requirements)
- permission (seeking permission to conduct an activity)
- purchase costs (purchase materials or equipment)
- record keeping (keeping records up-to-date)
- enforcement (cooperating with audits or inspections)
- publication and documentation (producing documents for third parties)
- procedural (costs of a non-administrative nature e.g. conducting fire safety drill)
- other

A close inspection of the Transport Standards shows that the only category listed above which may be relevant to the review is purchase costs associated with purchase of conveyances (on a pro rata basis) and the provision of addition equipment. The Transport Standards do not place any obligation on operators and providers to maintain any records associated with complying with the standards or to report on that compliance.

Because the Transport Standards are established regulation, we consider that of the seven elements of the RIS, the starting point for the review is the assessment of the impact (costs, benefits and where relevant, levels of risk) on consumers, business, government and community. Evaluation of costs and benefits will determine whether the Transport Standards meet the dual goals of 'effectiveness' and 'efficiency'.

Cost-benefit analysis ('CBA') focuses only on the impact of the regulation on economic welfare. Though costs and benefits can be readily quantified in monetary terms where market data is available, it is more difficult to value impacts where there is no 'market' for them (such as improvements in social outcomes).

We contend that eliminating discrimination against people with disabilities in the provision of public transport (the stated purpose of the Transport Standards) has an intangible benefit that cannot be quantified and has no economic market.

According to the Handbook, when benefits are difficult to quantify in monetary terms, cost-effectiveness analysis is a useful assessment technique. It is appropriate where a government regulation is already in place and is expected to continue, but not necessarily in its current form, and the aim is to improve the efficiency or effectiveness of the government intervention.

Contingent valuation is a 'stated preference' method of valuing intangibles, based on what people would do if faced with hypothetical situation. The method involves directly asking people in a survey, how much they would be willing to pay for a particular item, benefit or characteristic. In regulatory options designed to reduce

risks to life, the monetary value of saving one statistical life ('VSL') is derived by estimating the community's willingness to pay to reduce the level of 'risk' in order to avoid one statistical fatality. The number of lives saved, or the number of years of life saved, and the quality of those years of life saved, are important benefits that can be quantified in monetary terms.

The Cost-Benefit Analysis of Proposed New Health Warnings on Tobacco Products ('Tobacco Report') prepared for the Department of Health and Aging in December 2003 looked at international literature on the value of life and the Bureau of Transport Economics report on Road Crash Costs in Australia ('Report 102'). Report 102 adopted estimates of \$1.0 million to \$1.4 million per fatality, made up of loss of workforce productivity, loss of household productivity, pain and suffering and loss of quality of life. The value of life was then converted to a value of a life year. The Tobacco Report adopted a value of \$87,500 for a life year for its central case evaluation.

Similarly, it may be argued that providing a benefit to a selected portion of the community (people with disabilities) by improving physical access to public transport and its associated structures should be quantified. Such an evaluation would have to include estimations for increased social access, improved employment opportunities, improved access to health services and improved quality of life generally.

However, we are of the opinion that since the purpose of the Transport Standards is to remove discrimination by putting in place provisions designed to overcome personal disadvantage (resulting from disability) to the greatest extent possible, it is more appropriate that benefits be assessed in a descriptive or qualitative manner (as allowed for in Appendix C of the Handbook).

We do not consider that monetary assessment in the RIS framework is appropriate to properly assess the efficiency and effectiveness of the Transport Standards, five years after implementation. We therefore urge you to adopt a qualitative basis for the review.

Productivity Commission Inquiry Report No 30 ('Report')

One of the key points of the Report is that the DDA meets the Competition Principles Agreement legislation review requirements:

- many benefits are intangible but widespread
- costs of compliance are likely to be quite small for many organisations
- in-built safeguards help ensure a net benefit to the Australian community
- its impact on competition appears to have been limited
- no satisfactory alternatives for achieving its objectives exist

The Report found that the Transport Standards appeared to have had a relatively even impact on the costs of affected organisations and hence appeared to have been competitively neutral.

We are concerned that at the time of writing, the Report relied on Australian Bureau of Statistics ('ABS') data in 1998 publication 4430.0 Disability, Ageing and Carers: Summary of Findings. The Report noted that ABS data showed that the number of people with disabilities increased from 1.1 million in 1981 to 3.3 million in 1998. The proportion of people with disabilities reporting difficulties using public transport had changed little over that period (33.3% in 1981, 31.1% in 1998). Since the Report's publication, the same ABS data for 2003 showed a further slight fall to 29.9%. We have no more recent comparable data available.

What is of greater concern to us is that ABS publication 4102.0 Australian Social Trends, 2006 stated that though there was no significant change in Australia's overall rate of reported disability between 1998 and 2003, use of public transport by adults with a disability had decreased from 46% in 1998 to 39% in 2003. There was no reference to reported difficulties of people with disabilities using public transport.

Australian Social Trends 2007 make no reference to the use of public transport by people with disabilities at all (let alone any difficulties experienced). This indicates to us that public transport concerns of people with disabilities has lost prominence, and the stated purpose of the Transport Standards has lost significance to Government.

This lack of current data covering the period since the implementation of the Transport Standards makes the task of properly assessing the Standards more difficult.

Government Response to the Report

The Government accepted Recommendation 14.1 in principle that the disability standards cannot alter in a fundamental way the scope of the DDA. Only an amendment of the DDA should do this.

Recommendation 14.4 that where possible, monitoring and enforcement of disability standards should be incorporated into existing regulatory processes, was also accepted. However, the Government did not state how this was to be accomplished in the case of the Transport Standards.

We note that in any event, the Government has not yet brought its response before Parliament in the form of a Bill. We note that Parliament has indicated that it will introduce such a Bill in the current session.

Achievement of public transport accessibility

Since there is no requirement in current legislation to report to any Government department or statutory authority on compliance with the Transport Standards (not even regarding meeting the target dates) let alone on the frequency and volume of complaints to the carrier with respect to service, we are forced to rely on anecdotal evidence through case studies undertaken by concerned private bodies, and other submissions to the review.

Reliance on figures of complaints to the Human Rights and Equal Opportunity Commission ('HREOC') is not advised since only a small percentage of people experiencing difficulties (regardless of the link to a disability) will put themselves through the formal complaint process. Of those that are lodged, conciliated complaints might achieve an acceptable outcome for the individual concerned but cannot work to address a systemic issue.

The evidence through case studies noted in PIAC's submission support the contention that air travel has actually been made more difficult for passengers with disabilities.

- Passengers who were used to living and travelling independently are now required to travel with a carer.
- Mobility aids which had been carried regularly previously are now being refused on the same type of aircraft.
- Passengers are being denied return flights even though outbound flights were completed uneventfully.
- Conditions imposed, such as the Independent Travel Criteria, have become more restrictive and have less connection with real conditions experienced by passengers.
- While the number of flights between destinations offered by the various carriers has grown significantly, the number of flights available to carry wheelchairs to 'secondary destinations' has diminished. For example, on a random sample (Wednesday 27 June 2007, returning Friday 29 June 2007) Qantas offered 20 flights (five of which were direct) Townsville to Brisbane and another 20 flights return (six direct). However, only one flight each way could accommodate a mobility aid higher than 84 cm.
- New entrant to air travel in Australia, Tiger Airways, imposes conditions such as: vision impaired passengers must travel with a personal assistant; limit of two passengers per flight who have reduced mobility and require special assistance, and such passengers are required to be accompanied by another fare paying passenger; the airline will not carry 'live animals' and makes no reference to wheelchairs.

Clarification of rights and obligations

We are of the opinion that the structure of the current Transport Standards makes it difficult for users as well as operators and providers to easily identify specifics relating to any particular mode of transport. There are 120 subparts in the Transport Standards, each with references to conveyances and/or premises and/or infrastructure.

We **recommend** that the Transport Standards be redrafted to a modality based document. We enclose a copy of such a redraft in which we transferred existing regulations to each separate mode as follows:

- Premises and infrastructure
- Aircraft
- Buses and coaches
- Taxis
- Trains, trams, light rail and monorails
- Ferries

Because we are addressing only the Transport Standards with respect to air travel in this submission, we then modified some sections and added new sections to incorporate the requirements identified from the case studies. The amendments are ~~struck through~~ and the additions are **highlighted**. We are confident that other modes of travel could benefit from similar close attention, resulting in further appropriate amendments and additions.

The sections added which relate to air travel include:

- Boarding assistance
- Information availability prior to booking and during travel
- Notice of special requirements
- Carer arrangements
- Disability aids
- Refusal of transportation
- Ground and on-board assistance
- Security screening
- Assistance animals
- Emergency evacuations

We **recommend** that the changes and additions incorporated in the enclosed redrafted Transport Standards be adopted for inclusion in final update of the Transport Standards resulting from this review, and that the *Disability Standards for Accessible Public Transport Guidelines 2004 (No. 3)* ('Guidelines') be appropriately amended to reflect those changes.

In deciding which air travel changes to incorporate in the redrafted Transport Standards, we considered the case studies and international standards and legislation, in particular the United States of America ('US') Department of Transportation 14 CFR Part 382 Nondiscrimination on the Basis of Disability in Air Travel ('14 CFR Part 382'). A copy of this legislation is available at <http://airconsumer.ost.dot.gov/rules/382short.doc>. Since air travel is such a global industry, we considered it appropriate to incorporate world best practice in our redraft.

The Independent Travel Criteria maintained by Australian carriers is particularly problematic for passengers with disabilities. Virgin Blue requires passengers to have the ability to carry out the following four tasks without assistance:

- Reach for, pull down and secure an overhead oxygen mask (including fastening/unfastening the straps);
- Don a lifejacket, which involves reaching for and removing a life jacket from the plastic pouch under your seat, putting the lifejacket over your head, passing the straps around your waist, clipping the ends together and pulling the toggles to inflate;
- Fasten/unfasten your own seatbelt (although our cabin crew can assist with fastening seatbelts prior to departure and unfastening seatbelts on arrival, in the event of an emergency or turbulence during a flight, a person must be able to manipulate their own seatbelt); and
- Be able to understand and respond to cabin crew directions, including directions about emergency procedures.

In order to assess the appropriateness of such requirements (to safeguard passengers in the event of an emergency) we reviewed the following documents:

- US report, National Transportation Safety Board Safety Study Report PB2000-917002 – Emergency Evacuation of Commercial Airplanes (‘Safety Study’) available at www.nts.gov/Publictn/A_Stu.htm . We were unable to locate any relevant report at the Australian Transport Safety Bureau (‘ATSB’) regarding emergency evacuations. However, since air travel is a global industry and the same aircraft are used worldwide, we considered it reasonable to examine and rely on the Safety Study.
- Australian Transport Safety Bureau (‘ATSB’) Research and Analysis Report B2006/0142 Depressurisation Accidents and Incidents Involving Australian Civil Aircraft 1 January 1975 to March 2006 (‘Depressurisation Report’) available at www.atsb.gov.au/publications/2006/B20060142.aspx .
- US Annual Report on Disability-Related Air Travel Complaints October 2006 (‘Complaints Report’) available at <http://airconsumer.ost.dot.gov/publications/gateway1.htm> .
- Civil Aviation Orders Part 20 Section 20.11 Emergency and Life Saving Equipment and Passenger Control in Emergencies (‘CAO 20.11’) issued by Civil Aviation Safety Authority (‘CASA’), available at <http://www.casa.gov.au/rules/orders/020.htm> .

In the Safety Study, the Safety Board investigated all 46 evacuations which occurred during the period September 1997 and June 1999 in the US, where the emergency egress system was used to remove passengers from the airplane for their safety.

The Safety Study revealed the following interesting and relevant facts:

- On average, there was one evacuation every 11 days (out of an average 336,328 departures in the same period).
- All evacuations occurred on airport property (life jackets were not involved).
- 92% (2,614) of the 2,846 occupants on board were uninjured, 6% (170) sustained minor injuries, and 2% (62) sustained serious injuries.
- One case accounted for all of the fatalities and most of the injuries. Only two of those fatalities were evacuation related, one passenger died from smoke inhalation in the rear of the airplane and the second passenger died 16 days after the accident as a result of thermal injuries suffered while evacuating from an over-wing exit.
- The most serious evacuation-related injuries were the result of jumping out of exits or off of wings.
- Once a decision to evacuate the airplane was made, the speed at which passengers evacuated was highly dependent on the actions of flight attendants. Attendants reported that their efforts to maintain the flow of passengers out the emergency exits were often thwarted by passengers’ insistence on retrieving their carry-on luggage before evacuating. Passengers exiting with carry-on baggage were the most frequently cited obstructions to evacuation.
- Exit location, aisle width, bulkhead width and seating density are factors in the design of an airplane that can influence passengers’ access to exits, and consequently, the success of an emergency evacuation.

- The Safety Study found several factors (in addition to uncooperative passengers) hindered evacuations:
 - Passengers seated in exit rows did not read the briefing card to familiarise themselves with their duties in an emergency evacuation.
 - Passengers continued to have problems opening over-wing exits and stowing the hatch.
 - Accident severity played a role (interior furnishings were dislodged and became obstacles, seats broke free from their tracks and blocked aisles, a life-raft ceiling panel door fell open and blocked the main aisle, severe structural deformation on impact created difficulty in opening floor level exit doors).

We find it instructive that the Safety Study made no mention of people with a disability. We can only conclude that having a disability was not a factor affecting the success of any of the evacuations. Furthermore, we consider it reasonable to expect that such results would be reflected in any comparable situation in Australia.

The Depressurisation Report shows that in over 31 years of data relating to decompression events, not a single passenger travelling with the commercial airlines in Australia suffered hypoxia symptoms. The only recorded event where passengers were injured (fatally in that particular event), concerned a charter operation and affected all souls on board. Being disabled would not have contributed to or mitigated that outcome.

US Federal legislation requires air carriers to report all disability-related air travel complaints to the Secretary of Transportation, who is then required to report annually to the US Congress. Australia has no equivalent legislation.

The Complaints Report notes that approximately 17 million people with disabilities in the US travel by air each year, and the vast majority of them do not file a disability-related air travel complaint.

In 2005, a total of 13,584 complaints were received by 156 carriers (Qantas received 14). More than half the complaints reported (7,217) concerned the failure to provide adequate assistance to persons using wheelchairs. This occurred even with passenger-supportive regulation 14 CFR Part 382.

CAO 20.11 requires the operator, during the briefing on emergency evacuations, to enquire as to the most appropriate manner of assisting the person with a disability so as to prevent pain or injury to that person. This indicates that crew are expected to physically interact with passengers with disabilities in the event of an emergency evacuation.

Crew members must take and pass a proficiency test annually in the execution of emergency procedures which includes control of passengers during emergencies (including emergency evacuation). Of particular interest to this review is that the test requires crew to know how to handle disabled passengers and handle deranged passengers and others whose conduct might jeopardise the safety of the aircraft.

Based on the above study, reports and CASA orders, independent travel criteria conditions currently imposed by operators cannot be supported and are in fact refuted. For this reason we have included sections in our redraft that prescribe standards consistent with world best practice.

Flexibility of approach

We consider that in the interests of consistency, Australian Standards ('AS') should continue to apply to all relevant provisions in the Transport Standards. Furthermore, we are of the opinion that the AS should be included in the Transport Standards in the form of Schedules. This will serve to maintain clarity and certainty for users, operators and providers by requiring compliance with only one published set of regulations.

We consider that the provisions relating to equivalent access and direct assistance are sufficiently broad to enable operators and providers to comply with the Transport Standards.

Given the 30 year time frame for full compliance with the Transport Standards, we are of the opinion that the unjustifiable hardship provisions should be phased out over that time frame. It should also be made clear that the hardship provisions do not apply to new plant and equipment purchased or significant upgrades to infrastructure undertaken after the implementation of the Transport Standards. That is, all new plant, equipment and facilities are required to comply with the existing Transport Standards from date of purchase or installation/construction.

We **recommend** that the unjustifiable hardship provisions in the Transport Standards be phased out in line with full compliance, and those provisions not to apply to new plant, equipment or facilities.

Consistency of approach

Since we are addressing the Transport Standards only with respect to air travel, we limit our comments to the observation that close attention to users' requirements in other modes of travel will undoubtedly generate appropriate amendments similar to those we identified for air travel. We have not conducted sufficient research to address any perceived shortcomings in the provisions relating to those other modes.

There were few exemptions approved by the Human Rights and Equal Opportunity Commission ('HREOC') for operators or providers in air travel. The exemptions approved were correctly of temporary nature to allow operators time to explore options and implement upgrades that were compliant.

Compatibility of approach

The Transport Standards are demonstrably based on the AS in many of the provisions. Other Government regulations (such as the Building Code of Australia) are also closely aligned with AS. It is reasonable to expect that in future any relevant regulations would also be so aligned.

We have not been made aware of conflicting regulations which would impact seriously on the ability of operators and providers to comply with the Transport Standards. If any are found to exist, we **recommend** that the Transport Standards be amended to make it clear that Transport Standards take precedence to the extent of any inconsistency (except for provisions in the *Civil Aviation Act 1988* necessary for the safety of air navigation).

One area where we strongly support a cross-requirement of compliance with the Transport Standards is in the issuing of Air Operators' Certificates. We reviewed information available on the CASA website and appreciate that certificates address the operators' and aircrafts' operations, maintenance and airworthiness. Due to the lack of regulatory oversight of compliance with the Transport Standards, the process of enforcing compliance with the Transport Standards is lengthy, costly, risky and falls on the shoulders of people with disabilities. It is simpler and fairer to require compliance as a condition of the certificate.

We **recommend** that the Air Operators' Certificates include a condition that the operators will comply with the Transport Standards.

Certainty of process

By our interpretation of section 33 DDA, when operators and providers comply with the Transport Standards, the provisions relating to disability discrimination in work and other areas do not apply, and a case of discrimination cannot be made. Conversely, though the DDA makes it unlawful to contravene a disability standard, neither the DDA nor the Transport Standards impose a penalty for doing so.

We are of the opinion that instead of a passive obligation not to contravene disability standards, people with disabilities would be better served and protected by enacting a positive obligation to comply with the disability standards.

We **recommend** that steps be taken to amend the DDA to include a positive obligation to comply with disability standards and penalty provisions for contravening the disability standards.

We consider that the complaint process generally is adequate to address most acts of individual discrimination. However we are firmly of the view that the process seriously lacks the capacity to address discrimination of a systemic nature.

Pursuant to Part 35.1 of the Guidelines, the ‘primary’ means of ‘ensuring’ compliance with the Transport Standards is through a complaint to HREOC. Part 33.2 (4) of the Guidelines states that enforcement is by complaint to HREOC, or if terminated, an application to the Federal Court or Federal Magistrates Service. An individual aggrieved by systemic contravention of the Transport Standards should not bear the risk, cost and responsibility of pursuing large corporations to enforce statutory obligations.

The enforcement process is manifestly unfair and need to be overhauled. The Government should be responsible for enforcing compliance, not aggrieved persons. We are not aware of any other Government regulation where the disadvantaged person entitled to the protection of the legislation has the core responsibility of enforcing it.

In addition, we are concerned at the current emphasis on operators and providers reaching required percentages of compliance by nominated target dates. The ‘monitoring’ relies on self-reporting and does not address the issue of on-going compliance, or the entry of new operators and providers into the marketplace.

We **recommend** that HREOC be given to power to investigate incidents of contravention of the Transport Standards and to pursue the operators responsible in the Federal Court of Australia. Appropriate levels of funding must be provided to undertake the new function.

We approve of the requirement in US legislation 14 CFR Part 382 that requires carriers to categorise and record all disability-related complaints and to submit an annual report summarising those complaints to the Department of Transportation. We consider that a similar legislative requirement here in Australia, in conjunction with changes recommended above, would enhance and progress the objects of the DDA for all people with disabilities in Australia.

We **recommend** that steps be taken to amend the DDA to include a requirement for operators and providers to implement a process to collect, categorise and record all disability-related complaints, and to report annually to the Minister for Transport and Regional Services.

Conclusion

We urge the review committee to adopt a qualitative basis for the review, rather than a purely monetary basis.

We support PIAC’s submission to the review and we rely on the evidence of its case studies. In addition, we submit our amended Transport Standards for your consideration and our recommendations summarised in Appendix A.

CAIRNS COMMUNITY LEGAL CENTRE INC

Per:

Appendix A

Recommendations

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1. We **recommend** that the Transport Standards be redrafted to a modality based document.
2. We **recommend** that the changes and additions incorporated in the enclosed redrafted Transport Standards be adopted for inclusion in final update of the Transport Standards resulting from this review, and that the *Disability Standards for Accessible Public Transport Guidelines 2004 (No. 3)* ('Guidelines') be appropriately amended to reflect those changes.
3. We **recommend** that the unjustifiable hardship provisions in the Transport Standards be phased out in line with full compliance, and those provisions not to apply to new plant, equipment or facilities.
4. We **recommend** that the Transport Standards be amended to make it clear that Transport Standards take precedence to the extent of any inconsistency (except for provisions in the *Civil Aviation Act 1988* necessary for the safety of air navigation).
5. We **recommend** that the Air Operators' Certificates include a condition that the operators will comply with the Transport Standards.
6. We **recommend** that steps be taken to amend the DDA to include a positive obligation to comply with disability standards and penalty provisions for contravening the disability standards.
7. We **recommend** that HREOC be given to power to investigate incidents of contravention of the Transport Standards and to pursue the operators responsible in the Federal Court of Australia. Appropriate levels of funding must be provided to undertake the new function.
8. We **recommend** that steps be taken to amend the DDA to include a requirement for operators and providers to implement a process to collect, categorise and record all disability-related complaints and to report annually to the Minister for Transport and Regional Services.