

Submission to the Aviation Industry Ombuds Scheme Consultation

Australian Human Rights Commission

Submission to the Australian Department of Infrastructure,
Transport, Regional Development, Communications and the Arts

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1 Introduction

Air travel is a vital part of modern life that all people should be able to access without discrimination. This includes equal opportunity to choose a provider, flight type, time and service. Unfortunately, options for people with disability are more than often reduced. People with disability experience discrimination in air travel based on a multitude of factors such as inaccessible infrastructure, negative attitudes towards disability, and inaccessible policies, procedures and practices. Experiences of discrimination have a serious impact on the wellbeing, independence and inclusion of people with disability.

As human rights are interdependent, accessible transport is fundamentally connected to the realisation of rights to individual autonomy and independence, personal mobility, non-discrimination, community inclusion and participation for people with disability.

The Australian Human Rights Commission (Commission) welcomes the release of the Aviation White Paper and its eleven disability related reform initiatives. There remains a need to identify and understand the underlying drivers of disability discrimination and exclusion in air travel to ensure that the measures being introduced will address their root causes. To this end, the Commission encourages measurement and monitoring initiatives to accompany the proposed reforms so that progress in addressing systemic reform can be assessed over time.

1.1 United Nations Convention on the Rights of Persons with Disabilities (CRPD)

Under the United Nations *Convention on the Rights of Persons with Disabilities* (CRPD), Australia has obligations to ensure that the fundamental human rights and freedoms of all people with disability are promoted, upheld and protected.¹ This includes through effective legislative, administrative, or other measures, as outlined in Article 4 of the CRPD (general obligations).²

The obligations under the CRPD apply to all levels of government in Australia (i.e. Australian, State, Territory and Local governments).³

Provisions under the CRPD place general obligations on duty holders under Articles 4 and 9 to provide accessibility measures. These general obligations address the systemic barriers experienced by people with disability as a group or a collective. Examples would include the development and provision of universally designed goods, services, equipment and facilities, accessible

transport, accessible buildings, medical services, schools, housing, information etc. Measures taken to meet these obligations are not subject to the disproportionate or undue burden qualification.

Article 4 of the CRPD sets out the obligation of States to take ‘all appropriate measures to eliminate discrimination on the basis of disability by any person, organisation or private enterprise’.⁴ Non-discrimination is one of the general principles of the CRPD (Article 3), guiding the interpretation of how individual CRPD rights apply.

Aside from these general obligations, people with disability, as rights bearers hold individual rights under the CRPD in relation to equality and non-discrimination. They are entitled to reasonable accommodation, or individualised supports to be provided to them so they can fully participate and be included in a particular situation.

The denial of reasonable accommodation forms part of the definition of discrimination. This means that people with disability specify the individualised support they need to be able to undertake, participate or benefit from that particular situation on an equal basis with others. For example, a person with disability may require screen reading equipment; a person with disability may require a support person to assist them to understand information; a person with disability may require a support person to assist them to undertake daily activities. Reasonable accommodation is responsive to individual.

1.2 Australian legislative context

The Australian *Disability Discrimination Act 1992* (Cth) seeks to eliminate discrimination on the basis of disability in areas of public life, which includes access to goods, services and facilities, and public transport such as aviation. The *Disability Standards for Accessible Public Transport 2002* (Cth) are made under the Disability Discrimination Act to provide requirements for public transport operators and providers. The Standards apply to aviation services.

The Commission can receive complaints about alleged discrimination under the *Australian Human Rights Commission Act 1986* (Cth).

In its *Free & Equal* Project, the Commission puts forward an agenda for legislative reform to discrimination law, including the Disability Discrimination Act, and proposes a model for a national Human Rights Act. Importantly, these two areas of reform would introduce legislative mechanisms, such as a positive obligation on duty bearers and additional regulatory powers including to make disability standards more effective, that would lead to greater ‘rights mindedness’ and a

culture of prevention of discrimination, in contrast with the reactive complaints-based model presently in operation.

In addition to the establishment of an Aviation Ombuds Scheme and other disability initiatives introduced in the White Paper, the Commission reiterates the importance of the Free & Equal recommendations to modernise federal discrimination law being advanced in parallel. The Commission commends the Government for its recent commitment to review the *Disability Discrimination Act 1992* (Cth).

2 Feedback on Ombuds Scheme

The Commission is broadly supportive of the new Aviation Industry Ombuds Scheme role being established, as one of eleven disability related initiatives in the White Paper. The Consultation Paper recognises the need for the Ombuds Scheme to avoid duplication with other complaints handling bodies and recognises that the remit of the scheme could overlap with the Commission's existing role as the complaint handling body for disability discrimination.

The Commission notes that the Consultation Paper does not seek comment on disability access issues, noting these as being subject to future consultation. The rationale for this appears to be that any consultation on disability access issues should wait until a new aviation-specific disability standard is developed. This is disappointing and risks delaying improvements in the area of disability discrimination.

In the absence of any detail in the Consultation Paper on the proposed Aviation Charter or the Ombuds' jurisdiction in relation to disability access, the Commission can provide the following key points for consideration:

- Respondents
 - o As complaints relating to air travel received by the Commission usually relate to the whole-of-journey experience of air travel, rather than being confined to the airline, the Ombuds should have broad oversight of both airlines and airports, including security and other third-party companies used by airports.
- Access to justice
 - o The proposed Ombuds powers, such as own-motion investigations and powers to direct remedies, are welcome regulatory levers. Their use will be critical to achieving system level improvements, both for

consumer protection and discrimination claims. More detail is required for the Commission to assess the adequacy of the proposed remedies.

- It is critical that the Ombuds provide an accessible complaints resolution process and that reasonable adjustments be provided to complainants so that people with disability have access to justice on an equal basis with others.
- Duplication with the Australian Human Rights Commission
 - The Commission has concerns about potential duplication or overlap in jurisdiction should the proposed new entity be handling complaints under the Disability Discrimination Act and existing, or future, accessibility standards. It is unusual for dual complaint pathways to exist at the federal level and would be problematic to have dual pathways to make 'unlawful discrimination' complaints to the courts.
 - It should be recognised that the Commission's complaint jurisdiction extends to discrimination on a range of grounds, namely, race, sex, age, and disability. The Commission regularly receives intersectional complaints in relation to more than one protected attribute – for example a complaint against an airport and airline may allege both disability and age discrimination. It is unclear how the new entity would handle such matters and this could lead to splitting of complaints.
 - If dual pathways are developed, the Commission considers that there should be a prohibition on double handling of complaints – for example, in certain circumstances complaints lodged with Fair Work or state commissions and tribunals cannot be accepted by the Australian Human Rights Commission to avoid unnecessary duplication. The Commission's experience in actioning complaints that include claims that have already been considered in other forums is that they are time consuming and may lack merit – it is inefficient and not in the interests of procedural fairness to respondents for such dual pathways to be available sequentially.
 - The Commission considers it more appropriate for the Ombuds to handle complaints under the proposed Aviation Charter of Rights, and to have powers to refer relevant matters to the Commission, and the Commission to have power to refer relevant matters to the new entity,

where this is considered a more appropriate forum for complaint handling.

- A 'no wrong doors' approach should be adopted for initial complaints, with referrals to the body best placed to investigate. This would also allow a regulator not to accept a complaint if it has already been properly considered elsewhere.

The Commission will continue its engagement with the Australian Government on all disability related matters in the Aviation White Paper, including the establishment of the Aviation Ombuds Scheme.

¹ *United Nations Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008) ('CRPD').

² Ibid art 4(1)(b).

³ Ibid art 4(5).

⁴ Ibid art 4(1)(e).