THE LAW SOCIETY
OF NEW SOUTH WALES

Our ref: HRC:JvDPsb190722

19 July 2022

Ms Margery Nicoll
Acting Chief Executive Officer
Law Council of Australia
DX 5719 Canberra

By email: alex.kershaw@lawcouncil.asn.au

Dear Ms Nicoll,

Stage 2 Reform of the Disability Standards for Accessible Public Transport 2002

Thank you for the opportunity to contribute to the Law Council's submission in response to the Stage 2 Reform of the Disability Standards for Accessible Public Transport 2002 (**the Transport Standards**), which is being undertaken by the Australian Government Department of Infrastructure, Transport, Regional Development and Communications in partnership with the Queensland Government. The Law Society's Human Rights Committee has contributed to this submission.

Like the Law Council, the Law Society is not well-placed to respond to the consultation's targeted questions at the level of practical detail sought. Nevertheless, we have the following comments in relation to the effectiveness of the Transport Standards in contributing to full compliance with the *Disability Discrimination Act 1992* (Cth) (**DDA**).

The Law Society considers that it is of fundamental importance that accessible transport is available to people with disabilities to ensure their independence and full participation in the Australian community. Article 9 on the Convention on the Rights of Persons with Disabilities (**UNCRPD**), amongst other things, requires signatories to take appropriate measures to ensure equal access to transportation.[1] Article 31 requires parties to collect data to enable them to implement policies to give effect to the UNCRPD.[2] Article 33 deals with implementation and monitoring and requires that signatories have a framework to promote, protect and monitor implementation of the UNCRPD.[3]

The legal effect and enforcement of Disability Standards

The Law Society has considered a recent submission of the Public Interest Advocacy Centre (**PIAC**) on the Transport Standards.[4] We agree that one of the main challenges with their operation is the fact that the system relies exclusively on individuals being willing and

[1] United Nation Convention on the Rights of Persons with Disabilities, opened for signature 30 March. 2007, 2515 UNTS 3 (entered into force 3 May 2008).
[2] Ibid., Art 31.
[3] Ibid., Art 33.
[4] Public Interest Advocacy Centre, Submission to the Reform of the Disability Standards for Accessible Public Transport: Consultation Regulation Impact Statement, 22 April 2021.

THE LAW SOCIETY OF NEW SOUTH WALES
170 Phillip Street, Sydney NSW 2000, DX 362 Sydney
ACN 000 000 699 ABN 98 696 304 966
lawsociety.com.au
T +61 2 9926 0333 F +61 2 9231 5809
E lawsociety@lawsociety.com.au
Law Council OF AUSTRALIA
CONSTITUENT BODY

sufficiently resourced to make a complaint in relation to a breach, namely through a conciliation at the Australian Human Rights Commission (**AHRC**) and, in certain cases, by commencing proceedings in the Federal Court or the Federal Circuit and Family Court.

The practical effect of relying on individual complaints is that systemic problems are not brought to light. This is due to the way in which conciliations at the AHRC are conducted in private, and any agreement reached is often confidential and only binding between the parties to the complaint. While complainants can seek systemic outcomes at conciliation, for example improvements to policies that purport to comply with, or implement the Transport Standards, in practice these are hard to achieve. In the experience of our members, respondents typically resist those kinds of adjustments on the basis that such changes are too expensive, and therefore unjustifiably harsh or unreasonable. Furthermore, the high rate of resolution of matters at the AHRC also means that the Transport Standards are subject to infrequent judicial scrutiny.[5]

In its report*, Free and Equal: A Reform Agenda for Federal Discrimination Laws* (**AHRC Report**), the AHRC also expressed its concern about the lack of appropriate accountability mechanisms for the implementation of disability standards, stating that '(n)on-compliance is an issue, and is not easy to enforce'.[6] Other submissions to the AHRC Report also noted that implementation of the Transport Standards has been 'slow and inconsistent'[7] and that lack of enforcement mechanisms have resulted in 'low levels of industry compliance'.[8]

The Law Society therefore would support further examination of whether it is appropriate that an independent monitoring body could be tasked with implementation and enforcement of the Transport Standards, as suggested in PIAC's submission.[9] We support this as a general concept, as it would appear likely to achieve better results using a more systemic and holistic approach to Transport Standards than the individual complaints-driven process that currently exists.

The benefits of a mandatory reporting framework

As set out in section 33.7 of the Transport Standards, it is not unlawful to fail to comply with a requirement of the Standards if compliance would impose unjustifiable hardship on any person or organisation.

Under the Transport Standards, 'unjustifiable hardship' is to be interpreted and applied having due regard to the scope and objects of the DDA, in particular, the object of removing discrimination as far as possible, and the rights and interests of all relevant parties. However, the test for 'unjustifiable hardship' in the Transport Standards includes factors in addition to those listed in the test in the DDA, including costs and capital implications, exceptional operational, technical or geographic factors, resources reasonably available, likely benefits or detriments of compliance (for example, loss of heritage value), efforts made in good faith to comply with the Standard, and consultation with people with disability.

It is understandable that transport operators and providers are concerned by the lack of legal certainty arising from the exception of unjustifiable hardship, due to the fact that there is no process to validate the exception, unless a final determination is made in Court. The introduction of mandatory reporting on assets would mean that providers would have to report

[5] Cases such as *Haraksin v Murrays Australia Ltd (No 2)* (2013) 211 FCR 1, for example, are infrequent.
[6] Australian Human Rights Commission, Free and Equal: A Reform Agenda for Federal Discrimination Laws, December 2021, 135.
[7] Australian Centre for Disability Law, Submission to the Australian Human Rights Commission's Free and Equal Anti-Discrimination Law Discussion Paper, 3 December 2019, 3.
[8] Public Interest Advocacy Centre (PIAC), Submission to the Australian Human Rights Commission's Free and Equal Anti-Discrimination Law Discussion Paper, 8 November 2019, 8.
[9] Public Interest Advocacy Centre, Submission to the Reform of the Disability Standards for Accessible Public Transport: Consultation Regulation Impact Statement, 22 April 2021.

on whether an asset is compliant with the Transport Standards and, where this is not the case, identify why unjustifiable hardship, direct assistance or equivalent access applies or, alternatively, articulating their plan to realise progress towards compliance. This would presumably build a far more detailed picture across the transport industry of compliance, as opposed to infrequent cases brought by affected individuals in the courts.

The merits generally of a regulatory versus non-regulatory approach to disability standards as well as whether civil penalties would be an appropriate regulatory tool

Progressive realisation and implementation are at the heart of the intent of the Transport Standards, but without accountability mechanisms and benchmarks or milestones, they will remain a conceptual tool only. There are obvious costs and other implications of adopting a regulatory approach versus maintaining the status quo, or the non-regulatory option, namely self-reporting against compliance plans. From a human rights perspective of upholding Australia's obligations under the UNCRPD, particularly Article 33, our preliminary view is that a regulatory option would be the most effective way to hold operators and providers accountable, and improve the experience of persons with disability. It may be that in the first few years of operation of such a scheme, an educative approach, rather than civil penalties, would be more likely to bring about willing change from those in industry.

Thank you for the opportunity to contribute to this submission. Questions at first instance may be directed to Sophie Bathurst, Policy Lawyer, at sophie.bathurst@lawsociety.com.au or (02) 9926 0285.

Yours sincerely,

Joanne van der Plaat
President