

Submission to the Aviation Industry Ombuds Scheme – Consultation Paper

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About the Justice and Equity Centre

The Justice and Equity Centre is a leading, independent law and policy centre. Established in 1982 as the Public Interest Advocacy Centre (PIAC), we work with people and communities who are experiencing marginalisation or disadvantage.

The Centre tackles injustice and inequality through:

- legal advice and representation, specialising in test cases and strategic casework;
- research, analysis and policy development; and
- advocacy for systems change to deliver social justice.

We actively collaborate and partner in our work and focus on finding practical solutions. We work across five focus areas:

Disability rights: challenging discrimination and making the NDIS fairer to ensure people with disability can participate equally in economic, social, cultural and political life.

Justice for First Nations people: challenging the systems that are causing ongoing harm to First Nations people, including through reforming the child protection system, tackling discriminatory policing and supporting truth-telling.

Homelessness: reducing homelessness and defending the rights of people experiencing homelessness through the Homeless Persons' Legal Service and StreetCare's lived experience advocacy.

Civil rights: defending the rights of people in prisons and detention, including asylum seekers, modernising legal protection against discrimination, raising the age of criminal responsibility to 14, advancing LGBTIQ+ equality and advocating for open and accountable government.

Energy and water justice: working for affordable and sustainable energy and water and promoting a just transition to a zero-carbon energy system.

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Recommendations

Recommendation 1 - The Ombuds Scheme not be tasked with enforcing compliance with the Aviation Disability Standards

The Australian Human Rights Commission is better placed than the Ombuds Scheme to independently monitor compliance and enforce the Aviation Disability Standards. The AHRC should be empowered to exercise a full suite of compliance powers. The Ombuds Scheme should establish efficient pathways to facilitate complaints to the AHRC.

Recommendation 2 - Objectives of the Ombuds Scheme to include identifying and resolving systemic issues, facilitating best practice dispute resolution, and being accessible to, and inclusive of, people with disability

The objects of the Ombuds Scheme should include to:

- identify emerging and systemic issues, and resolve or facilitate resolution of these issues, to ultimately influence systemic improvement in the aviation industry;*
- facilitate best practice dispute resolution, including by adopting the Benchmarks for Industry-based Customer Dispute Resolution in the enabling legislation; and*
- be accessible to, and inclusive of, people with disability.*

Recommendation 3 - The Ombuds Scheme be governed by a Board comprising an independent Chair and equal numbers of directors with community and industry expertise

A governing Board should be established comprising an independent Chair and equal numbers of directors with community and industry expertise, including two community directors with lived experience of disability and/or recognised representatives of people with disability.

Recommendation 4 - Rules for the operation of the Ombuds Scheme to be approved by the Australian Competition & Consumer Commission

The Board should establish rules for the operation of the Ombuds Scheme, to be approved by the Australian Competition & Consumer Commission.

Recommendation 5 - All passenger airlines and airports that operate in Australia to be members

Membership should include all passenger airlines (including international airlines) and airports that operate in Australia, with tiered membership to support airlines and airports of varying size and operation.

Any exemptions should be limited and determined against transparent criteria, and publicised by the Ombuds Scheme and the relevant airline/airport.

Recommendation 6 - Any consumer complaints relating to a person's disability to be eligible

Consumer complaints where the issue complained of relates to, arises from or otherwise impacts a person's disability should be deemed eligible.

Recommendation 7 - The Ombuds Scheme to accept representative complaints

The Ombuds Scheme should accept representative complaints lodged on behalf of one or more affected consumers.

Recommendation 8 - The Ombuds Scheme to work cooperatively with other complaints schemes or processes

The Ombuds Scheme must work cooperatively with other federal, state and territory complaints schemes or processes, including provision of information to complainants about other potential relevant bodies, cross-referral powers for the Ombuds Scheme to refer matters to other bodies, and scope to jointly investigate emerging and systemic issues with other relevant bodies.

Recommendation 9 - Consumers to be able to complain directly to the Ombuds Scheme

Consumers should be able to escalate their complaint directly to the Ombuds Scheme in certain circumstances (ie where the complaint is of a serious nature, requires an urgent response, etc).

Recommendation 10 - The Ombudsperson to make decisions having regard to all the circumstances of the complaint and complainant

The Ombudsperson should, when making determinations, take into account the applicable law, industry practice, principles of fairness and reasonableness, and any vulnerability of the consumer.

Recommendation 11 - Consumers to escalate urgent complaints and access 'fast track' pathways

Consumers should be able to escalate urgent complaints and access 'fast track' pathways so complaints can be appropriately prioritised, whether complaining directly to airlines and airports, or to the Ombuds Scheme. A prioritisation framework should include complaints about incidents that impact a consumer's safety, or result in personal injury or property damage.

Recommendation 12 - Time limits for making complaints to be accessible, compatible with other complaint forums, and enforced on a discretionary basis

Time limits for making complaints need to be:

- accessible to people with disability;*
- consistent and compatible with other complaint avenues for similar subject matter; and*
- enforced on a discretionary basis.*

Recommendation 13 - The Ombuds Scheme to report broadly and regularly in pursuit of its objectives

In addition to the types of publications listed in the Consultation Paper, the Ombuds Scheme should publish detailed complaints data, a de-identified register of resolutions reached through case management, case studies of select complaints, determinations made by the Ombudsperson, and reports investigating systemic issues and recommendations.

1. Introduction

The Justice and Equity Centre ('JEC'), formerly the Public Interest Advocacy Centre, welcomes the opportunity to make a submission to the Department of Infrastructure, Transport, Regional Development, Communications and the Arts' Consultation Paper on the Aviation Industry Ombuds Scheme ('Ombuds Scheme').

The JEC 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.

In particular, we have extensive experience in disability discrimination litigation and public policy development related to public transport. Equal access to air travel is a current priority for our work. 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').

This submission has been endorsed by the Physical Disability Council of NSW ('PDCN'), the peak body representing people with physical disabilities across NSW. Please see letter from PDCN dated 17 October 2024 to the Department annexed to this submission.

Consumer protections in air travel are of particular importance for people with disability. Where airlines and airports fail to deliver services, people with disability may be disproportionately impacted and experience serious consequences. Through our work we have heard accounts of people with disability who have experienced discrimination, neglect, and abuse in air travel.

Our submission addresses specific questions raised in the Consultation Paper, with a focus on the importance of considering people with disability in the design of the Ombuds Scheme. While this submission should be read as a whole, below is a summary of our views in relation to the following questions posed by the Consultation Paper:

- **Question 1:** an objective of the Ombuds Scheme should include identifying emerging issues to influence systemic improvements in the aviation industry. The Ombuds Scheme should facilitate best practice industry-based dispute resolution services, including by adopting The Treasury's *Benchmarks for Industry-based Customer Dispute Resolution* and explicitly reference the need for its services to be accessible to people with disability.
- **Question 3:** a governing Board should be established comprising an independent Chair and equal numbers of directors with community and industry expertise, including two community directors with lived experience of disability and/or recognised representatives of people with disability. The Board should establish rules for the operation of the Ombuds Scheme, which should be approved by the Australian Competition & Consumer Commission.
- **Question 6:** membership should include all passenger airlines (including international airlines) and airports that operate in Australia, with tiered membership to support airlines and airports of varying size and operation. Any exemptions from membership should be

limited and determined against transparent criteria and publicised by the Ombuds Scheme and the relevant airline/airport.

- **Question 10:** eligible complaints should include any consumer complaint relating to a person's disability. Further, the Ombuds Scheme should accept 'representative complaints' lodged on behalf of one or more affected consumers. To properly implement a 'No Wrong Door' policy, any ineligible complaints should be referred to the correct body.
- **Question 13:** the Australian Human Rights Commission (in its capacity handling discrimination complaints) and state and territory discrimination and consumer complaint handling bodies have the potential to overlap with the Ombuds Scheme.
- **Question 16:** there may be circumstances where it will not be appropriate for consumers to attempt to resolve complaints directly with airlines or airports, and there should be an option for consumers to escalate their complaint directly to the Ombuds Scheme. Similar to other ombuds schemes, when making a determination, the Ombudsperson should have regard to relevant law, industry practice, principles of fairness and reasonableness, and any vulnerability of the consumer.
- **Question 17:** when complaining directly to airlines and airports, as well as to the Ombuds Scheme, consumers should be able to escalate urgent complaints and access 'fast track' pathways so complaints can be appropriately prioritised. A prioritisation framework should include complaints relating to a consumer's safety, personal injury or property damage.
- **Question 18:** the time limit for making a complaint must be accessible to people with disability. The time limit should be consistent and compatible with other complaint avenues that may be pursued in relation to similar subject matter, and should be enforced on a discretionary basis. If a shorter time limit applies to complaints to the Ombuds Scheme, the Ombudsperson must have discretion to accept an out-of-time complaint, including where a person lodged their complaint in another forum.
- **Question 20:** broad and regular data collection and reporting will enable the Ombuds Scheme to identify emerging issues and pursue its objective to influence systemic improvements in the aviation industry. In addition to the types of publications listed in the Consultation Paper, the Ombuds Scheme should publish detailed complaints data, a de-identified register of resolutions reached through case management, case studies of select complaints, determinations made by the Ombudsperson, and reports investigating systemic issues and recommendations.

2. Regulator of Aviation Disability Standards

The Consultation Paper does not seek stakeholder views on the Ombuds Scheme's role in relation to disability access but says, in the future, the Government will consider options for the Ombuds Scheme to investigate non-compliance with the new Aviation Disability Standards ('Standards') through a separate process.

The JEC welcomes the Government's consideration of monitoring, compliance and enforcement of the Standards. As we said in our submission to the Aviation Green Paper, the greatest weakness of the current *Disability Standards for Accessible Public Transport 2002* (Cth)

(‘Transport Standards’) is the lack of monitoring and enforcement.¹ However, we do not consider the Ombuds Scheme is the most appropriate body for that purpose.

The regulator of the Standards should be given a full suite of compliance powers to enforce the Standards, including to:

- collect detailed industry data on compliance with the 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 Standards;
- conduct reviews or audits of compliance relating to systemic issues with the Standards;
- conduct inquiries into potential breaches of the Standards by operators and providers and provide recommendations to achieve compliance;
- issue fines for breaches of the 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 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.²

Inherently, ombuds schemes help parties resolve disputes. While such a scheme could also identify and monitor systemic issues, it would only do so as an outcome of its dispute resolution role where complaints indicate such problems. Typically, ombuds schemes do not have a regulatory – proactive, investigative and compliance-focused – role. If a systemic issue is not the subject of a complaint, the Ombuds Scheme may be unaware of the issue and therefore not well placed to investigate. Therefore, in our view the Ombuds Scheme would not be an appropriate body to exercise the types of powers and functions necessary to oversee the Standards.

Moreover, the intended funding structure of the Ombuds Scheme could impede the Ombuds Scheme’s ability to enforce the Standards. If the Ombuds Scheme is funded by scheme members as proposed, industry members may be reluctant to contribute additional funding for it to carry out additional objectives aimed at enforcing the Standards.

In our view, the AHRC is better placed than the Ombuds Scheme to independently monitor compliance and enforce the Standards (with the appropriate granting of regulatory powers, and with sufficient allocation of resources to allow it to exercise those powers). This would be appropriate given the Standards will be a schedule to the Transport Standards, which are made under the *Disability Discrimination Act 1992* (Cth) (‘DDA’). In our submission to the Aviation Green Paper, in relation to the full suite of compliance powers listed above, we observed:

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

¹ JEC (formerly PIAC), *Submission to the Aviation Green Paper* (30 November 2023) <<https://jec.org.au/wp-content/uploads/2023/12/PIAC-Submission-to-Aviation-Green-Paper.pdf>> 11.

² *Ibid.*

to conduct investigations and reviews aimed at identifying breaches of a potential positive duty to eliminate disability discrimination.

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.³

As the existing industry regulator, the Civil Aviation Safety Authority ('CASA') may also be relevant to the AHRC's enforcement of the Standards.

While we do not consider the Ombuds Scheme is the appropriate body to monitor or enforce the Standards, the Scheme should have clear direction on how to assist complainants with complaints relating to the Standards, including through well-established and efficient pathways for communication and cross-referral as outlined further in our submission below.

Recommendation 1 - The Ombuds Scheme not be tasked with enforcing compliance with the Aviation Disability Standards

The Australian Human Rights Commission is better placed than the Ombuds Scheme to independently monitor compliance and enforce the Aviation Disability Standards. The AHRC should be empowered to exercise a full suite of compliance powers. The Ombuds Scheme should establish efficient pathways to facilitate complaints to the AHRC.

3. Answers to questions

3.1 Design of the Ombuds Scheme

Question 1: What should be the objectives of the Ombuds Scheme?

The Ombuds Scheme's objectives should include identifying emerging and systemic issues in the provision of aviation services to consumers, as well as resolving or facilitating resolution of these issues (eg referring the issue to a regulator), to ultimately influence systemic improvement in the aviation industry.

To facilitate resolution of issues, the Ombuds Scheme will need to work smoothly and compatibly with other government or industry bodies that handle consumer complaints, including anti-discrimination commissions and tribunals that can implement systemic measures that address disability access needs. Our response to question 13 below outlines specific complaint schemes that have potential to overlap with the Ombuds Scheme.

³ Ibid 11-12.

The enabling legislation should adopt The Treasury's Benchmarks

The Ombuds Scheme should facilitate best practice industry-based dispute resolution services to support better consumer outcomes. The Treasury's *Benchmarks for Industry-based Customer Dispute Resolution* ('Benchmarks') provide the following principles:

- accessibility;
- independence;
- fairness;
- accountability;
- efficiency; and
- effectiveness.⁴

The Benchmarks are referenced in legislation and regulation, in both the telecommunications and finance sectors,⁵ and other dispute resolution schemes have voluntarily adopted the benchmarks.⁶ Given the Benchmarks are well established proven standards, we recommend the Benchmarks be explicitly referenced in the legislation establishing the Ombuds Scheme. The Benchmarks would guide how the Ombuds Scheme functions, uses its powers, implements processes and resolves disputes. Legislating the Benchmarks would provide a reference point for how the Ombuds Scheme should be administered and what consumers can expect.

We suggest the 'accessibility' benchmark should specifically refer to the need to promote the experience of people with disability when engaging with the Ombuds Scheme. This is because consumer protections in air travel are of particular importance for people with disability. As we said in our submission to the inquiry into the Airline Passenger Protections (Pay on Delay) Bill 2024:

Where airlines fail to deliver promised services, the consequences for passengers with disability are particularly serious. People with disability may need to make more extensive preparations than other travellers, to ensure their support needs will be met – for example, by hiring support persons or obtaining relevant advance permissions to carry health equipment. These will often be more challenging and/or costly to rearrange in the event of service failures; and the need to ensure adequate supports are available can mean people with disability have fewer alternative options than other travellers.

Additionally, where services fail, people with disability may be left unsupported and at risk of distress or harm. For example, a passenger who uses a catheter and an ostomy bag, which may require attention and changing every several hours, might plan their trip to allow support staff to assist them at departure and arrival. However,

⁴ The Treasury, *Benchmarks for Industry-based Customer Dispute Resolution* (February 2015) <https://treasury.gov.au/sites/default/files/2019-03/benchmarks_ind_cust_dispute_reso.pdf>.

⁵ *Telecommunications (Consumer Protection and Service Standards) Act 1999* (Cth) s 128(10); *Corporations Act 2001* (Cth) s 1051A.

⁶ Australian and New Zealand Ombudsman Association ('ANZOA'), *Rules and Criteria* (amended 22 November 2018) <https://anzoa.com.au/ws/media-library/ceb11af663ae4142891f15ae7992e4e7/anzoa_rules.pdf> promotes adoption of the Benchmarks by ombudsmen and their offices.

where an airline's flights are delayed and/or a connection is missed, that passenger may be left without support to manage this need, placing them at serious risk.

These issues are particularly acute in relation to disability-specific assistance services. Where an airline fails to provide a promised support, people may be left in a manual wheelchair in which they cannot self-mobilise; without a meet-and-assist service they rely upon to navigate through the airport, and with no means of independently seeking help; or without the necessary equipment to safely de-plane upon arrival at their destination. The JEC has heard accounts of people with disability who have experienced each of these issues.⁷

As a specific user group who are likely to be disproportionately impacted by consumer issues in the aviation industry, the Ombuds Scheme's objectives, in adopting the 'accessibility' Benchmark, should explicitly refer to the need and object of the Ombuds Scheme to be accessible to, and inclusive of, people with disability. To meet this objective, people with disability should be involved in the design of the Ombuds Scheme and it should be user tested for accessibility prior to commencing operation.

Recommendation 2 - Objectives of the Ombuds Scheme to include identifying and resolving systemic issues, facilitating best practice dispute resolution, and being accessible to, and inclusive of, people with disability

The objects of the Ombuds Scheme should include to:

- *identify emerging and systemic issues, and resolve or facilitate resolution of these issues, to ultimately influence systemic improvement in the aviation industry;*
- *facilitate best practice dispute resolution, including by adopting the Benchmarks for Industry-based Customer Dispute Resolution in the enabling legislation; and*
- *be accessible to, and inclusive of, people with disability.*

Question 3: What governance arrangement should be adopted for the Ombuds Scheme?

The Australian and New Zealand Ombudsman Association ('ANZOA') says an industry-based ombuds scheme must be accountable to an independent board of industry and consumer representatives.⁸ As such, we support the Government's view in the Consultation Paper that a governing board should be established to oversee the Ombuds Scheme.

⁷ JEC, *Submission to Inquiry into Airline Passenger Protections (Pay on Delay) Bill 2024* (28 August 2024) <<https://jec.org.au/wp-content/uploads/2024/09/2024.08.28-Submission-to-Inquiry-into-Airline-Passenger-Protections-Pay-on-Delay-Bill.pdf>>.

⁸ ANZOA, *Essential Criteria for Describing a Body as an Ombudsman* <https://anzoa.com.au/ws/media-library/e496946f33294277ad3974c7d27da483/2010_anzoa_policy-statement_essential-criteria-for-describing-a-body-as-an-ombudsman.pdf> 2.

Similar to governing boards of other industry ombuds schemes,⁹ it is essential the Ombuds Scheme Board is led by an independent Chair. Additionally, the Board should comprise an equal number of directors with community and industry expertise, to ensure fairness and independence. Community directors should be nominated by a recognised community organisation. Industry directors should equally represent airlines and airports. The enabling legislation should stipulate majority decisions of the Board must include at least one community director and one industry director.

It is essential the Board is genuinely diverse with a mix of skills, experiences, backgrounds and characteristics. As set out above, consumer protections in air travel are of particular importance to people with disability. To ensure the perspectives of consumers with disability are represented, there should be two community directors with lived experience of disability and/or recognised representatives of people with disability. In our view, two directors with this experience is necessary to acknowledge the responsibility of representing a large and diverse community of people with disability. The need for the Board to be diverse and include two people with lived experience of disability and/or recognised representatives of people with disability should be set out in the enabling legislation, or otherwise in the Board's Constitution.

There may be risks with appointing additional independent board members depending on their expertise. If an independent board member's expertise aligns in particular with the industry, this would lead to an imbalance in the otherwise equal composition of directors, and could undermine the independence of the Ombuds Scheme. If the Ombuds Scheme Board intends to provide for additional independent directors, the governance framework should prescribe specific qualifications, skills and/or expertise sought to be gained by that appointment.

The Government should appoint the first independent Chair of the Board. Following that appointment, the Government with the input of the Chair should appoint the first community directors. It is important the industry directors are not appointing the initial independent Chair and community directors. After the initial Board is constituted, any replacement Chair or community directors should also be appointed by the Government.

Given industry directors will be remunerated for their role on the Board by the airline or airport they represent, community directors should also be remunerated to recognise their role, expertise and ensure their full participation in all Board and committee meetings. The enabling legislation should provide that community directors are remunerated in accordance with the benchmark for good practice.

To align with good practice, the Board should commission an independent review of the effectiveness of its governance periodically, and at least every five years.

In our view, it is appropriate for the Board, once constituted, to determine the Ombuds Scheme's operations (ie eligibility for complaints, time limits for making complaints, maximum monetary

⁹ For example, the Australian Financial Complaints Authority ('AFCA') Board is made up of an equal number of non-executive Directors with consumer and industry expertise; the Telecommunications Industry Ombudsman ('TIO') Board consists of three directors with consumer experience and three directors with industry experience; and the Energy & Water Ombudsman NSW ('EWON') comprises five industry directors from electricity, gas and water provider members and five community directors from a variety of community organisations.

award, etc) through rules. This will enable the Ombuds Scheme to operate flexibly and evolve over time. Noting the Australian Competition & Consumer Commission ('ACCC') regulates consumer-related issues in the aviation industry, the ACCC should perform an oversight role in relation to the Ombuds Scheme. In particular, the ACCC should approve the rules set by the Board, including any subsequent amendment to the rules.

Recommendation 3 - The Ombuds Scheme be governed by a Board comprising an independent Chair and equal numbers of directors with community and industry expertise

A governing Board should be established comprising an independent Chair and equal numbers of directors with community and industry expertise, including two community directors with lived experience of disability and/or recognised representatives of people with disability.

Recommendation 4 - Rules for the operation of the Ombuds Scheme to be approved by the Australian Competition & Consumer Commission

The Board should establish rules for the operation of the Ombuds Scheme, to be approved by the Australian Competition & Consumer Commission.

Question 6: Which airlines and airports should be required to be members of the Ombuds Scheme? Should there be any exemptions and, if so, on what grounds?

Membership of the Ombuds Scheme should be as broad as possible, with all passenger airlines (including international airlines) and airports that operate in Australia required to be members – consumers should be protected equally. To accommodate this view and to account for variations in size and operations of airlines and airports, membership requirements could be on a tiered basis. In other words, a small regional airport would not have the same requirements as a larger metropolitan airport.

If the Scheme permits exemptions to membership, it is important exemptions or exempt categories are limited and determined against transparent criteria. Exemptions should be published by the Ombuds Scheme and the relevant airline/airport so consumers are aware. As noted, consumer protections in air travel are of particular importance to people with disability, and broad exemptions should not be available to any airline that carries any person with disability or who has specific medical assistance needs. All airports (as opposed to airfields or air strips) should be Scheme members.

Recommendation 5 - All passenger airlines and airports that operate in Australia to be members

Membership should include all passenger airlines (including international airlines) and airports that operate in Australia, with tiered membership to support airlines and airports of varying size and operation.

Any exemptions should be limited and determined against transparent criteria, and publicised by the Ombuds Scheme and the relevant airline/airport.

3.2 Complaint handling

Question 10: What types of complaints should be eligible for consideration by the Ombuds Scheme, and what types of complaints should not?

In considering the types of eligible complaints, it is essential to consider how people may experience detriment or harm in air travel. When considering harm, there are two aspects: (1) the type of incident/harm; and (2) the person affected and the impact of the incident/harm on them. Often the second aspect is overlooked, and the type of incident/harm is considered uniform for all people – this is not the case. For example, a delayed or cancelled flight is likely to impact a person with disability and a person without disability in different ways. The same would apply in relation to damaged or lost mobility aids, equipment or baggage. Similarly, lack of assistance or equipment may mean a person with disability is unable to board or disembark their flight. Accordingly, even if some types of consumer complaint are generally excluded, the Ombuds Scheme should still accept as eligible any consumer complaint where the issue complained of relates to, arises from or otherwise impacts a person's disability.

Additionally, we agree with the Consultation Paper that clear guidance on complaint eligibility is necessary to provide clarity to consumers and industry. We recommend avoiding unduly narrow eligibility criteria, to improve consumer access to complaint handling and dispute resolution.

In addition to individual complaints, representative complaints should be able to be lodged on behalf of one or more affected consumers – this will increase access to justice for consumers. This would align with the existing right to lodge representative complaints with the AHRC where 'the class members have complaints against the same person, and all the complaints are in respect of, or arise out of, the same, similar or related circumstances and all the complaints give rise to a substantial common issue of law or fact.'¹⁰

The ability to lodge representative complaints would have the added benefit of streamlining complaints involving multiple consumers who have experienced related problems. It may also assist the Ombuds Scheme to identify, monitor and investigate systemic issues.

As is currently specified in the *Australian Human Rights Commission Act 1986* (Cth), the legislative framework for the Ombuds Scheme could specify that 'a person who is a class member for a representative complaint is not entitled to lodge a separate complaint in respect of the same subject matter'¹¹ with the Ombuds Scheme. This would avoid unnecessary inefficiency or duplication.

It is also essential that complaints deemed ineligible for investigation by the Ombuds Scheme be appropriately referred to the correct body. This is critical to properly implement a 'No Wrong Door' policy.

¹⁰ *Australian Human Rights Commission Act 1986* (Cth) ('AHRC Act') s 46PB(1).

¹¹ AHRC Act s 46P(3).

Recommendation 6 - Any consumer complaints relating to a person's disability to be eligible

Consumer complaints where the issue complained of relates to, arises from or otherwise impacts a person's disability should be deemed eligible.

Recommendation 7 - The Ombuds Scheme to accept representative complaints

The Ombuds Scheme should accept representative complaints lodged on behalf of one or more affected consumers.

Question 13: What existing complaints schemes or processes have the potential to overlap with the Ombuds Scheme?

As noted in the Consultation Paper, the remit of the Ombuds Scheme could overlap with the existing complaint handling role of the AHRC. We consider this can be effectively managed so the Ombuds Scheme can operate compatibly with the AHRC. We have previously put forward our views on how this can be achieved in our submission to the Aviation Green Paper (where we contemplated the AHRC performing a regulatory role):

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.¹²

If the AHRC is not the chosen body to enforce compliance with the Standards, there would also be potential overlap with that other body.

In addition to the AHRC, state and territory complaint handling bodies have the potential to overlap with the Ombuds Scheme. For example, in NSW, discrimination complaints against airlines and airports can be lodged with Anti-Discrimination NSW or the AHRC (noting the same complaint cannot be pursued in both forums). NSW Fair Trading also accepts complaints about airlines in certain circumstances.¹³

Recommendation 8 - The Ombuds Scheme to work cooperatively with other complaints schemes or processes

The Ombuds Scheme must work cooperatively with other federal, state and territory complaints schemes or processes, including provision of information to complainants about other potential relevant bodies, cross-referral powers for the Ombuds Scheme to refer matters to other bodies, and scope to jointly investigate emerging and systemic issues with other relevant bodies.

Question 16: What complaint resolution process should the Ombuds Scheme adopt?

As the Consultation Paper outlines, a three-step complaint resolution process is generally adopted by other industry ombuds schemes. However, we consider there may be instances where it will not be appropriate for consumers to attempt to resolve complaints directly with airlines or airports, and there should be an option for consumers to escalate their complaint directly to the Ombuds Scheme in certain circumstances. These circumstances include where the complaint:

- is of a more serious nature (ie because of the harm experienced, as we considered ‘harm’ in response to question 10 above);
- requires a more urgent response; or

¹² JEC (n 1) 13-14.

¹³ NSW Fair Trading, ‘How to Resolve a Dispute’, *Flights, cruises and tours* (Web Page) <<https://www.fairtrading.nsw.gov.au/buying-products-and-services/travel/flights,-cruises-and-tours>>.

- where other relevant factors apply (eg inaccessibility of the airline or airport’s complaint process).

For example, 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. In such urgent circumstances, and if liability for the damage is disputed, a complaint resolution process that requires the complainant to go through a three-step escalation process would be burdensome and frustrating – the Ombuds Scheme must be able to investigate quickly and provide practical and fair outcomes.

Additionally, some airline or airport complaint processes may not be accessible to people with disability, particularly if complaints are required to be made and pursued online with no alternative methods offered. By way of example, Jetstar says it ‘aim[s] to resolve all customer complaints on the spot via Live Chat’ and this is available in English-language 24 hours/7 days a week;¹⁴ however there is no information about alternative methods to lodge a complaint if those communication methods are not accessible to customers due to disability, language or other barriers.

Where a complaint proceeds to decision by the Ombudsperson, similar to other ombuds schemes, the Ombudsperson should be able to take industry practice, principles of fairness and reasonableness, and any vulnerability of the consumer into account in reaching a decision, in addition to the applicable law.¹⁵

The approach to decision-making should be flexible and adapted over time, and so should generally be set out in rules and guidance (with oversight from the ACCC) rather than prescribed in detail in enabling legislation.

Recommendation 9 - Consumers to be able to complain directly to the Ombuds Scheme

Consumers should be able to escalate their complaint directly to the Ombuds Scheme in certain circumstances (ie where the complaint is of a serious nature, requires an urgent response, etc).

¹⁴ Jetstar, ‘Complaints and compliments’, *Contact Us* (Web Page <<https://www.jetstar.com/au/en/contact-us/complaints-and-compliments>>).

¹⁵ See for example, AFCA’s Complaint Resolution Scheme Rules (1 July 2024) provides at r A.14.2 that ‘the AFCA Decision Maker must do what the AFCA Decision Maker considers is fair in all the circumstances having regard to:

- legal principles,
- applicable industry codes or guidance,
- good industry practice and
- previous relevant Determinations of AFCA or Predecessor Schemes.

TIO’s ‘Evidence and decision making’ web page (30 November 2014) provides that ‘[w]hen forming any view, assessing any evidence, or making any decision we consider’ relevant laws, good practice, what is fair and reasonable, any vulnerability of the consumer, TIO Position Statements, and actions of the consumer and provider both before and during consideration of the Enquiry or Complaint. This guidance also provides more information about ‘vulnerability’, ‘relevant laws’, ‘good practice’, ‘TIO Position Statements’, and ‘Fair and Reasonable’.

Recommendation 10 - The Ombudsperson to make decisions having regard to all the circumstances of the complaint and complainant

The Ombudsperson should, when making determinations, take into account the applicable law, industry practice, principles of fairness and reasonableness, and any vulnerability of the consumer.

Question 17: How much time should an airline or airport have to resolve a complaint, before the complaint is considered by the Ombuds Scheme? What factors should be considered by the Ombudsperson in deciding if a complaint was resolved within a reasonable time?

As set out in response to question 16 above, consumers should have the ability to escalate urgent complaints and access 'fast track' complaint resolution pathways so that complaints can be processed and actioned in an appropriate order of priority and consumers can access quicker timeframes for resolution. The escalation and fast track processes should be available when complaining directly to airports and airlines and also when complaining to the Ombuds Scheme.

One way to triage complaints may be to consider the harm experienced (as we considered 'harm' in response to question 10 above). At a minimum, we think it is appropriate to prioritise complaints about incidents that impact a consumer's safety, or result in personal injury or property damage. For example, where a wheelchair is damaged in transit, a consumer will require urgent compensation or rectification to remedy the impact of this damage at their destination. This type of complaint needs to be addressed within hours so that appropriate action can be taken.

Other complaints relating to travel delays where only a monetary outcome is sought may be a lower priority, and should be resolved within a reasonable period of time to be determined by the Board once constituted. However, there may be other grounds on which it is appropriate for a person to seek prioritisation or a 'fast track' pathway, such as where they are experiencing financial hardship.

Recommendation 11 - Consumers to escalate urgent complaints and access 'fast track' pathways

Consumers should be able to escalate urgent complaints and access 'fast track' pathways so complaints can be appropriately prioritised, whether complaining directly to airlines and airports, or to the Ombuds Scheme. A prioritisation framework should include complaints about incidents that impact a consumer's safety, or result in personal injury or property damage.

Question 18: What time limit should apply for making a complaint?

Acknowledging that people with disability may experience additional barriers to pursuing complaints, the complaint making process must be accessible to, and inclusive of, people with disability. This includes allowing an appropriate timeframe for making a complaint, taking into account that time limits can prevent people from exercising their right to complain.

Time limits for making a complaint to the Ombuds Scheme should be consistent and compatible with other complaint avenues for similar subject matter, and there should be discretion to allow

complaints out of time. This is important to avoid conflicting timeframes which would cause confusion among consumers, and to properly implement a 'No Wrong Door' policy to help preserve a consumer's right to lodge their complaint even if they inadvertently complain to the incorrect forum.

Relevantly, the AHRC, which has potential to overlap in relation to the Standards, has a discretion to terminate complaints under the DDA if 'lodged more than 24 months after the alleged acts, omissions, or practices took place.'¹⁶ This timeframe was recently extended from 6 months to 'reduce procedural barriers arising from complainants being delayed in making a complaint...'¹⁷ In our view, complaints to the Ombuds Scheme should be allowed for at least 24 months for consistency with this complaint pathway.

Whatever the time limit, it is essential the Ombudsperson has discretion to accept a complaint, even if out of time, where a person lodged their complaint in another forum which was not able to deal with it, so that they are not disadvantaged in pursuing their complaint and enforcing their rights.

This occurs in Victoria for discrimination complaints that involve federal jurisdiction which cannot be pursued in the Victorian Civil and Administrative Tribunal and instead must be pursued in a court – the limitation period can be extended so that applicants do not lose their ability to have their matter decided just because of this error (which is easily made).¹⁸

We consider a similar approach to the above Victorian model would be appropriate for facilitating cross-referrals between the Ombuds Scheme and the AHRC, should the timeframes for lodging complaints in either forum differ from each other. This will ensure consumers are not disadvantaged for not knowing a different forum is responsible for handling their type of complaint. We also consider the Ombuds Scheme should play an active role in facilitating cross-referrals so the burden of lodging in a different forum does not rest solely on the individual complainant.

Recommendation 12 - Time limits for making complaints to be accessible, compatible with other complaint forums, and enforced on a discretionary basis

Time limits for making complaints need to be:

- *accessible to people with disability;*
- *consistent and compatible with other complaint avenues for similar subject matter; and*
- *enforced on a discretionary basis.*

¹⁶ AHRC Act s 46PH(1)(b).

¹⁷ Explanatory Memorandum, Anti-Discrimination and Human Rights Legislation Amendment (Respect at Work) Bill 2022 10.

¹⁸ *Victorian Civil and Administrative Tribunal Act 1998* (Vic) pt 3A.

3.3 Guidance and reporting

Question 20: What regular publications should the Ombuds Scheme produce?

As the Consultation Paper recognises, public reports and guidance ‘foster a culture of accountability, transparency and continuous improvement in the Australian aviation industry’. We agree and recommend the Ombuds Scheme be required to publish reports regularly on its performance and on issues observed through its work.

Broad and detailed data collection, analysis and reporting will enable the Ombuds Scheme to identify and report on trends and systemic issues. Such data and analysis could then be the subject of investigation and recommendations by the Ombuds Scheme itself, or referral to a regulator or other body, in pursuit of its objective to influence systemic improvements in the aviation industry.

In addition to the types of publications listed in the Consultation Paper, we recommend the Ombuds Scheme report on the following:

- **Detailed complaints data:** this data should be reported at regular intervals and should include:
 - the number of complaints made to the Ombuds Scheme, including the number of complaints referred by the Ombuds Scheme to a scheme member to resolve through internal dispute resolution (stage 2);
 - the number of complaints resolved through the Ombuds Scheme (including at stages 2 and 3);
 - in relation to individual complaints made to the Ombuds Scheme:
 - demographics of complainant, including identifiers of disadvantage;
 - nature of complaint:
 - the scheme member(s) against which the complaint was made;
 - issue(s) raised in the complaint eg delay, cancellation, baggage, mobility equipment, injury, security screening, etc;
 - any systemic issues or trends;
 - outcome of complaint;
 - time taken to resolve complaint (in hours);
 - current caseload including the age and status of open complaints;
 - analysis of industry behaviour based on complaints data;
 - comparative complaint data; and
 - any other comparable data reported by AFCA in its Datacube.¹⁹
- **Case studies (stages 2 and 3):** the Ombuds Scheme should publish case studies on select complaints, describing the process of the parties reaching a resolution and the agreed outcome. As a body intended to be informal and accessible, case studies would empower consumers to make complaints.
- **De-identified register of resolutions reached through case management (stage 3):** given a significant proportion of complaints will be resolved through the case management process (ie conciliation, shuttle negotiation, mediation or recommending an outcome), a de-identified register would promote transparency and accountability, and allow

¹⁹ AFCA, *Datacube* (Web Page, 31 December 2023) <<https://data.afca.org.au/>>.

consumers to better understand the kinds of issues they could complain to the Ombuds Scheme about and the kinds of outcomes they could achieve.

- **Determinations made by the Ombudsperson (stage 3):** published determinations will provide transparency about the Ombuds Scheme’s decision-making approach, as well as aid in consistent decision-making of the Ombuds Scheme (even if determinations are not treated as precedent). It will also demonstrate accountability to consumers for the conduct of airlines and airports. Determinations should identify the scheme member against which the complaint is made, but not the complainant or any other party to the complaint. Importantly, determinations should include detailed written reasons for the decision reached. For any determinations not published (eg in accordance with any rules governing the Ombuds Scheme’s decision-making process), the Ombuds Scheme should be required to report on the number of determinations not published by reason of that provision of the rules.²⁰
- **Reports investigating systemic issues and recommendations:** in addition to transparency and accountability, these reports would play an important role in helping other airlines and airports to continually improve their service provision. Relevantly, ANZOA espouses that an Ombuds Scheme must have an ‘unconditional right to make public reports and statements on the findings of investigations undertaken by the office and on issues giving rise to complaints.’²¹
- **Other:** the Ombuds Scheme should be able to publish any other information in pursuit of its objectives.

All publications produced by the Ombuds Scheme should be published in accessible formats.

Recommendation 13 - The Ombuds Scheme to report broadly and regularly in pursuit of its objectives

In addition to the types of publications listed in the Consultation Paper, the Ombuds Scheme should publish detailed complaints data, a de-identified register of resolutions reached through case management, case studies of select complaints, determinations made by the Ombudsperson, and reports investigating systemic issues and recommendations.

²⁰ See for example AFCA’s Complaint Resolution Scheme Rules (1 July 2024) r A14.5: A determination will not be published if to do so would risk identifying any party other than the Financial Firm or Firms, or if there are other compelling reasons not to publish it.

²¹ ANZOA (n 8) 2.



Endorsement of the Justice and Equity Centre's Submission to the Aviation Industry Ombuds Scheme Consultation Paper – 17th October 2024

17th October 2024

Dear Department of Infrastructure, Transport, Regional Development, Communications and the Arts,

PDCN is the peak body representing people with physical disabilities across New South Wales. This diverse group includes young people, older people, and carers, with a range of physical and sensory disabilities, from a mix of socio-economic backgrounds and metropolitan, rural, and regional areas.

The Physical Disability Council of NSW (PDCN) appreciates the opportunity to contribute to the development of the Aviation Industry Ombuds Scheme and takes this opportunity to endorse the Justice and Equity Centre's (JEC) submission. PDCN have had a long and valuable relationship with JEC, collaborating on a multitude of issues affecting people with disability with great success. We greatly appreciate and value JEC as an organisation and have witnessed firsthand the quality of their work within the disability space.

As the peak body for physical disability in NSW, aviation is a key concern raised by our membership last year. PDCN has previously supported JEC's response to these issues and in their submission to the Aviation Green Paper in 2023. PDCN extends that support through the endorsement of their official submission to the Aviation Industry Ombuds Scheme consultation paper. We believe that as it currently stands, protections for people with disability in the aviation space are not adequate and have resulted in discrimination. The recent release of the Aviation White Paper is a positive step in ensuring the rights of people with disabilities are respected and upheld when interacting with the aviation industry, however it is imperative that these protections are adequately implemented in codesign with people with lived experience of disability, industry and relevant stakeholders. JEC provides expert legal and regulatory insight through their submission in regard to the proposed development of an Aviation Industry Ombuds Scheme. PDCN endorses the recommendations put forward by JEC.

PDCN gives particular note to the following recommendations.

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Recommendation 2 - Objectives of the Ombuds Scheme to include identifying and resolving systemic issues, facilitating best practice dispute resolution, and being accessible to, and inclusive of, people with disability

The role of the Ombuds Scheme should assist complainants with complaints through established and efficient pathways of communication with relevant government or industry bodies, resolve and facilitate resolutions, and influence systemic improvements to the industry. This should also be codesigned with people with disabilities, and user tested for accessibility.

PDCN also notes that Ombuds schemes do not have a regulatory, proactive, investigative and compliance focused role. To ensure there is regulatory oversight, the AHRC should be empowered to exercise a full suite of compliance powers and the Ombuds Scheme should establish efficient pathways to facilitate complaints to the AHRC.


Recommendation 3 - The Ombuds Scheme be governed by a Board comprising an independent Chair and equal numbers of directors with community and industry expertise

PDCN strongly supports the representation of at least two community directors with lived experience of disability on the governing Board of the Aviation Industry Ombuds Scheme. It is essential that the perspectives of people with disabilities are not only listened to, but people with disabilities have decision making power. As lived experience of disability covers a broad range of experiences, perspectives and challenges, it is essential that at *least* two members of the Board are representative of the disability community.

Recommendation 5 - All passenger airlines and airports that operate in Australia to be members

PDCN supports the mandatory inclusion of all airlines and airports operational in Australia in the Ombuds Scheme. It is essential that there is cohesion and consistency across the aviation sector in complaints processes. People with disabilities facing discrimination or difficulties while travelling in airports or planes should expect to use the same system for complaints resolution across the country and all airports within Australia to increase efficiency and streamline complaints resolution.

Recommendation 11 - Consumers to escalate urgent complaints and access 'fast track' pathways

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PDCN supports the inclusion of 'fast track' pathways for complaints. A prioritisation framework that includes complaints about incidents that impact on a consumer's safety or result in injury or property damage would be invaluable for those travelling with a disability.

Often, people with disabilities travel with mobility devices, such as wheelchairs, that are vital to their independence. These devices are also often customised to the individual needs of the user. If a person's mobility device is damaged or lost, a large financial and social loss is experienced. This stressful ordeal can be drawn out by a long complaints process, the implementation of a 'fast track' pathway for complaints would ease the stress and anxiety faced by people with disabilities who experience discrimination, property damage or personal harm while traveling using the aviation industry.

Recommendation 13 - The Ombuds Scheme to report broadly and regularly in pursuit of its objectives

PDCN supports the recommendation for the Ombuds Scheme to report broadly and regularly. It is important that there is transparency in the operation of the Ombuds Scheme to ensure that accountability for complaint resolution is upheld.

PDCN appreciates the opportunity to comment on the Aviation Industry Ombuds Scheme consultation paper, and thanks JEC for their expertise and work in this space for people with disabilities.

Thank you for the opportunity to comment on the Aviation Industry Ombuds Scheme and we look forward to remaining involved in the continuing implementation of the Aviation White Paper recommendations that will help improve the aviation experiences of people with disability across Australia.

Kind regards,

A handwritten signature in black ink, appearing to read 'Edward Morris', with a stylized flourish underneath.

Edward Morris
Chief Executive officer
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