Equal Opportunity Tasmania

Draft regulatory framework for the on-demand passenger transport industry

Submission by the Anti-Discrimination Commissioner (Tas)

November 2018

Celebrating Difference
Embracing Equality

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Introduction

Thank you for providing us with an opportunity to comment on the draft regulatory framework for the on-demand passenger transport industry.

Our interest in this matter stems from many years working with the transport industry to ensure that obligations under discrimination law are met, both in the on-demand passenger transport industry and in the wider public transport sector.

Complaints to Equal Opportunity Tasmania (EOT) in which discrimination and other prohibited conduct is alleged in the taxi and broader transport industry remain significant. Issues range from the failure to understand obligations regarding assistance animals through to complaints regarding discriminatory treatment of both drivers and passengers.

Our concern is to ensure that all service providers understand and meet obligations under discrimination law and that organisations responsible for the provision of services are aware of their legal responsibilities under the *Anti-Discrimination Act 1998* (Tas) (ADA).

Once again, thank you for providing us with an opportunity to comment. Please do not hesitate to contact me if you require further information.

Sarah Bolt
ANTI-DISCRIMINATION COMMISSIONER (TAS)

Obligations under Discrimination law

Providing safe and equitable access to on demand transport services is of ongoing interest and concern to Equal Opportunity Tasmania. As outlined in our March 2017 submission to the *Taxi and Hire Vehicles Industries Regulatory Review*, significant barriers to the provision of equitable transport services continue to exist in Tasmania, particularly for people with disability.

Whilst the introduction of broader on-demand passenger services such as Uber have the capacity to provide more choice in the market, we believe that these will only be of benefit if regulatory mechanisms are adopted that ensure equitable access to all services and encourage all participants in the industry to provide services in a non-discriminatory manner.

Anti-Discrimination Act

The *Anti-Discrimination Act 1998* (Tas) (ADA) prohibits discrimination on the grounds of a range of attributes or characteristics including disability, age and race. The Act applies to a broad range of public activities, including the provision of facilities, goods and services. This includes transport services.

The ADA also prohibits a person from engaging in any conduct which offends, humiliates, insults or ridicules a person on the basis of a range of attributes including race, age, sexual orientation, gender or disability.[1] It is also prohibits inciting hatred towards, serious contempt for, or severe ridicule of a person or group of persons on the grounds of a range of attributes including race, disability or sexual orientation.[2]

Disability includes physical limitations and disfigurement, sensory impairments such as sight or hearing loss, neurological conditions such as multiple sclerosis and motor neurone disease, psychological and psychiatric illnesses, learning and intellectual impairments, injury and illness. It does not matters how severe the disability is or for how long it lasts.

Discrimination prohibited under the ADA includes both 'direct' and 'indirect' discrimination.[3] Section 14 provides that:

> (2) Direct discrimination takes place if a person treats another person on the basis of any prescribed attribute, imputed prescribed attribute or a characteristic imputed to that attribute less favourably than a person without that attribute or characteristic.
>
> (3) For direct discrimination to take place, it is not necessary –

1 *Anti-Discrimination Act 1998* (Tas) s 17(1)

2 *Anti-Discrimination Act 1998* (Tas) s 19(b).

3 *Anti-Discrimination Act 1998* (Tas) s 14(1).

(a) that the prescribed attribute be the sole or dominant ground for the unfavourable treatment; or

(b) that the person who discriminates regards the treatment as unfavourable; or

(c) that the person who discriminates has any particular motive in discriminating.

Indirect discrimination is defined in section 15:

(1) Indirect discrimination takes place if a person imposes a condition, requirement or practice which is unreasonable in the circumstances and has the effect of disadvantaging a member of a group of people who –

(a) share, or are believed to share, a prescribed attribute; or

(b) share, or are believed to share, any of the characteristics imputed to that attribute –

more than a person who is not a member of that group.

(2) For indirect discrimination to take place, it is not necessary that the person who discriminates is aware that the condition, requirement or practice disadvantages the group of people.

Charging a person a different fee for a service because they have a disability is a form of direct discrimination. Refusing to pick up a passenger because of their race or nationality is also form of direct discrimination. Starting the meter for a taxi fare from the time the taxi pulls up to pick up a passenger and continuing to run the meter until the person leaves the vehicle may amount to indirect discrimination if the practice is used to disadvantage a person with disability who may take longer to embark or disembark from the vehicle than other passengers. Failure to provide reasonable adjustments to ensure that a person with a disability can access the same services as those without a disability may also amount to indirect discrimination unless the provision of access would cause unjustifiable hardship.

Under the ADA, an exception may apply where a respondent to a complaint can demonstrate that the discrimination was 'reasonably necessary' to comply with 'any law of this State or the Commonwealth'[4] or if the provision of the goods or service on equitable terms would cause unjustifiable hardship.[5] Section 101 provides, however, that those wishing to rely on an exception as a defence to a complaint are responsible for proving on the balance of probabilities that the exception applies.

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4 *Anti-Discrimination Act 1998* (Tas) s 24.

5 *Anti-Discrimination Act 1998* (Tas) s 48(b).

Section 104 of the ADA provides that organisations must take reasonable steps to make sure its members, officers, employees or agents do not engage in discrimination or prohibited conduct. Organisations are also responsible for ensuring that its members, officers, employees and agenda are:

- Are aware of discrimination and other unlawful conduct under the ADA;
- Don't engage in, repeat or continue discrimination and other prohibited conduct under the ADA; and
- Are aware of any orders of the Anti-Discrimination Tribunal that are relevant to them.

Organisations that do not do this are liable for any breach of the ADA by any of its members, officers, employees or agents.

Regulation of licences and service types

The Proposals paper sets out two options for the transition to deregulate the Tasmanian taxi industry. EOT has no view on the preferred approach. We are however concerned that a poorly regulated industry will fail to meet the demands of a community that is increasingly seeking more access to flexible transport options. Our approach is one of ensuring that access to transport services is provided on an equitable basis to all Tasmanians and that all sectors of the industry and aware of their obligations under discrimination law.

Access to Taxi Subsidy Program

The transition options outlined in the proposals paper appear to be based on the premise of providing taxis with exclusive access to Taxi Subsidy Program (TSP) fares. No justification is provided for this approach. Nor does the proposals paper include any modelling on the impact of restrictions on those who currently access the TSP.

To be eligible for the Taxi Subsidy Program a person must be a member of the Transport Access Scheme (TAS) and hold a valid concession. TAS members receive a subsidy on their taxi fares. The subsidy is 50% of the fare, up to a value of $25 when using a standard taxi. Wheelchair-reliant members receive a 60% fare subsidy, up to a value of $30 when using a wheelchair accessible taxi. A total of $5,964,000 was expended on TAS in 2017-2018.[6]

Our understanding is that the proposal to restrict access to the TSP to taxis stems from inability of TSP customers using their smart cards outside of taxis. However no discussion is included as to whether this is the reason behind the proposed approach. Nor are alternatives considered which might achieve the same ends for those who wish to use booked services other than taxis.

The justification for restricting access to the TSP to taxi services appears to be based on the view that it would provide the taxi industry with a steady stream of clients to support the industry through the transition period.

Such an approach risks distorting the transport market and is contrary to discrimination law.

The Tasmanian Government has responsibility for ensuring that people with disability have access to transport services on an equal basis to others. Accessibility does not simply relate to the ability to access a vehicle, it also applies to booking and payment systems.

Whilst the paper indicates that deregulation of booked services for subsidised fares will be reviewed to ensure adequate consumer protections. No timeframe or other arrangements are provided for the review. Nor does the paper touch on what it might be by ‘adequate’ consumer protections.

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6 Department of State Growth, *Annual Report 2017-18* p110

People with disabilities have the right to ride in any public transport vehicle whether it be a taxi or a ride-sharing service and arrangements should be put in place to enable the TSP to be used for any on-demand transport service. Such an approach would provide those in receipt of the TSP with a greater level of choice and ensure that they too are able to take advantage of benefits arising from the deregulation of the industry. We also believe it would act as a strong incentive to the taxi industry to be more responsive to the needs of people with disability currently using conventional taxi services.

There is a case to suggest that the market has not operated well in response to the needs of people with disability – that in circumstances where there is restriction on service availability it has been difficult for those who require accessible services to access them because of perception of additional cost or responsibility associated with provision of service to this segment of the market. For many years we have argued strongly for the taxi industry to recognise and acquit its responsibilities to provide equitable services to this market. Now in response to the arrival of new entrants to the market, the proposals paper suggests the retention of monopoly in this market. Whilst there are good reasons for ensuring that there is a sufficient supply of WATs for that segment of the market who require specialised vehicles, there does not seem to be any great reason for the restriction of supply in circumstances where a conventional taxi service can be used.

Whilst deregulation of the taxi industry may promote flexibility in the way in which services are delivery, it may also result in adverse social impacts and these need to be carefully assessed and monitored over the coming period.

To this end we consider a full regulation analysis including costs and impacts on vulnerable users should be undertaken prior to agreeing to the approaches outlined in the Proposals paper. As a matter of good practice all substantive regulatory change should be the subject of a regulation impact statement even in circumstances where regulation is being reduced. Such an analysis is critical to ensuring that the costs and benefits of the proposed changes are clearly understood.

People with disability in particular have a right to accurate, timely, accessible information about the likely impact of the options proposed and whether they will be disproportionately impacted by these changes.

Deregulation of Taxi Areas

Option 2 in the Proposal paper arrangements intended to address the issue of unmet demand. Option 1 is silent on this issue.

Of particular concern to EOT is the proposed timing of the deregulation of the existing 24 taxi areas and the impact this may have on the availability of WATs in rural and regional areas.

Deregulation of taxi areas would enable existing WAT licence holder to make available services in broader areas and provide opportunities to meet unmet demand. This has been a particular problem in the Burnie, Ulverstone and Devonport areas where WAT services has been restricted. The proposed approach would not see change in the taxi areas until year three of the transition. We do not consider this is sustainable and would prefer that zoning regulations are relaxed in

year 1 in areas where there is unmet demand for WAT services. This is particularly important as there appears to be little interest in Uber or other ride-sharing companies in providing WAT services.

Booked Service Licence

Whilst it is clear that all providers of transport services are required to meet obligations set out under discrimination law the complex nature of the taxi industry in Tasmania has meant that responsibility for meeting these standards has not always been clear. This has given rise to situations where it is not always clear which party has responsibility for particular matters.

The lack of standardised regulatory arrangements has led, in part, to a reliance on complaints under discrimination law to force compliance with legal obligations. However, reliance on a knowledge of rights together with the capacity and willingness to go through formal complaint processes is in our view a poor substitute for clear regulatory standards and clearly identified accountability structures in the industry.

We welcome the intention under the new framework to define services as either booked services only or taxi services that can operate in both the booked and hail and ride markets. We believe this will add an important degree of transparency to the industry and provide a clearer basis on which to identify responsibility for the provision of non-discriminatory services.

Further, we are supportive of the introduction of a booked service licence to replace existing licences and the requirement for ride-sourcing vehicles to possess a booked service license prior to operating in the sector.

We consider this will provide a greater degree of transparency in the industry and enable all operators to be held accountable for the services they provide.

We remain concerned, however, that a wholly deregulated industry will result in further segmentation of the taxi and ride-sharing market in ways that may be potentially detrimental to people with disability. In our March 2017 submission to the Taxi and Hire Vehicles Industries Regulatory Review we raised concerns about the potential of services such as UberASSIST to create a separate category of service users based on disability or impairment in circumstances where those customers are quite capable of accessing conventional taxi or ride-sourcing vehicles and their assistive technology device can be safely stowed in the vehicle.

From the limited information made available by Uber Australia, UberASSIST appears to be specifically targeted at passengers with folding wheelchairs, walkers and other mobility aids. Our concern about this approach is that it risks sending a message that conventional vehicles are not required to accommodate persons who are reliant on mobility aids and who are capable or transferring independently into these vehicles. The use of a standard or conventional vehicle does not diminish responsibility for making appropriate adjustments to existing methods of service delivery where these are required. Just as all passengers would expect to be provided with assistance luggage or other goods being transported by a taxi or ride-sharing vehicle, a person with a mobility aid should also be able to expect the same level of assistance at the same cost as other customers.

Regulation of Drivers

In our March 2017 submission we expressed ongoing concern about the lack of training available to new and existing drivers in relation to their understanding of obligations under discrimination law.

It is disappointing, therefore, that the proposals paper suggests that other than for drivers providing a WAT service, training should be reduced to only those requirements that relate to the safety of drivers and passengers and that operators be given responsibility for ensuring that drivers have the appropriate level of training and be free to choose the method and content of that training.

Whilst we acknowledge that as part of their annual ancillary certificate renewal, all drivers would be required to declare that they understand and comply with their public passenger vehicle legislative obligations, as well as their requirements under disability/anti-discrimination legislation, no further details about how they will be required to demonstrate that understanding or how they have/are meeting those requirements has been canvassed in the paper.

In this context we note that Uber has in place *Community Guidelines* which place responsibility on drivers of ride-sharing vehicles to comply with anti-discrimination laws. Whilst this global statement of commitment is welcome. The requirement is that drivers not discriminate 'against drivers or other riders based on their race, religion, national origin, disability, sexual orientation, sex, marital status, gender identity, age *or any other characteristic protected under applicable law*' (emphasis added) and further that '(Uber) expect drivers using the Uber app to *comply with all applicable laws governing the transport of riders with disabilities*, including transporting service animals' (emphasis added). As a general statement of service standards, the commitment to providing non-discriminatory services is welcomed. We are less convinced, however, that broad statements such as those contained in the *Community Guidelines* are a sufficient for drivers to understand the full range of legal obligations under the *Anti-Discrimination Act* and related laws.

Nor do we consider that driver screening alone provides sufficient protection against drivers who may operate in a way that is unsafe for passengers. Again, whilst Uber *Community Guidelines* provides some information on ensuring a respectful and safe environment for all passengers, no information is provided, for example, on legal protections against sexual harassment and the circumstances in which this may be covered by discrimination law.

EOT is of the view that drivers engaged in both taxi and booked services should be provided with training on their legal obligations under discrimination law.

To this end, EOT recommends that all drivers (both taxi and ride-sourcing services) should be required to undergo mandatory discrimination law training (including obligations in relation to people with disability) prior to commencing employment. This would be in addition to the training required by WAT drivers specific to the safety requirements for operating a WAT vehicle.

Safety

All forms of public transport should be safe for users. This includes ensuring that vehicles are physically safe, that driving practices make for a safe journey, that passengers are safeguarded against any forms of abuse, harassment or assault and that personal information collected as part of the service is safeguarded.

Reports of crimes and other unlawful behaviours are not unknown in the taxi and ride-sharing industry. Women in particular have reported a number of serious incidents in which they have been harassed by drivers and information gathered about journeys used inappropriately. Whilst police should obviously be notified in circumstances where the incident reaches a criminal threshold, not all behaviours will be prosecutable.

Whilst we accept that these types of incidents are not common and that Uber and other ride-sharing services provide customers with the ability to rate the service they are provided, we are of the view that strong penalties and other sanctions should be available to State Growth in circumstances where duty of care is breached.

Whilst Working with Vulnerable People checks provide some screening of service providers, there does not appear to be any mechanism or requirement for drivers to report additional incidents or to have their licences reviewed in circumstances where a report may be made against them or they are the subject of traffic violations (eg, excessive speed, dangerous driving, breaches of road safety).

The proposals paper refers to a requirement that all parties in the chain of responsibility will be required to adopt a primary duty of care to ensure the safety of drivers, passengers and other road users. However no further detail is provided about the terms of the duty of care or how it will be set out. From our perspective, we consider there should be a single comprehensive statement of requirements, including requirement relating to discrimination law, applicable to all operators as a minimum statement of service standard. We also consider that a reportable incident scheme should be established that would require operators and drivers to notify State Growth of incidents, including complaints or other sanctions made by or against service providers.

We are also concerned that arrangements should be in place to ensure that all service providers have appropriate insurance protection in the event of injury to passengers arising from traffic accidents. This is of particular concern in relation to ride-sharing services.