



Queensland Advocacy Incorporated

Our mission is to promote, protect and defend, through advocacy, the fundamental needs and rights and lives of the most vulnerable people with disability in Queensland.

Systems and Legal Advocacy for vulnerable people with Disability

15 Jan 2018

Dear Commissioners

Please accept the following submission in relation to the joint application from the State of Queensland (acting through the Department of Main Roads and Transport) and Queensland Rail for temporary exemptions to the *Disability Discrimination Act 1992* (DDA) and the Disability Standards for Accessible Public Standards 2002 (DSAPT).

Sincerely

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QAI endorses the objectives, and promotes the principles, of the Convention on the Rights of Persons with Disabilities.

Patron: His Excellency The Honorable Paul de Jersey AC

Acronyms

ADA	<i>Anti-discrimination Act 1992 (Qld)</i>
ARA	Australasian Railways Association
ARG	Accessibility Reference Group
DDA	<i>Disability Discrimination Act 1992 (Cth)</i>
DSAPT	Disability Standards for Accessible Public Transport
EMU	Electrical Multiple Unit (Current non-NGR suburban trains manufactured by Walkers Limited, Maryborough for Queensland Rail between 1979 and 1986)
HRC	Human Rights Commission
IMU	Interurban Multiple Unit (A class of EMU)
QR	Queensland Rail
TMR	Department of Transport and Main Roads

Submission Summary

- **QAI opposes the application.** The trains should not be permitted to run until they are DSAPT compliant.
- **There are no DSAPT Part 33 ‘target dates’ for compliance in relation to new vehicles.** All new vehicles must be compliant.
- Green-lighting the application and allowing the trains to run sends an unfortunate message: that transport providers can deliberately or negligently commission and run non-DSAPT-compliant conveyances, and if someone objects, they will be permitted to run the non-compliant vehicles as long as they undertake to fix them.
- The Human Rights Commission Guidelines state that a **‘significant reason not to grant an exemption’** is if it would allow conduct that is **‘inconsistent with or would undermine the objects of the DDA’**.
The NGR are new trains, and granting an exemption would be inconsistent and undermine the DDA objects. It would not ‘eliminate, as far as possible, discrimination against persons on the ground of disability in the areas of ..the provision of .. services’.¹ Ensuring that new trains are compliant when they go ‘in-service’ will advance ‘the elimination of discrimination’ far more than permitting non-compliant trains to run and be rectified ‘in-service’.
- **‘Build inaccessibly first, seek exemptions later’ is a bad precedent to allow.** Exemptions such as these would send a message to transport providers that the AHRC will grant a ‘get out of jail free card’ to any transport provider who ignores legislative requirements, no matter how flagrantly.
- The Queensland Executive must lead the way to ‘promote recognition and acceptance within the community of the principle that persons with disabilities have the same fundamental rights as the rest of the community’.

¹ Section 3 (a).

- **The argument that the ‘NGR are needed for the Commonwealth Games’ is misleading and overstated.** The ARG noted a comment by the Director General (DG) of TMR made during an ARG meeting with the Deputy Premier, the DG and QR CEO that QR has a Plan B for Commonwealth Games train arrangements that does not depend on the NGR being available. This comment was repeated by the DG at a QR ARG meeting on June 27, 2017.

- **No ‘hardship’ can justify these exemptions** (not cost, not claimed Commonwealth Games necessity). Unjustifiable hardship is only relevant as a defence to a discrimination complaint, not flawed design and consultation processes for an entirely new fleet of trains.

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1. Exemption Application Background

In January 2014 the Queensland Government entered in a 32 year contract with NGR Project Company Pty Ltd (Bombardier NGR Consortium) for the design, construction and maintenance of 75 new six car train sets and a new purpose-built maintenance centre. A joint statement by then Treasurer Tim Nicholls and Minister for Transport Scott Emerson said the contract 'will save taxpayers more than \$11 million per train' and 'at a fixed price, so there are no hidden surprises for taxpayers'.²

At \$4.4 billion, the New Generation Rollingstock (NGR) is the largest single public transport investment by any Queensland Government.³ The trains were to be delivered under a Public Private Partnership (PPP) and the government's original expectation was that the trains would be in service by December 2018. Queensland would make staged payments to the consortium over a 30 year concession period, at the expiry of which Queensland would retain ownership of the trains and the maintenance facility.⁴ The Consortium has delivered fifteen trains to date.

The TMR Accessibility Reference Group (the ARG) is comprised of people with a range of impairments, a number of whom are intimately familiar with the DSAPT. John Macpherson, for example, has made submissions in relation to DSAPT proposals by the Australasian Railways Association.⁵ The ARG became aware of the access problems in 2014 and made their concerns known to the applicants.

The applicants appear to have ignored those concerns. We note that the timing of the Transport Minister's proposal to address some of the NGR access challenges closely followed ARG members' engagement of legal counsel and QAI's lodgement on their behalf of Right to Information applications to determine more about TMR, Queensland Rail and Cabinet's decision-making.

Now, acting through the Department of Transport and Main Roads (TMR) and Queensland Rail (QR), the State of Queensland has submitted to the Australian Human Rights Commission (AHRC) a joint application for temporary exemptions from the *Disability Discrimination Act 1992* (Cth) ('DDA') and the Disability Standards for Accessible Public Transport ('DSAPT') in relation to the NGR Project.

The applicants request urgent processing because, they state, the NGR are needed for the Commonwealth Games on the Gold Coast in April 2018. A Business Review of Queensland Rail by Deutsche Bahn tabled in Queensland parliament in June 2017 noted that '18 NGR

² Media release Joint Statement by Treasurer and Minister for Trade The Honourable Tim Nicholls Minister for Transport and Main Roads and the Honourable Scott Emerson. 'New trains for half the price' January 2014
< <http://www.parliament.qld.gov.au/Documents/TableOffice/TabledPapers/2017/5517T1225.pdf>>

³ Urbanalyst. 2014. 'Bombardier NGR Consortium wins \$4.4bn contract for Queensland New Generation Rollingstock Project' .
< <http://www.urbanalyst.com/in-the-news/queensland/2293-bombardier-ngr-consortium-wins-44bn-contract-for-queensland-new-generation-rollingstock-project.html>>
February 4, 2014

⁴ Audited Consolidated Financial Statements 2013–14 – Government of Queensland. 6-46.

⁵ John Macpherson. 'Alternate Solutions and Guidelines to the ARA Version of Disability Standards for Accessible Public Transport'.
<https://www.humanrights.gov.au/sites/default/files/content/disability_rights/exemptions/ara/subs/macpherson.pdf>

trains are required to service the proposed Commonwealth Games ' and 'a conservative view would be that 18 NGR trains will not be ready by April 2018'.⁶ Nevertheless, on the day the Deutsche Bahn report was tabled, the Minister for Transport said 'I am confident that they (the NGR) will be on the network by the end of the year'.

There has been considerable political gaming on this issue. The (Labor) government narrative lays the blame for the access and other problems on the (LNP) Opposition, which commissioned the 'cut price' trains in 2014.⁷ The Opposition narrative cites Labor's 'rail fail' as evidence of the Government's incompetence and mismanagement.⁸

The planned arrival of the NGR 'on track' coincides closely with the staging of the Commonwealth Games on the Gold Coast in April 2018. Along with the older EMU trains, the NGR will run on the Brisbane/Gold Coast network and Games success will depend in part on hassle-free attendance and that depends, in part, on adequate public transport provision. Smooth execution of both projects will reflect well on the incumbent Queensland government.

2. QAI's Interest

QAI does systemic disability advocacy, and rights to access public transport, to community participation, to employment and to social relationships are fundamental. People with disability are less likely to participate in the recreational and social life of the communities in which they live⁹ and the lack of sufficient accessible public transport is a contributing factor.¹⁰ The ABS has determined that 40.2% of people with disability¹¹ use public transport,¹² so full access to the south-east Queensland train network over the NGR service life of ~32 years is a long-term systemic concern.

In 2016, three rail users, each of whom has mobility impairment and each of whom is a member of the Queensland Department of Transport and Main Roads' Accessibility Reference Group ('ARG') approached QAI about advocacy support in relation to their campaign to ensure that the Queensland public train system is fully accessible. They identified three key accessibility challenges in the design of the new trains.

- The corridor access to the NGR toilet is not DSAPT-compliant. It is too narrow for wheelchairs.

⁶ DB Engineering & Consulting GmbH. *Whole of Business Review of Queensland Rail Report prepared for the Citytrain Response Unit* July 2017, page 4.

⁷ Hon Jackie Trad, Minister for Transport in Hansard 8 August 2017, p 1944.

⁸ Andrew Powell, Member for Glasshouse in Hansard 8 August 2017, p 1943.

⁹ Attorney-General's Department, Regulation Impact Statement on Draft Disability Standards for Accessible Public Transport, Canberra, January 1999, p. 11..

¹⁰ Disability Standards for Accessible Public Transport: Issues Paper

¹¹ aged 5 years and over

¹² 4430.0 - Disability, Ageing and Carers, Australia: Summary of Findings, 2015
<<http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/4430.0main+features202015>>

- The NGR toilet design is not DSAPT compliant (dimension-wise) and it does not allow a parallel transfer to and from a wheelchair.
- The rear-of-train guard-station positions the guard 70 metres from the accessible boarding point, guaranteeing missed passengers.

Queensland has taken delivery of 15+ new NGR trains, each with these *and more* access challenges. From the beginning, the applicants were aware of their DSAPT obligations yet failed to make provision for full access. The current exemption application would not have been necessary if TMR and the Queensland government had:

- followed DDA and DSAPT guidelines;
- consulted with people who have relevant mobility and other impairments giving rise to a range of access needs; and
- specified in the commissioning deed that-
 - (a) the new trains' design must comply with the DDA and DSAPT, and
 - (b) TMR could refuse to accept non-compliant NGR trains without penalty.

In September 2016, QAI wrote to the Transport Minister about these and other access challenges. QAI initiated statutory 'right to information' requests in an attempt to determine when access-relevant decisions were made, and whether the original NGR commissioning contract included provisions that would require the contractor to supply DSAPT-compliant trains.

TMR advised QAI that:

The Project Deed outlines that the train's design must comply with DSAPT and DDA requirements – Qtectic must demonstrate compliance (it either does comply or it doesn't).¹³

As the exemption application indicates, the trains delivered so far appear not to be DDA or DSAPT compliant. It is not clear to us whether Queensland has sought to address the access or other design and manufacturing problems by seeking contractual remedies. According to then Transport Minister Jackie Trad, cancelling the contract with Canadian company Bombardier over its problematic NGR trains would be a huge waste of money.

¹³ Correspondence to QAI on 16 May 2017 from Helen Adcock, Department of Transport and Main Roads Principal Advisor (RTI & Privacy).

That would see an incredible amount of Queensland taxpayer dollars going towards compensating Bombardier for the ripping up of the contract," Ms Trad said.¹⁴

Instead, Queensland has lodged this application.

3. QAI Position on the Exemption Application

QAI opposes the application. The trains should not be permitted to run until they are DSAPT compliant. We set out our reasons below.

3.1 Granting the proposed exemptions would be exceptional and set a bad precedent.

The NGR (in-) accessibility fiasco has been more than five years in the making. Depending, in part, on the HRC's decision on this application, the fiasco may linger through another 30 or more years of less-than-optimal NGR service. In the commissioning, design, and operation of the NGR, the applicants' contempt for the transport needs of people with disabilities is manifest in their indifference to:

- the objects of the DDA
- the guiding principles of the DSAPT, and
- their legal obligations under the both.

Green-lighting the application and allowing the trains to run sends an unfortunate message: that transport providers can deliberately or negligently commission and run non-DSAPT-compliant conveyances, and if someone objects, they will be permitted to run the non-compliant vehicles as long as they undertake to fix them.

Granting the exemption would be an exceptional decision: previous rail-related exemption applications (by the ARA) focussed on existing conveyances. The HRC granted the exemptions because it would have been unreasonable to expect providers to withdraw existing stock from service. The NGR are not existing stock. They are badly designed new stock.

¹⁴ 'Queensland will honour deal to deliver problematic trains' in *The Brisbane Times*, 12 September 2017. <https://www.brisbanetimes.com.au/national/queensland/queensland-will-honour-deal-to-deliver-problematic-trains-20170912-p4yvvh.html>

The DSAPT depends on voluntary compliance. Beyond appealing an exemption decision at the AAT, the only 'remedy' is public disapprobation. If the Queensland Government had commissioned the trains before it agreed to DSAPT minimums, QAI would support a compromise arrangement provided that the trains were made accessible.

No such extenuating circumstance applies here. Queensland is a member of the Australasian Railways Association, and has been party to two previous applications for narrow gauge railway exemptions. The HRC granted those exemptions, and Queensland was aware of the new minimums, yet Queensland then commissioned these trains with access paths even narrower than the exemption-reduced minimums.

Queensland, through the ARA, sought the umpire's decision, then ignored it. Granting the application will encourage other providers to flaunt the DSAPT.

3.2 Granting the proposed exemptions would be contrary to DDA objects.

The application is not consistent with DDA section 3:

- (a)... the elimination of discrimination¹⁵

While parliament's overall intent in enacting the DDA was to incentivise compliance rather than punish non-compliance, to allow the applicants to run the trains now rather than when the applicants make the trains compliant would not be consistent with the elimination of discrimination 'as far as possible'¹⁶ in the provisions of services. It is possible, and not unreasonable, to delay the NGR in-service date.

The applicants state that 'it may not be reasonable to immediately or completely eliminate discrimination in every instance'.¹⁷ The question would not arise if they had not placed non-compliant trains into service in the first place.

A consultative approach and the construction of fully accessible narrow gauge trains were both 'possible' and achievable, but to permit non-compliant trains to operate in-service when

¹⁵ DDA section 3 (a)

¹⁶ DDA section 3(a).

¹⁷ New Generation Rollingstock Project Application for temporary exemptions under the Disability Standards for Accessible Public Transport 2002 (Cth) and Disability Discrimination Act 1992 (Cth) 27 September 2017 Joint application by the State of Queensland (acting through the Department of Transport and Main Roads) and Queensland Rail, page 17.

the applicants made so many errors of judgement along the way will incentivise further non-compliance.

Granting the application is tantamount to offering a free pass to any Australian transport provider who ignores legislative requirements. Granting the exemptions may embolden further discrimination and non-compliance by public transport providers. Queensland's Department of Transport and Main Roads had years of advanced notice of the need to comply with relevant legislation and standards. The Commonwealth and Queensland discrimination laws have been in force since the early 1990s, the DSAPT since 2002, and the ARA exemptions since 2007. Queensland commissioned the new trains in 2013.

- (b)... the same rights to equality before the law¹⁸

Granting the application confirms and strengthens a 'some are more equal than others' double-standard where the rights of persons with disabilities before the law sit below the rights of other citizens. The Human Rights Commissioners no doubt are aware that discrimination on the grounds of disability is the most frequent concern for people who enquire to the Australian Human Rights Commission about their human rights or who lodge complaints about breaches of those rights.

Australians with disability continue to experience unacceptably high levels of discrimination in their everyday lives. The rights of people with disability are especially vulnerable in relation to employment and the provision of goods and services. Social isolation and low rates of disability employment and community participation are all knock-on effects of this lesser right of persons with disabilities to access public transport.¹⁹ People with disability are less likely to share in the recreational and social life of the communities in which they live, and while not the only reason for this trend, the lack of sufficient accessible public transport is a contributing factor.

People with disability are more likely to have to rely extensively on more expensive modes of transport, such as special bus services, taxis and private car travel as a passenger. This reliance is due to people with disability being much less likely to have a driver's licence than people without disability, and difficulties in accessing public transport.²⁰ A reliance on more expensive modes of transport limits the opportunity to travel — a higher average cost per trip will mean that people with disability will tend to limit themselves to essential travel.

¹⁸ (DDA section 3 (b))

¹⁹ Attorney-General's Department, Regulation Impact Statement on Draft Disability Standards for Accessible Public Transport, Canberra, January 1999, p. 11.

²⁰ Physical Disability Council of Australia Ltd (PDCA). Submission to **Review of the Disability Standards for Accessible Public Transport 2002**.

To allow these less-than-fully-accessible trains into service amounts to saying that persons with disabilities do not have the same rights to equality as the rest of the community. The 'same rights' message must be delivered to the Queensland executive, because the NGR failure has been a failure of leadership. As the 'Response to request for further information' from the applicants admits, the problem began with decisions made by Cabinet. The applicants must do more than modify the NGR trains. They must modify the way they think about persons with disabilities.

- (c)... promotion of the same fundamental rights for persons with disabilities²¹

Granting the exemptions as requested undermines community acceptance of the principle that persons with disabilities have 'the same fundamental rights as the rest of the community'. To allow the proposed exemptions is to send a message to transport providers that they can commission services now and seek AHRC exemptions later, and that this is an effective strategy for public transport commissioning, design and provision.

3.3 Granting the application is contrary to the guiding principles and Part 33 of the DSAPT

The DSAPT guiding principles²² state that:

(4) Under the Disability Standards, public transport services and facilities will become more accessible by ..

(b) the requirement that, from the commencement of the Disability Standards, all new items comply with the requirements of the Disability Standards.

DSAPT Part 33.1 states:

33.1 Date for compliance with these Standards — new conveyances, premises and infrastructure

Operators and providers must comply with the specified sections of these Standards for all new premises, infrastructure and conveyances brought into

²¹ DDA section 3 (c)

²² Disability Standards for Accessible Public Transport section 1.2 4(b)

use for public transport service on and from the date these Standards come into effect under section 31 of the *Disability Discrimination Act 1992*.

The NGR are new trains. The DSAPT pre-dated NGR conception by ten years. As one of the biggest public transport providers in the nation, Queensland Rail can have no reasonable excuse for commissioning trains which do not comply with existing minimum access standards.

3.4 Detailed Responses to Queensland's Exemption Application

NB Extracts from the Queensland Government NGR Exemption Application are indented and appear in italics.

3. THE NGR TRAIN

(a) The NGR train was procured in December 2013 (when the Public Private Partnership (PPP) contract was awarded) to the following technical specifications:

(i) Single deck, electric train to operate on the South East Queensland suburban and interurban narrow-gauge rail network

(ii) Six narrow body cars per train, with a train crew/drivers cab at each end (147 metres long)

(A) Two accessible cars (known as the MA and MB cars in the middle of the six-car set)

(B) Twelve allocated spaces, six in each accessible car

(C) One unisex accessible toilet module in the MB car

(D) Four priority seats in each car

The Queensland Government has paid lip-service, and barely that, to persons with disabilities and their needs through the NGR process. The Commonwealth and Queensland must mandate, through legislation, regulation and policy, mechanisms to ensure the accessibility of public transport from planning to procurement, manufacture and service. 'Accessibility' means compliance with the *Disability Discrimination Act 1992* (Cth), the DSAPT and consultation with persons with disabilities throughout the process. In order to ensure that public transport meets everyone's needs, people with disability must co-design the transport hardware, physical infrastructure, communications and staffing arrangements.

This could have happened with the NGR, but it did not.

QAI tried to determine the degree to which the above-stated 'technical specifications' included the requirement that the trains be fully 'accessible': whether, for example, the commissioning documents included the requirement that the trains be built to *Disability Discrimination Act 1992* (Cth) and DSAPT minimums.

On 19 May 2017, Queensland Advocacy Incorporated made Right to Information (RTI) applications²³ NGR trains and compliance with disability standards for accessible public transport, to TMR, the Office of State Development and Queensland Rail asking for:

- Any Access Audit (or relevant document on access that includes information about equitable access solutions) carried out re: NGR trains in Qld. As we represent members of the Queensland Rail Accessibility Reference Group, this request concerns any Access Audit other than observations by members of the ARG.
- Queensland Rail's plans/drawings/schematics that include information about equitable access solutions, executed prior to TMR taking over the project.
- Any opinion, assessment, statement or report etc that considers whether the specifications of the original TMR NGR tender comply with the Disability Standards for Accessible Public Transport and the Disability Discrimination Act 1992 (Cth).²⁴
- The Project Deed, or, in particular, that part of the project Deed that outlines that the train's design must comply with DSAPT and DDA requirements.
- Reports regarding compliance with the Disability Standards for Accessible Public Transport and the *Disability Discrimination Act 1992* (Cth) received from Qtectic.'

Taking into account the extensions of time requested by Queensland Rail and TMR, the high charges estimates, our budget and the possibility that we would find no un-redacted and/or conclusive answers to our queries, QAI withdrew our applications. However, QAI understands that the TMR Accessibility Reference Group ('ARG') was first consulted in March 2015. The ARG was informed that the basic carriage design could not be altered, including the width of the access path in question, the dimensions of the toilet and the location of the guard.

(b) Due to the narrow gauge of the tracks in the South East Queensland passenger rail network, car bodies are narrow-width which means compliance with a number of the requirements of the DSAPT is a challenge.

'Narrow gauge' is an excuse for non-compliance, but not a reason. The accessibility of trains on Queensland's narrow gauge lines is not an intractable design challenge: the much older

²³ QAI ref: 135/04945).

²⁴ **From:** Nick Collyer [<mailto:Nick@gai.org.au>]

Sent: Friday, 19 May 2017 11:22 AM

To: Helen Adcock <Helen.Z.Adcock@tmr.qld.gov.au>

Subject: RE: RTI Application 135/04945 - Department of Transport and Main Roads

(and still in-service) EMU trains used on Brisbane's suburban lines are fully accessible. The real challenges are:

- finding the political commitment to ensure that our transport systems are accessible, and
- enacting legislation and policy that creates the checks and balances necessary to ensure accessible procurement, concept and co-design when the political commitment is absent.

(c) Consultation with external stakeholders was undertaken throughout train procurement, concept and detailed design development phases of the project.

In 2013, Queensland commissioned the NGR in haste, at a cut price and under the auspices of a TMR that was trying to please a first term government with a huge majority and an electoral mandate to slash government spending. TMR and Queensland Rail did not consult with the ARG or any other persons with disabilities until it was too late to alter the dimensions of the access path and toilet module that are the subject of this application.

In response to the HRC's request for clarification of 'unavoidable design constraints' the applicants have provided nothing but, 'We blame the Executive'.

The applicants' have admitted²⁵ that, 'The decision to include one toilet module (rather than two) was made at Cabinet level by the State Government at that time'.²⁶ The admission confirms the need for legislative direction and constraints that will guarantee persons with disabilities that they will co-design public transport.

(d) Two sessions were held with representatives from the Queensland disability sector at a physical mock-up of a portion of the train in August 2014 and March 2015.

By August 2014, the design horse had bolted and ARG 'consultation' regarding key elements was disingenuous. Our information from ARG members is that their comments censured the design but were treated by TMR as immaterial because key dimensions like that of the access path between carriages and the toilet were already set and could be altered only at considerable expense. Not until the March 2015 session were ARG members told that the design was fixed and their key access concerns were not negotiable.

²⁵ New Generation Rollingstock Project Application for temporary exemptions under the Disability Standards for Accessible Public Transport 2002 (Cth) and Disability Discrimination Act 1992 (Cth) Response to request for further information and documents of 18 October 2017 Public Version 15 November 2017, page 2.

²⁶ September 2012.

3 (e) *The non-compliances identified on the NGR train relate to:*

(i) Access paths – width:

(A) The access path adjacent to the allocated spaces in the two accessible cars is not compliant.

(B) The access path past the unisex accessible toilet module is not compliant.

(ii) Access paths – extent of path:

(A) The access path does not extend between the single assisted boarding point door and all allocated spaces and priority seats in the accessible cars.

(B) The access path does not extend between all allocated spaces and priority seats in the accessible cars to/from the unisex accessible toilet module.

(iii) Unisex accessible toilet module:

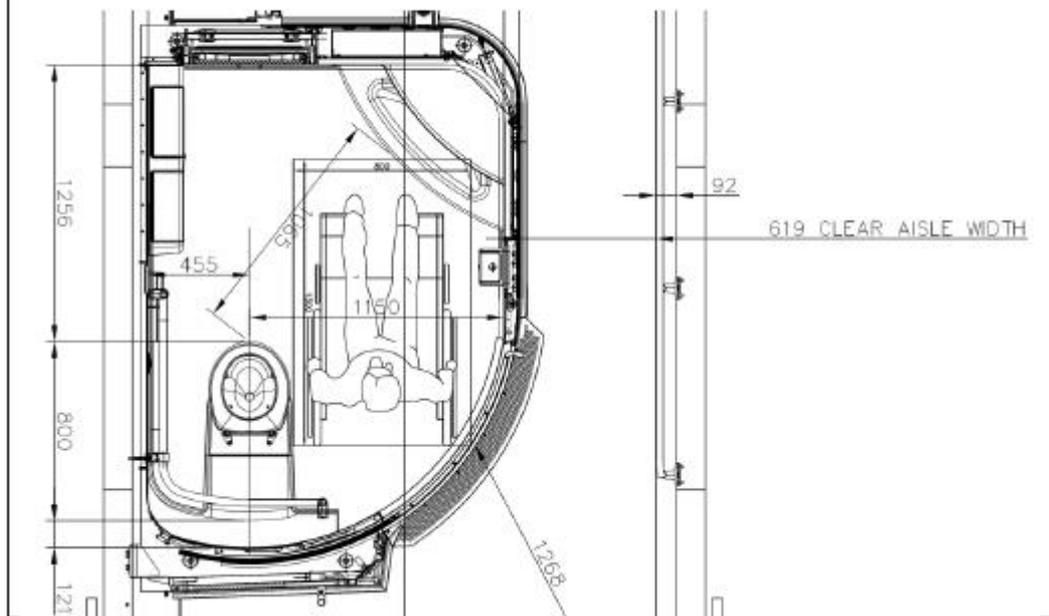
(A) Dimensions – one dimension within the toilet module (from the centre-line of the pan to far side wall) is noncompliant due to the design trade-off between the size of the toilet module and adjacent path past the toilet.

(B) Functionality – some customers using a mobility device may not be able to carry out a fully parallel side transfer to the pan due to the circulation space between the toilet module's curved door and wall and pan.

This exemption application would not have been necessary if TMR, when it commissioned the trains in 2013, had insisted on the inclusion of an essential contractual term that specified that the Consortium must comply with DDA and DSAPT guidelines and minimum dimensions. The DSAPT has been in force since 2002 and all new designs/procurements should be fully compliant as they enter service.

The statement at 3(e)(iii)(A) above is incorrect. It links toilet non-compliance to width constraints associated with narrow gauge, but the corridor width has no impact on the footprint of the toilet. The circulation space is constrained by the curved door rather than the corridor width. See the illustration below.

Existing NRG Toilet



The curved door inhibits the movement of persons using wheelchairs as they manoeuvre inside the toilet. It does not allow a parallel transfer to the toilet pedestal.

4. TEMPORARY EXEMPTIONS SOUGHT

Together, TMR and QR3 seek the following exemptions to the DDA and DSAPT for a period of three years, to progressively resolve non-compliances (as far as possible) and improve the overall functionality of the NGR train.

As stated above, QAI asks the AHRC to refuse the applicants' proposals for temporary exemptions.

5. PRELIMINARY CONSIDERATIONS

5.1 Urgent processing requested

(a) The Applicants require the use of the NGR fleet for the 2018 Gold Coast Commonwealth Games, which will officially commence on 4 April 2018. The use of

NGR trains is integral to the Commonwealth Games timetable. In order for the NGR fleet to be ready, a period of track testing and trial operation will be required.

The applicants claim the Commonwealth Games train demand as grounds for an expedited processing and grounds for the exemptions themselves. The DDA Exemptions Guidelines state:

Where an exemption is sought for reasons wholly unrelated to the objects of the Disability Discrimination Act (such as to gain commercial advantage), this may be a factor weighing against the grant of an exemption.²⁷

The timing of the Commonwealth Games places an additional and unnecessary burden of decision on the Human Rights Commissioners, even though the Games were foreseeable and the NGR access challenges could have been addressed long ago. Linking the timing of the HRC decision to the Commonwealth games is a misleading, blame-shirking conceit, and in our view, an affront to the HRC.

Queensland won the Commonwealth Games bid more than six years ago, in November 2011.²⁸ Queensland commissioned the not-fully-accessible NGR trains more than four years ago, in 2013. The applicants have had ample time to rectify the accessibility blunders and have resolved to partially address them only at the eleventh hour, yet the applicants want the HRC to consult and process this application 'urgently' because they must stage a sacrosanct sports event. The applicants imply that to deny them their 'urgent processing' would be to deny the common good, but the responsibility for time pressure arises through their actions alone.

NB: The Minister for the Commonwealth Games Stirling Hinchliffe has announced²⁹ that the Commonwealth Games will include the largest integrated Para-Sport program in Commonwealth Games history. The common good includes the interests of the athletes and fans who have mobility impairments who want to use the trains to access the games.

(b) The NGR trains are required to replace an ageing portion of the existing QR fleet (EMU Fleet, Electrical Multiple Unit). Work is being performed to extend the life of these units to allow them to continue in service and on the network. This is increasing costs and these units will need to be retired as soon as possible.

(c) As a result, the Applicants request an expedited consideration of this application.

²⁷ Australian Human Rights Commission Temporary Exemptions under the Disability Discrimination Act – 16/02/2010, page 4.

²⁸ <http://www.abc.net.au/local/stories/2011/11/10/3363282.htm>

²⁹ <https://www.gc2018.com/article/gc2018-host-largest-para-sport-program-commonwealth-games-history>

The much older EMUs are accessible because Queensland Rail and the ARG partnered to make them that way when the EMUs were revamped for accessibility compliance a few years ago. The EMUs are now moribund because they have defects unrelated to access. Extending their service life will make them available as a 'Plan B' for the Commonwealth Games, if sufficient NGR are not available. An 'ageing fleet' argument is therefore not relevant to the request for expedited exemption.

6. REASONS FOR DSAPT EXEMPTIONS SOUGHT

6.1 How the proposed exemptions fit within the objects and scheme of the DDA/DSAPT

We have detailed the lack of fit at 3.2 of this submission. We add that to 'fit with' is 'to be of a suitable quality, standard, or type to meet the required purpose'.³⁰ Fair judging as to the 'fit' of these proposals necessitates that the Commissioners appraise them in a broad reform context and not in the narrow space of the next three years.

The salient contextual matters are the objects and scheme of the DDA/DSAPT; the elimination, since 1992, of disability discrimination; ensuring the same rights to equality; and, promoting recognition of the same fundamental rights for people with disabilities now *and in the future*. The promotion of rights and equality for people with disabilities is a long-term project.

We ask the Commissioners to consider that these trains did not emerge *out of nothing* in 2017. They have been at least five years in-the-making, yet when these trains were conceived in 2012, the objects of the *Disability Discrimination Act 1992* (Cth) were two decades old.

Allowing the exemptions may alleviate some of Queensland Rail's capacity challenges, but will:

- underwrite continuing discrimination against persons with disabilities
- undermine the concept of same rights to equality before the law, and
- obstruct the recognition and acceptance of same fundamental rights in the future.

Allowing the exemptions may indicate to transport providers that it is okay to make poor access decisions. The only message given to public transport providers would be that the only significant downside of (DDA/DSAPT) non-compliance is the possible electoral repercussions from using public money to remedy the mistakes.

This exemption application is a mitigating strategy in response to advocacy work by persons with disabilities. The ARG voiced these access concerns from 2014, but the Transport Minister announced the plan to make access changes only in late 2017. Coincidentally, or

³⁰ <https://en.oxforddictionaries.com/definition/fit>

not, the Minister announced the access plan not long after some ARG members intensified their advocacy by:

- appearing in the media about this issue.³¹
- approaching QAI for support
- engaging counsel to advise about a discrimination complaint against TMR/Queensland Rail

In May/June 2017 QAI lodged Right to Information requests to TMR, Queensland Rail and the Office of State Development. The Transport Minister's proposal to address these access challenges appeared on Friday 22 September 2017.

6.2 Why immediate compliance with the DDA/DSAPT is not possible or should not be required

A new train should not require a temporary exemption from the DSAPT. Queensland has done without NGR trains until now. Queensland should follow the modification schedule and only put NGR on track as the modifications are completed.

(a) The NGR trains will be required to run on a narrow gauge rail track in Queensland. This necessitates that the NGR train cars have a narrow width to fit on existing infrastructure, including railway tracks and tunnels.

Narrow gauge is not a reason to build inaccessible trains. Queensland's IMU trains run on the same gauge. They have two toilets and their access paths are compliant.

(b) The narrow body width of the train also requires that a balance be struck between the proportion of the car width allocated to the toilet module's circulation space and the proportion allocated to the adjacent aisle width. Increasing the aisle width beside the toilet module will necessarily reduce the circulation space inside the toilet module and lead to further reduction in toilet compliance and functionality. This means that in some instances, an access path no wider than 600mm is achieved.

If the NGR had two toilets per six car train, like the current IMUs and consistent with TMR's intention for retrofitting 35 NGRs, the issue of aisle width would not arise.

³¹ For example, <https://tinyurl.com/ycwoag9x>; <https://tinyurl.com/yys2fg6o>

(c) For example, the minimum distance between the centre line of the toilet pan and the far side wall of the toilet module must be at least 1150mm. On an NGR train, this would only leave around 600mm for the adjacent corridor leading to the MA car. This corridor is required to allow crew access by QR staff, including guards.

On all models of the IMU, guards and other staff currently enter and leave the guard and driver's cabs via the aisle adjacent to the toilet. This practice of many years has been effective and has not caused any operational problems.

(d) It is not possible to use the inter-car gangway between the MA and MB cars as an access path due to the:

(i) significant pitching when the train is in motion; and

(ii) floor gradient, which does not meet the compliance requirement for a walkway.

Agree.

(e) While the gangway width is compliant for an access path, the motion and gradient issues may present a risk to some passengers with disabilities and the elderly who may attempt to reach the unisex accessible toilet module in the MB car from the MA car.

Agree. TMR appears to have ignored this existing evidence in its designing the NGR.

(f) The only DSAPT-compliant solutions given these technical constraints are to either:

(i) provide a second toilet in the MA car, so that an access path is not required from allocated spaces in the MA car to the toilet module in the MB car; or

(ii) remove the toilet from the MB car altogether, which in turn no longer requires that an access path be provided between the MA car and the MB car.

Agree. Two toilets or no toilets per six car train was obvious at the design phase of the NGR.

(g) Either option would take a significant length of time to implement.

The ARG pointed out the design flaws two years ago. The ARG could have pointed out the gangway instability if they were consulted from the beginning.

(h) The Applicants are planning to undertake rectification work to ensure compliance with the DSAPT. This process is expected to take between 18 and 36 months to complete.

As stated above, rectification should be undertaken prior to the NGR entering service.

(i) In order to allow the rectification process to be undertaken without further delays, the Applicants seek that these temporary exemptions be granted as an interim measure to allow enough time to retrofit and reconfigure the NGR trains.

QAI does not support temporary exemptions for the NGR.

(j) Although removing the toilet modules on all MB cars would allow the Applicants to achieve substantial technical compliance with the DSAPT, this would deliver an inferior overall outcome for passengers on longer journeys due to reduced passenger amenity.

The initial procurement should have specified two toilets per train. This would have prevented a waste of public money, greater flexibility in the deployment of individual trains and a best practice on-board experience for all customers.

(i) Reconfiguration of the accessible toilet module to meet dimensions and improve functionality in line with DSAPT (A) Interurban fleet of 35 trains (two toilet modules per six car train) – adding a second unisex accessible toilet module to the MA car, so that allocated spaces and priority seats in both the MB and MA have an access path to a toilet module

(B) Suburban fleet of 40 trains (no toilets) – remove the unisex accessible toilet module from the MB car.

(k) This would also require that the NGR trains be returned to the manufacturer for the removal of their toilet modules, which could further delay the introduction of NGR trains to the passenger rail network. The removal of toilet modules would be unlikely to achieve a materially faster introduction of NGR trains onto the rail network compared to the undertaking of the rectification work.

Agree.

(l) The lack of temporary exemptions would also disadvantage the travelling public of Queensland due to the unavailability of urgently required new rollingstock, which is required to replace the ageing fleet currently in use for passenger rail services. It will also impact public transport for the 2018 Gold Coast Commonwealth Games.

The EMU trains are aged but remain quite serviceable. Prolonging their life will be to the travelling public's advantage. Note that members of the ARG heard the DG of TMR state that the NGR are not crucial to the Commonwealth Games.

6.3 Any things done or planned by the Applicant which seek to achieve the objects of the DDA/DSAPT (etc)

The question remains unanswered as to why the applicant did not consider the Objects of the DDA / DSAPT during design and procurement.

(b) As noted, this approach will mean that passengers will not need to move through the inter-car gangway between the MA and MB cars. On the interurban fleet, both the MA and MB cars will have their own unisex accessible toilet modules, for which a DSAPT-compliant access path will be provided from the accessible spaces and priority seats.

Again, this was the obvious design for the NGR trains.

6.4 Any terms or conditions which further the objects of the DDA and which the Applicants are prepared to meet as a condition of being granted the exemption

(a) TMR and QR are intent on keeping stakeholders informed of progress towards rectification work and the retrofitting of the NGR trains. To achieve this, TMR will:

(i) progressively carry out the rectification work referred to above;

(ii) facilitate physical access for the ARG to provide design input and test the reconfigured toilet modules before they are returned to passenger service;

(iii) continue to consult with the ARG as set out above; and

(iv) report to the Commission as set out above.

(b) In order for the Commission to obtain a better understanding of the constraints currently faced by the NGR trains, TMR are also prepared to facilitate a visual inspection by the Commission of an NGR train already delivered to Queensland.

Supported.

6.5 The results of any consultations undertaken with people who may be affected by the proposed activity and their representative organisations

(d) In the 2017 ARG Feedback, the ARG indicated that adding a second toilet to interurban NGR trains would be an acceptable solution when considering toilet location, while indicating its preference for a solution that included a train guard's cab in the middle of the train.

The ARG proposed the second toilet in the MA car as the only way that DSAPT compliance was possible for customers in the MA car not able to reach the toilet in the MB car.

The mid train guard cab is not a DSAPT issue, but as the inevitable service failures accrue due to the guard in car 6 being stationed 70 m from the platform assisted boarding point it will become a DDA issue. Currently the guard cab is not more than 5-10 m from the assisted boarding point allowing easy interaction between guard and any customer waiting to board and who requires assistance.

(e) The Applicants have taken this feedback into consideration, but for a variety of reasons have concluded that adding a guard cab to the middle of NGR trains would not be appropriate. A middle guard cab with doors would impede customer access through the NGR cars, reducing the benefits of the new design. Direct assistance

would still be provided to all passengers requiring it, with the QR business operating model providing for timely and reliable assistance from platform staff.

The NGR service life is ~30 years. The Queensland Government cannot guarantee now what staffing arrangements will be in five years' time, let alone what they will be in the 2040s. In the meantime, 'timely and reliable assistance from platform staff' will only be possible at stations that have platform staff, and many platforms are unstaffed for much of the time.

The time for meaningful consultation was during design phase and prior to procurement. TMR and QR squandered the opportunity to consult during this time, preferring to present the ARG with a design to be acquiescently approved. Post procurement consultation was only able to influence peripheral matters as the major design flaws were already contractually locked in. Later consultations were part of the TMR strategy of risk management.

6.6 Information about any Action Plan developed and lodged by the Applicants in accordance with Part 3 of the DDA, including a report on the implementation of the Action Plan to date.

(a) TMR released its Disability Service Plan 2017-2020 on 27 July 2017. This followed on from its Disability Action Plan made pursuant to the DDA, Improving Access to 2017 (which was reviewed in 2016).

(b) The Queensland Government has developed the State Disability Plan 2017-2020 All Abilities Queensland: Opportunities for All to support Queenslanders with disability. TMR supports this whole of government commitment.

(c) QR has an Accessibility Action Plan 2014. The document outlines the extensive consultations undertaken by QR with disability sector contacts on a range of issues relating to the NGR project, as well as outlining QR's commitments to upgrade infrastructure, engaging with people with disabilities and working to enhance accessibility.

The Action Plans are long on generalizations (and pictures) and short on firm commitments to provide accessible conveyances by particular dates. Queensland Rail put 2 NGR on track and in service on 11 December 2017 when they knew they were not fully accessible. Queensland Rail constructed a new step overpass at Banyo Station to protect pedestrians who had to cross at street level. No such protection was offered people with mobility impairments.

6.7 The financial or other hardship which will be incurred if the exemptions are not granted

(a) There are compelling and sound economic and social reasons for the temporary exemption to be granted. As noted above, the NGR trains are required to replace an

ageing train fleet which has reached its end of life. Further, the NGR trains are required for operation in the upcoming Gold Coast Commonwealth Games in April 2018.

The EMU trains can have their service life extended. The limiting factor on services during the Commonwealth Games may yet prove to be the availability of crew (drivers and guards) to staff such trains as are available.

(b) Without this exemption being granted, the only manner in which the Applicants could comply with section 2.6 of the DSAPT would be to remove all toilet modules (which would further delay roll-out and prevent the preparation, testing and use of any NGR trains in time for the Commonwealth Games), or to withhold the NGR trains from service altogether. Either outcome would impose significant financial burdens on the State and deprive passengers and patrons of new trains at a time when they are critically needed.

Queensland should refit the fleet prior to entering service, including constructing a guard's cab mid-train.

(c) If the temporary exemptions were granted, passengers with disabilities would also attain long term benefits from the rectification work being undertaken. This would include further accessibility improvements that exceed the requirements of the DSAPT. These benefits would include:

Temporary exemptions will not provide a long-term benefit for people with a disability. If the exemptions are not granted the NGR trains will not be excused from DSAPT or the DDA, and be liable to complaints of discrimination. The only beneficiary of any temporary exemptions will be the State of Queensland.

(i) doubling the toilet facilities currently offered on interurban trains, given that both train cars with allocated spaces would have DSAPT-compliant access paths provided to accessible toilet facilities instead of just one car

Doubling the number of toilets is not a benefit. Providing access paths to accessible facilities is a DSAPT minimum requirement.

(ii) the single boarding point offering superior service reliability, allowing operational consistency and making it easier for passengers with hidden disabilities to seek assistance .

Customers requiring boarding assistance already board from the accessible boarding point designated on each platform throughout the City Train network. This single assisted boarding point is located mid platform. NGR will not change or influence this. 6.7(c)(ii) offers nothing that customers do not already have.

Customers with hidden disabilities waiting at this accessible boarding point will be located 70 m from the guard in car 6, making communication with the guard difficult or impossible. Guards will be challenged to visually identify a hidden disability at any distance. Currently, customers with hidden disabilities can easily converse or interact with the guard who is located mid-train in EMU, IMU and SMU trains.

Guards currently forget to assist customers who require assistance to alight at an annoying frequency despite being within metres of the customer. The wide separation of guard and customer in the NGR will see boarding and alighting assistance failures reach systemic levels. As noted, people with hidden disabilities waiting to board will fare the worst as the distant guard will only have the capacity to visually assess if a customer requires assistance rather than converse with the customer as is currently possible on EMU, IMU and SMU trains.

(iii) additional priority seating in new locations

(iv) improved functionality for the wall-mounted unit in the allocated spaces

(v) adding braille to the 'Emergency Door Release' button

(vi) new wording on the 'Priority seating' signage

(vii) maximising functionality of grab/handrails, accessible buttons and controls

6.8 Measures proposed to minimise or reduce any hardship which maybe faced by people with a disability and any other people affected by the proposed exemption

(a) There are 105 stations on QR's Citytrain network that provide unisex accessible toilets for customers (a substantial majority of the total 154 stations across the network).

A number of these toilets fall well short of the DSAPT footprint and toilets are customarily locked when stations are unstaffed. This measure will not be effective for the full duration of operational hours at most stations. People with larger mobility aids may not fit in some of the unisex toilets even if they are open.

(b) A Customer Communication/Education Campaign will also be delivered to support customer awareness of assisted boarding and how to obtain assistance for the NGR trains.

This should be standard practice; not a measure to reduce hardship.

(c) QR will provide an opportunity for passengers with disabilities to view and trial the accessible toilet module prior to travel.

Welcome, but this will involve only a small sample of the many thousands of potential users.

(d) Finally, QR will communicate boarding locations (MA car – no toilet access or MB car - with toilet) for each station platform on the QR website so passengers who need toilet access can plan their travel for origin and destination.

The proposal is impracticable. Not all people gain their information online. And, apparently, QR is proposing two assisted boarding points per platform. QR has in the past stated that this double boarding point option, one for MA another for MB, is not achievable – but suddenly it has emerged as a solution? Platform staff or guards should be trained to board customers into the MB car on request rather than expect customers on the platform to differentiate an MA car from an MB car or know which of two locations they should wait at.

7. REASONS FOR DDA EXEMPTIONS SOUGHT

(a) Sections 23 and 24 are general provisions of the DDA.

(b) The Applicants seek exemptions from these sections to the extent that they relate to issues covered by the temporary exemptions sought above. This is to prevent the temporary exemptions from the DSAPT being rendered otiose in collateral proceedings under the DDA.

(c) The rationale for seeking the above exemptions from the DDA is otherwise the same as the reasons outlined in section 6 for exemptions from the DSAPT.

For the reasons stated, a temporary exemption from the DSAPT is not warranted.

4 Responses to HRC Questions

What are the reasons in favour of granting an exemption?

The applicants have made this case.

What will be the impact on individuals and others on the particular exemptions sought under sections 2.6, 2.8(1), 8.2, 15.3, 15.4(1)(a) and 15.4(1)(b) of the DSAPT?

Impact on 'Julie'

The access path by the bathroom is too narrow for wheelchairs. Consider the hypothetical but probable experience of passenger 'Julie', who:

- uses a wheelchair
- employs a 'parallel transfer' when going to the toilet
- boards a non-compliant NGR
- enters the 'MA' car that has allocated wheelchair spaces but no toilet , ³²and
- urgently needs to use the toilet.

Julie will need to:

- press the assistance button
- disembark (with assistance)
- quickly board the 'MB' (toilet) car, with assistance, and
- enter the bathroom space.

At this point, Julie discovers that she is unable to use the toilet because the curved door prevents her from positioning her wheelchair ready for a parallel transfer.

Julie will have to:

³² ... because, for example, the other accessible carriage's wheelchair spaces are occupied, or both Julie and the customer service assistant confuse which is the

- exit the toilet
- find the Emergency Help Point
- activate the 'press for assistance' button
- with assistance, disembark
- if available, use a platform toilet
- wait for the next available train.

Julie will be treated less favourably and in a discriminatory way.

What is your view regarding the applicants' submission that the post-rectified trains will ultimately have accessibility improvements that will exceed the requirements of the DSAPT?

NGR boarding and alighting arrangements likely will be inferior: more inefficient and 'buggy' than current EMU boarding and alighting arrangements. DSAPT 8.8 states, 'It must be possible for a passenger to notify the operator of a conveyance that he or she needs a boarding device to board or alight from a conveyance.'

First, as yet, new NGR boarding arrangements are untested. In-service EMU's have a guard stationed in the middle of the train. Because the NGR guard-station lies at the rear of the train, the guard will be ~70 meters from the accessible boarding point. Queensland Rail's boarding solution is to employ customer service staff for boarding and alighting assistance at every NGR station from first to last service. Flaws will emerge:

- The isolation of the guard from the assisted boarding point will diminish service levels for people who require assistance, especially on unstaffed platforms. Customers will be overlooked or forgotten, left on the train or left behind on the platform.
- EMU passengers who use wheelchairs have been overlooked. Recently, and notoriously, a woman³³ ended up in a shunting yard when staff allocated to help her disembark.

Reasons include:

- human error
- under-staffing

³³ Karin Swift was 'left for dead'. It was not an isolated incident, according to another train passenger. <<http://www.abc.net.au/news/2017-05-28/woman-karin-swift-wheelchair-stranded-brisbane-train-apology/8566628>>

- The expense over 30+ years of NGR service will be astronomical. No incumbent government can guarantee that the extra staff will not be reassigned or cut. At the trial, I spoke to a customer assistant at Helensvale station who said she had been employed only a few weeks before, and on a casual basis.
- The NGR 'press for assistance' buttons do not always work correctly. Here is a personal account of an NGR malfunction on the day of the accessibility trial one week before the NGR launch in December 2017:

When I was in the guard cabin with the guard on the trial, someone pushed the assistance button in the MB carriage. The guard picked up the handset and couldn't hear what the person was saying (she was right next to the speaker but not talking into it), and then handed it to the second guard, who also couldn't hear what was being said. He then turned to me and said that he would go down and speak to the passenger as he couldn't hear what she was saying, and then walked down to the MB carriage to talk to her (this method would obviously be a problem if the carriages are packed).

Later I asked him how close a person has to get to the speaker to enable them to hear what someone is saying. His response was that a passenger has to get their mouth pretty close, especially in a busy carriage, or else the guards can't hear. They can see the person on the CCTV, just not hear them properly.

Paula Herlihen

In the event any of the exemptions sought are granted, should any conditions be imposed on the granting of an exemption in this matter?

Exemptions would set a dangerous precedent and make a mockery of the DSAPT. They should not be granted. The Queensland Government has paid lip-service, and barely that, to persons with disabilities and their needs through the NGR process.

If conditions are imposed, QAI suggests that the Human Rights Commissioners make a general recommendation that the Commonwealth and Queensland must mandate, through legislation, regulation and policy, mechanisms to ensure the accessibility of public transport from planning to procurement, manufacture and service. 'Accessibility' means compliance with the *Disability Discrimination Act 1992* (Cth), the DSAPT and consultation with persons with disabilities throughout the process. In order to ensure that public transport meets

everyone's needs, people with disability must co-design the transport hardware, physical infrastructure, communications and staffing arrangements.

.....

