

Bills Digest  
No. 150 2003–04

## Civil Aviation Amendment (Relationship with Anti-discrimination Legislation) Bill 2004

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Civil Aviation Amendment (Relationship with  
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# Civil Aviation Amendment (Relationship with Anti-discrimination Legislation) Bill 2004

**Date Introduced:** 11 March 2004

**House:** House of Representatives

**Portfolio:** Transport and Regional Services

**Commencement:** Royal Assent

## Purpose

The purpose of the Civil Aviation Amendment (Relationship with Anti-discrimination Legislation) Bill 2004 is to allow the making of regulations under the *Civil Aviation Act 1988* (CAA) that are inconsistent with Commonwealth anti-discrimination laws, where the inconsistency is necessary for the safety of air navigation. A further purpose is to retrospectively validate existing regulations that may be inconsistent with Commonwealth anti-discrimination laws, where the inconsistency is necessary for the safety of air navigation.

## Background

### Regulations – effect of inconsistency

Regulations relating to civil aviation have been made under section 98 of the *Civil Aviation Act 1988* (the CAA). Section 98(1) provides as follows:

Regulations etc.

- (1) The Governor-General may make regulations, not inconsistent with this Act:
  - (a) prescribing matters required or permitted by this Act to be prescribed;
  - (b) prescribing matters necessary or convenient to be prescribed for carrying out or giving effect to this Act;
  - (c) for the purpose of carrying out and giving effect to the provisions of the Chicago Convention<sup>1</sup> relating to safety;

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- (d) in relation to safety of air navigation within a Territory or to or from a Territory;
- (e) in relation to safety of air navigation, being regulations with respect to trade and commerce with other countries and among the States; and
- (f) in relation to safety of air navigation, being regulations with respect to any other matter with respect to which the Parliament has power to make laws.

The *Disability Discrimination Act 1992* (DDA) makes discrimination on the basis of disability unlawful in many areas of life. The *Sex Discrimination Act 1984* (SDA) makes discrimination on the basis of sex, marital status or pregnancy unlawful. Both Acts include a number of exemptions.

Regulations made under an Act are generally invalid if they are inconsistent with the Act under which they are made, other Acts, or the common law.<sup>2</sup> Therefore, unless either Parliament specifically provides that regulations made under an Act may make discrimination on one or more of the bases proscribed by the DDA or the SDA lawful, or the regulations fall within one or more of the exemptions in the DDA or the SDA, regulations that purport to allow such discrimination will be invalid.

A number of regulations have been made under the CAA that may be invalid for this reason. For example, there are regulations that allow discrimination on the basis of the disability of colour blindness, for instance in relation to air traffic controllers. These regulations will be valid if the discrimination allowed relates to the inherent requirements of a job, as this exemption is provided for by the DDA.<sup>3</sup> However, it has been argued that the current requirements of the regulations go beyond what is required by the inherent requirements of the job of an air traffic controller.<sup>4</sup> Furthermore, regulations permitting discrimination on the basis of disability that do not relate to a job (such as in relation to a private pilot's licence) would probably be invalid. There are also regulations that impose requirements on the basis of pregnancy.<sup>5</sup> These regulations may be invalid, even if it can be established that they are necessary for air traffic safety, as there is no exemption in the SDA permitting discrimination based on the inherent requirements of a job.

### **Human Rights and Equal Opportunity Commission exemption**

Under section 55 of the DDA and section 44 of the SDA, the Human Rights and Equal Opportunity Commission (HREOC) may grant exemptions from specified provisions of those Acts. On 26 November 2002 HREOC granted a conditional exemption to persons acting pursuant to the then existing Civil Aviation Regulations regarding medical fitness, or pursuant to amendments to those regulations that were proposed at that time, for a period of 5 years. The exemptions were granted subject to the condition that they were 'to apply only where a person's pregnancy (for the purposes of the SDA) or disability (for the purposes of the DDA) prevents the person safely fulfilling the inherent requirements of the role covered by the licence concerned'.<sup>6</sup>

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In the process leading up to HREOC granting an exemption, submissions were received from a number of bodies. Most opposed the grant of an exemption, primarily taking issue with the current colour blindness standards and arguing that current colour blindness testing is inappropriately restrictive.<sup>7</sup> The situation in relation to colour blindness following the granting of the exemption appears uncertain as it may be argued that a disability constituted by a level of colour blindness that purportedly would result in the refusal of a licence does not prevent the person concerned from 'safely fulfilling the inherent requirements of the role covered by the licence concerned'.

Civil Air also opposed the requirement that a pregnant air traffic controller be required to obtain two medical clearances in order to continue work after the 30<sup>th</sup> week of pregnancy. They argued that this requirement was unduly onerous.<sup>8</sup>

The exemption granted by HREOC relates only to medical fitness to hold licences granted by the Civil Aviation Safety Authority (CASA). It does not relate to discrimination that may occur in the aviation regulations otherwise than in relation to licences.

## **International requirements**

Australia is a contracting state to the Convention on International Civil Aviation<sup>9</sup> (generally referred to in the aviation industry as the Chicago Convention). Part 67 of the Civil Aviation Safety Regulations (which deal with medical requirements) is based on international standards and recommended practices, as prescribed in Chapter 6 of Annex 1 to the Chicago Convention. CASA stated in its request to HREOC for an exemption from the provisions of the DDA and the SDA that:

Conformity with international standards and practices prescribed under the Convention is necessary, otherwise Australia's regulatory regimes for aviation safety and practices would be put at great risk of not being accepted by the International Civil Aviation Organisation (the body administering the Convention) and other Contracting States.<sup>10</sup>

## **Discrimination against women**

Australia is a party to the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW).<sup>11</sup> As such it is required to take appropriate measures to eliminate discrimination against women in the field of employment.<sup>12</sup> States Parties are required to take appropriate measures to prevent discrimination against women on the grounds of marriage or maternity.<sup>13</sup> The Convention recognises that protective legislation may be appropriate in relation to women's employment, but is concerned with the protection of women's health against risks to them arising from their employment rather than the protection of others against perceived risks. Risks to women from their employment may arise in some areas affected by this Bill (such as where the employment

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of a pregnant woman involves flying) but in other areas (for example, in relation to the employment of a pregnant air traffic controller) it appears unlikely.

In international law, not all distinctions and different treatment will constitute discrimination. Distinctions will not be discriminatory if the criteria for discrimination are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Convention.<sup>14</sup>

The SDA relies in part on CEDAW for its constitutional validity. The objects of the Act include:

to eliminate, so far as is possible, discrimination against persons on the ground of sex, marital status, pregnancy or potential pregnancy in the areas of work, accommodation, education, the provision of goods, facilities and services, the disposal of land, the activities of clubs and the administration of Commonwealth laws and programs.<sup>15</sup>

### **Discrimination against people with a disability**

Australia is also a party to the Discrimination (Employment and Occupation) Convention 1958,<sup>16</sup> ('the Employment Convention') the International Covenant on Civil and Political Rights ('the ICCPR')<sup>17</sup> and the International Covenant on Economic, Social and Cultural Rights ('the ICESR').<sup>18</sup> The DDA relies in part on these instruments for constitutional validity. The most relevant in relation to the types of discrimination proposed to be permitted under the Bill is the Employment Convention. It should be noted that this Convention permits discrimination which is 'based on the inherent requirements' of a particular job.<sup>19</sup> As under CEDAW, discrimination would only include unreasonable differential treatment.

The objects of the DDA are set out in section 3, which provides as follows:

#### **Objects**

The objects of this Act are:

- (a) to eliminate, as far as possible, discrimination against persons on the grounds of disability in the areas of:
  - (i) work, accommodation, education, access to premises, clubs and sport; and
  - (ii) the provision of goods, facilities, services and land; and
  - (iii) existing laws; and
  - (iv) the administration of Commonwealth laws and programs; and
- (b) to ensure, as far as practicable, that persons with disabilities have the same rights to equality before the law as the rest of the community; and

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- (c) 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.

## Main Provisions

The substantive provisions of the Bill are contained in **Schedule 1**.

**Part 1** of the Schedule amends the CAA so that regulations with certain limited discriminatory effect may validly be made in the future.

**Item 1 of Part 1** of the Schedule inserts new **subsections 98(6A) and (6B)** into the CAA. **New subsection 98(6A)** enables the making of regulations containing provisions relating to medical standards that are inconsistent with the SDA.

**New subsection 98(6B)** enables the making of regulations containing provisions that are inconsistent with the DDA.

In both cases such regulations are only authorised by the Act where the inconsistency is necessary for the safety of air navigation.

**Part 2** of the Schedule validates any existing regulations that may previously have been invalid due to inconsistency with the DDA or the SDA, provided that they would have been valid if the amendment made by **Item 1** had always been in place.

**Item 3** of the Schedule retrospectively validates regulations that would have been invalid because of inconsistency with the DDA or the SDA but could validly be made after the commencement of the Bill. It does this by declaring rights and liabilities to be, and to have been, the same as if the amendment made by **Item 1** had been in place when such regulations commenced.

**Item 3(3)** of the Schedule provides that the retrospective validation of regulations does not affect rights and liabilities of parties to a proceeding heard and finally determined by a court before the commencement of the Schedule.

**Item 4** of the Schedule provides that regulations made before the commencement of the Bill that would, at the time they were made, have been invalid because of inconsistency with the DDA or the SDA, operate as valid regulations after the commencement of the Bill if the regulations would have been valid if the amendment made by **Item 1** had been in place when they commenced.

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## Concluding Comments

### Discriminatory effect

The Bill will allow regulations to be made which permit conduct which would otherwise constitute a breach of the DDA or the SDA. This is unlikely to constitute a breach of Australia's obligations under international conventions (other than in limited respects, such as the position of air traffic controllers) given that the aim of the regulations is air safety.

The Bill could also be seen as a weakening of Australia's commitment to non-discrimination on the basis of disability or sex. However, it can be argued that the discrimination that will be permitted in this case is necessary and proportionate to the need to ensure the safety of those utilising civil aviation.

### Retrospectivity

The Bill validates existing regulations both in relation to the past operation of such regulations and in relation to their future operation. Validation of the future operation of the regulations may be seen as essentially a convenient mechanism to avoid the need to remake regulations that may have been invalid but could, after the passage of the Bill, be validly made. However, retrospective validation of the regulations may affect the rights of any person who may currently argue that those regulations were invalid because of inconsistency with the DDA or the SDA. It is not clear why retrospective validation is considered to be necessary, or how many people's rights may be affected.

Subitem 3(3) of the Schedule provides that the retrospective validation of existing regulations does not affect rights and liabilities to parties to a proceeding that has been finally determined by a court. It is not clear why these rights and liabilities are preserved but those arising where proceedings before a court have been instituted but not yet finally determined, or those involving a decision of a body other than a court,<sup>20</sup> are not preserved.

## Endnotes

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1 The Chicago Convention is defined in section 4 of the CAA as follows:

*Chicago Convention* means:

- (a) the Convention on International Civil Aviation done at Chicago on 7 December 1944, whose English text is set out in Schedule 1 to the *Air Navigation Act 1920*; (b) the Protocols amending that Convention, being the Protocols referred to in subsection 3A(2) of that Act,

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whose English texts are set out in Schedules to that Act; and (c) the Annexes to that Convention relating to international standards and recommended practices, being Annexes adopted in accordance with that Convention.

- 2 D. Pearce and S. Argument *Delegated Legislation in Australia*, Butterworths, Sydney, 1999, pp. 198, 208.
- 3 For example, section 19(2) of the DDA allows a body that has power to confer a qualification in relation to an occupation to discriminate on the grounds of a person's disability if the disability is such that the person would not be able to carry out the inherent requirements of the occupation.
- 4 See for example the submission from Civil Air, the Association representing air traffic controllers: [http://www.hreoc.gov.au/disability\\_rights/exemptions/casa/subs/civilair.doc](http://www.hreoc.gov.au/disability_rights/exemptions/casa/subs/civilair.doc) (site visited 17 May 2004).
- 5 Civil Aviation Regulation 5.04 prohibits a person from performing flight crew duties unless the person holds an appropriate current medical certificate. Such certificates are issued under Part 67 of the Civil Aviation Safety Regulations, and Regulation 67.235 provides that a certificate held by a pregnant woman is, in general, taken to be suspended immediately after the 30<sup>th</sup> week of gestation.
- 6 Notice of HREOC exemption decision re: Civil Aviation Safety Authority  
[http://www.hreoc.gov.au/disability\\_rights/exemptions/casa/casadec.htm](http://www.hreoc.gov.au/disability_rights/exemptions/casa/casadec.htm), (site visited 26 May 2004).
- 7 op. cit., n. 4.
- 8 ibid.
- 9 <http://www.iasl.mcgill.ca/airlaw/public/chicago/chicago1944a.pdf>, (site visited 26 May 2004).
- 10 Letter from Peter Ilyk, General Counsel CASA to HREOC dated 29 July 2002,  
[http://www.google.com.au/search?q=cache:QLar3Lds2vkJ:www.hreoc.gov.au/disability\\_rights/exemptions/casa/Letter-Ilyk%2520to%2520HREOC.doc+civil+aviation+safety+exemption+ilyk&hl=en](http://www.google.com.au/search?q=cache:QLar3Lds2vkJ:www.hreoc.gov.au/disability_rights/exemptions/casa/Letter-Ilyk%2520to%2520HREOC.doc+civil+aviation+safety+exemption+ilyk&hl=en), (site visited 17 May 2004).
- 11 <http://www.unhchr.ch/html/menu3/b/e1cedaw.htm>, (site visited 26 May 2004).
- 12 ibid., Article 11.
- 13 ibid.
- 14 See, for example, W. McKean, *Equality and Discrimination under International Law*, Oxford University Press, 1983, pp.260-263.
- 15 *Sex Discrimination Act 1984* paragraph 3(a).
- 16 [http://www.unhchr.ch/html/menu3/b/d\\_ilo111.htm](http://www.unhchr.ch/html/menu3/b/d_ilo111.htm), (site visited 26 May 2004).
- 17 [http://www.unhchr.ch/html/menu3/b/a\\_ccpr.htm](http://www.unhchr.ch/html/menu3/b/a_ccpr.htm), (site visited 26 May 2004).

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18 [http://www.unhchr.ch/html/menu3/b/a\\_ceschr.htm](http://www.unhchr.ch/html/menu3/b/a_ceschr.htm), (site visited 26 May 2004).

19 *ibid.*, article 1.

20 For instance, rights and liabilities relating to a decision by HREOC would not be preserved.

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