

CHAPTER 2

BACKGROUND TO THE BILL

2.1 This chapter briefly outlines the background to the proposed amendments and the main provisions of the Bill.

Background

2.2 The Civil Aviation Amendment (Relationship with Anti-discrimination Legislation) Bill 2004 seeks to amend Section 98 of the *Civil Aviation Act 1988* to allow the Governor-General to make regulations that may be inconsistent with current Commonwealth anti-discrimination laws, provided the inconsistency is necessary for aviation safety. It also seeks to validate past actions under existing regulations and aviation safety standards that may have appeared to be inconsistent with current anti-discrimination laws.

2.3 In her Second Reading Speech, Mrs De-Anne Kelly stated that the introduction of the Bill was a direct result of the review of civil aviation regulations currently being undertaken by the Civil Aviation Safety Authority (CASA). The purpose of CASA's review is to:

... harmonise where possible Australia's aviation safety regulations with international standards and make them simpler and easier to use and understand.¹

2.4 As a member state of the International Civil Aviation Organisation (ICAO), Australia is obliged to implement ICAO standards in its aviation regulations.

2.5 Some of the procedures that Australia has already implemented in complying with the ICAO standards may appear to be inconsistent with the *Sex Discrimination Act 1984* or the *Disability Discrimination Act 1992*. However they have been developed for the sole purpose of aviation safety.

2.6 The proposed amendment aims to remove the uncertainty currently existing in relation to any such actions or procedures, carried out in accordance with safety standards and regulations, which may appear to be inconsistent with either the *Sex Discrimination Act 1984* or the *Disability Discrimination Act 1992*.

2.7 The Explanatory Memorandum notes that 'any regulations having the potential to be inconsistent with Commonwealth anti-discrimination legislation will be subject to

1 Second Reading Speech, Civil Aviation Amendment (Relationship with Anti-Discrimination Legislation) Bill 2004, *House Hansard*, 11 March 2004, p. 26571.

clearance by the Human Rights Branch of the Attorney General's Department and will undergo comprehensive consultation procedures and parliamentary scrutiny.²

2.8 Mrs Kelly also stated that 'the Bill itself will have no discriminatory effect.' She went on to say:

Although the Government acknowledges that these amendments will allow inconsistency between aviation regulations and anti-discrimination legislation, ... any such regulations will not be unnecessarily restrictive or discriminatory, especially when viewed in the context of the Government's obligation to protect the safety of flight crew, fare-paying passengers, other aircraft and people on the ground.³

2.9 The purpose of this inquiry is to ensure there is appropriate consultation with industry and community experts, and also to ascertain whether sufficient mechanisms already exist within current legislation to cover these inconsistencies.

Impact on passengers

2.10 An example of apparent inconsistencies with anti-discrimination legislation is the now-routine practice for airline staff to question passengers seated in exit rows as to whether they are willing and able to assist staff in an emergency situation.

2.11 In her second reading speech, Mrs De-Anne Kelly stated that:

People sitting next to aircraft emergency exits should not be suffering under any disability which would render them incapable of opening the exit hatch in an emergency.⁴

Impact on airlines and flight crew

2.12 Airline staff should be free to ask passengers, who are unable to assist in an emergency situation, to move from the exit rows, without fear of contravening any of Australia's anti-discrimination legislation.

2.13 Ms Alison McKenzie, from Qantas Airways, gave evidence that:

The requirement for exit row seating does not apply only to disabled passengers but to anyone that cannot get up and open the exit row door or who will obstruct the evacuation of the aircraft. It applies to elderly passengers and to anyone who is incapacitated at that time... When we are

² Explanatory Memorandum, Civil Aviation Amendment (Relationship with Anti-Discrimination Legislation) Bill 2004

³ Second Reading Speech, Civil Aviation Amendment (Relationship with Anti-Discrimination Legislation) Bill 2004, *House Hansard*, 11 March 2004, p. 26571.

⁴ *ibid.*

imposing that requirement, we are... complying with our obligations under the Civil Aviation Act and the civil aviation regulations.⁵

2.14 There may be the need for regulations relating to the medical fitness of flight crew or air traffic controllers, apart from those for which an exemption was granted by the Human Rights and Equal Opportunity Commissioner (HREOC) in November 2002, which may be inconsistent with the *Sex Discrimination Act 1984*.

2.15 The representative from the Department of Transport and Regional Services (DoTARS) gave evidence of the type of regulations that might be required:

The sorts of regulations that are currently in place and may be changed in the future ... relate to the circumstances in which someone can be cleared medically to fly an aircraft; the circumstances in which someone meets the medical or other standards to operate in the cabin of an aircraft; ...⁶

2.16 In a limited number of cases, it may be impossible to modify some aircraft (for example smaller aircraft) in order to provide unassisted access for some disabled people, due to the onerous design standards with which aircraft must comply. This inability to modify such aircraft could be perceived as discrimination against disabled people.

2.17 In her second reading speech, Mrs Kelly explained:

Aircraft must conform to onerous design standards which may, in a limited number of cases, render them incapable of being modified to provide unassisted access for some disabled persons. These types of provisions are important for aviation safety, and should not be construed as being unlawfully discriminatory.⁷

2.18 There may be other examples of inconsistencies, as yet unforeseen, which could arise in the future. As the DoTARS representative stated at the hearing:

There can be no set of standards sufficiently prescriptive to deal with all cases.⁸

5 *Committee Hansard* , 16 June 2004, p. 10.

6 *ibid*, p. 24.

7 Second Reading Speech, Civil Aviation Amendment (Relationship with Anti-Discrimination Legislation) Bill 2004, *House Hansard*, 11 March 2004, p. 26571.

8 *Committee Hansard* , 16 June 2004, DoTARS, p. 28.

Mechanisms in existing legislation

2.19 There are mechanisms within the *Disability Discrimination Act 1992* and the *Sex Discrimination Act 1984* that may already provide means to allow these apparent inconsistencies. These are listed and explained below:

Provisions of the *Disability Discrimination Act 1992*

2.20 There are a number of provisions within the *Disability Discrimination Act 1992* (DDA) that allow lawful discrimination in certain circumstances.

Section 11: Unjustifiable hardship

2.21 This section defines what constitutes unjustifiable hardship when determining whether, in the circumstances, discrimination may be lawful.

2.22 Unjustifiable hardship is used as a reason to claim that the discrimination is lawful in the circumstances. For example, subsection 15(4) states that it is not unlawful for an employer to discriminate against a person on the grounds of a person's disability if providing services or facilities to accommodate that person's disability would 'impose an unjustifiable hardship on the employer.'⁹ This is also the case in subsection 24(2), where it states that

This section does not make it unlawful to discriminate if the provision of the goods or services would impose unjustifiable hardship on the person who provides the goods or services ...¹⁰

Section 15: Discrimination in employment

2.23 This section has an 'inherent requirements' provision that allows disability discrimination in employment. Section 15(4) states that:

Neither paragraph (1)(b) nor (2)(c) renders unlawful discrimination by an employer against a person on the ground of the person's disability, if ... the person because of his or her disability:

(a) would be unable to carry out the inherent requirements of the particular employment;¹¹

2.24 This equates to allowing an employer to effectively discriminate against a disabled person if that person's disability does not allow them to perform the 'inherent requirements' of that particular role.

9 *Disability Discrimination Act 1992*, paragraph 15(4)(b).

10 subsection 24(2).

11 subsection 15(4)(a).

Section 47: Acts done under a statutory authority

2.25 Subsection 47(2) states that:

This part does not render unlawful anything done by a person in direct compliance with a prescribed law.¹²

2.26 The definition of 'law' given in subsection 47(5) includes a law of the Commonwealth or any state or territory, or any regulations or any other instruments made under the law. This could include any action performed under the Civil Aviation Act 1988 or any of its regulations.

Section 48: Infectious Diseases

2.27 Section 48(b) states that:

This part does not render it unlawful for a person to discriminate against another person on the ground of the other person's disability if:

(b) the discrimination is reasonably necessary to protect public health.

2.28 It could be argued that actions performed pursuant to the *Civil Aviation Act 1988* or its regulations, which are necessary for air navigation safety, would also be performed in the interests of protecting public health.

Section 55: Commission may grant exemptions

2.29 This is probably the mechanism most useful in providing a way to allow unlawful discrimination 'for the air navigation safety'. Any organisation or person can apply to HREOC to be granted an exemption from the operation of the DDA.

2.30 The disadvantage claimed by those in favour of the Bill¹³ is that these exemptions are granted temporarily, applying for a maximum of five years, with the intention that the person or organisation will utilise that period of time to comply with the DDA. They are also specifically tailored to meet the requirement of the situation to be exempted.

2.31 The exemption process necessarily includes close scrutiny of the sought exemption, and the seeking of the opinions of those it would directly affect. Those who support the Bill say that it provides an efficient and permanent resolution to past and future inconsistencies between the anti-discrimination legislation and the *Civil Aviation Act 1988*, while the exemption process would necessitate continually applying, reviewing and re-applying for exemptions.

12 *ibid*, section 47 (2)

13 See for example *Submission 12*, Qantas Airways, p. 2; *Submission 5*, Department of Transport and Regional Services (DoTARS), p.1.

Provisions of the *Sex Discrimination Act 1984*

Section 7B: Indirect discrimination - reasonableness test

2.32 This section of the *Sex Discrimination Act 1984* (SDA) allows lawful discrimination under the Act if the practice is considered to be 'reasonable in the circumstances.'

Section 40: Acts done under statutory authority

2.33 This section is similar to section 47 of the DDA. It states that:

- (1) Nothing in Division 1 or 2 affects anything done by a person in direct compliance with:
 - (c) a determination or decision of the Commission;
 - (d) an order of a court;¹⁴

2.34 However, notably missing from the SDA is the 'prescribed law' inclusion in this section. Consequently, section 40(1) of the SDA is not as useful to respondents to claims of discrimination, as comparable section 47 of the DDA.

Section 44: Commission may grant exemptions

2.35 This section is similar to section 55 of the DDA. Any organisation or person can apply to the HREOC to be granted an exemption from the operation of the SDA.

2.36 It has limitations identical to those in the DDA, whereby each exemption is specifically tailored to meet a given discrimination circumstance; each application undergoes an approval process involving consultation with affected persons and stakeholders. Again, exemptions granted by HREOC under the SDA are for a specified period, not exceeding five years.

14 *Sex Discrimination Act 1984*, subsection 40(1).