CHAPTER 3

Key Issues

3.1 The Committee received submissions and evidence both in support and in opposition to the Bill. Some submissions agreed with the objective of the Bill but were not satisfied that amending the *Civil Aviation Act 1988* was the most effective and efficient method of achieving it.

3.2 This chapter discusses the issues raised in submissions and evidence given during the public hearing in relation to the provisions of the Bill. Issues raised include:

- Terminology;
- Retrospectivity;
- Appropriateness of the Bill;
- Removal of right to make a complaint; and
- The 'clearance' process.

Key issues

Terminology

3.3 Several submissions[1] raised the issue that certain words used in the provisions of the Bill were not sufficiently clear for the purposes of determining what was unlawful discrimination.

3.4 Proposed subsections 96(6A) and 96(6B) of the Bill provide that regulations under the *Civil Aviation Act 1988* may contain provisions regarding medical standards that are inconsistent with the SDA or provisions that are inconsistent with the DDA, if the inconsistency is "necessary for the safety of air navigation". The use of the term "necessary" in this context was questioned by HREOC, People with Disabilities and by the Griffith Law School.[2]

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1 See, for example, *Submission 3*, Human Rights and Equal Opportunity Commission, (HREOC) p.2; *Submission 6*, Griffith Law School, p. 1; *Submission 12*, Qantas, p. 3.

2 *Submission 3*, Human Rights and Equal Opportunity Commission, (HREOC) p.2; *Submission 6*, Griffith Law School, p. 1; and *Submission 12*, Qantas, p. 3.

3.5 HREOC commented that, 'What is meant by "necessary" in this context is open to conjecture'[3], and HREOC posed the question of what a court might ultimately find to be "necessary".[4]

3.6 HREOC expanded on this during its evidence at the public hearing, saying that one of its concerns is 'that it is not clear by what mechanism necessity is to be appropriately assessed.'[5] Mr David Mason from HREOC added that:

> Given that the aim [of the Bill] is the pursuit of certainty, if it is still possible for someone … to be challenging whether the particular regulatory measure was necessary, there is no real ascertainable standard that we can see for that exercise. And we would prefer, … to see more upfront processes. [6]

3.7 The Griffith Law School stated that both the words 'necessary' and 'safety', in the above context, were not sufficiently defined, adding that they were 'contestable concepts' that could 'give rise to uncertainty and litigation'[7] if more specific terms were not substituted.

3.8 People with Disability was also concerned about the term 'necessary for the safety of air navigation', stating that it:

> … may permit unnecessary and unreasonable discrimination … well beyond the specific discriminatory measure(s) that may genuinely be required to assure aviation safety. Whether this will ultimately be the case depends on the specific meaning given to the terms … in the regulations to be made.[8]

3.9 A submission by the Human Rights Committee within the Law Society of New South Wales considered that:

> given the paramount importance of making legislation as consistent with anti-discrimination legislation as possible, … the term "necessary for the safety of air navigation" ought to be read as narrowly as possible.'[9]

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3 *Submission 3*, HREOC, p.2.

4 *Submission 3*, HREOC, p.2.

5 *Committee Hansard*, 16 June 2004, Mr David Mason, p. 3.

6 ibid.

7 *Submission 6*, Griffith Law School, p. 1.

8 *Submission 13*, People with Disability, p. 3.

9 *Submission 1*, The Law Society of New South Wales, p.1.

3.10 Although Qantas did not discuss the words 'necessary' or 'safety' they did question the use of the word 'navigation' in the context of 'air navigation safety'[10].

3.11 In its submission, Qantas discussed the problems they have encountered in defence of passenger complaints of discrimination. It believes that the word 'navigation' should be changed in the Bill to 'transport', which would be inclusive of issues relating to the carriage of passengers and of aircraft design. It pointed out that the word 'navigation' would provide 'opportunity for further argument' as to whether the 'issues were relevant only to the navigation of the aircraft'[11]. Qantas proposed that changing to the word 'transport' would alleviate possible additional court time and costs that would result from trying to determine the meaning of 'navigation' safety.

3.12 Commenting on this during the hearing, Ms Alison McKenzie of Qantas said that:

> To me, air navigation is what occurs in the cockpit of an aircraft and arguably … this bill does not extend that far. … If there is a better way of phrasing it, making it clearer that it relates to flight or to some other way, we [Qantas] would support that. … It could be narrowed somehow to apply to airlines, but I think air navigation is quite specific from a regulatory perspective. [12]

3.13 However, in the hearing, DoTARS explained that the term 'navigation' is used throughout the *Civil Aviation Act 1988* and that '[i]t has a long history and certainly is one we would prefer to stick with.'[13] The department representatives went on the explain that:

> … the term 'safety of air navigation' is also used throughout the Civil Aviation Act and regulations, so to move to using 'air transport' would be inconsistent with the terminology that has flowed down from the [Chicago] convention into the Civil Aviation Act as well.[14]

Committee View

3.14 The Committee is satisfied that the terminology within the Bill is sufficiently clear and that the use of the term 'navigation' is consistent with the Bill's objective of allowing Australia to comply with its international obligations to meet safety standards and practices set by the ICAO.

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10 *Submission 12*, Qantas, p. 3.

11 ibid.

12 *Committee Hansard*, 16 June 2004, Ms McKenzie, pp. 14 & 15.

13 *Committee Hansard*, 16 June 2004, DoTARS, p. 22.

14 ibid.

Retrospectivity

3.15 The Griffith Law School criticised the retrospective nature of the Bill and argued against granting the Executive the power to 'exempt the operation of … human rights legislation without further scrutiny by the Parliament.'[15]

3.16 The Victorian Bar was strongly opposed to the retrospective nature of the Bill, stating that 'it is objectionable in principle'[16]. Its submission was restricted to such an in-principle objection and they requested that Schedule 1, Part 2, Item 3 (which contains the retrospective provisions of the Bill) should be deleted from the Bill.

3.17 Qantas was the sole submission that openly supported the retrospective provisions of the Bill, pointing out the existence of current conflicts or inconsistencies between the *Civil Aviation Safety Regulations 1998*, and anti-discrimination legislation.[17] They commented that, 'to the extent that such regulations are invalid, [due to the conflict] Qantas supports the retrospective validation of such regulations.'[18]

3.18 The Committee asked DoTaRS to explain why the retrospective effect of the Bill was necessary. In a supplementary submission to the Committee it explained:

> The effect of the retrospective provisions would be to ensure that the existing regulations operate and are valid in line with previous understandings. No-one will find themselves in a worse position than they were in under the law as previously administered and understood.
>
> Failure to make the rights, duties and obligations of persons the same whether an alleged act of discrimination occurred before or after the commencement of the Bill would leave the regulations which are to be validated by the Bill vulnerable to legal challenge. While the regulations would, under clause 4 of Part 2 of the schedule to the Bill, be validated from the date of commencement of the Bill, any prior invalidity would lead to uncertainty about the lawfulness of actions taken by persons in reliance upon those regulations prior to commencement. Thus, the decisions of medical examiners or airlines taken in good faith in reliance upon the validity of the air safety regulations prior to commencement would be thrown into doubt. Much of the utility of the Bill would thereby be defeated.[19]

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15 *Submission 6,* Griffith Law School, p. 3.

16 *Submission 7,* The Victorian Bar, p. 2.

17 *Submission 12*, Qantas, p. 2.

18 *Ibid,* p. 1.

19 *Submission 5A*, Department of Transport and Regional Services, p.4.

3.19 DoTaRS were further asked to detail how many people's rights may be affected by such retrospective validation. It explained:

> Neither the Department, CASA nor the Attorney-General's Department are aware of any people whose ability to claim invalidity of the relevant air safety regulations would be affected.[20]

Committee View

3.20 Whilst legislation that operates retrospectively is always a matter of concern, the Committee appreciates that as the exemption process granted by HREOC is unable to operate retrospectively, in the interest of certainty for parties seeking to comply with air safety regulations (that may conflict with anti-discrimination laws), there is a need for such operation.

Appropriateness of Bill

3.21 Several submissions, including some that supported the objective of the Bill, did not believe that the Bill was the most appropriate means to meet that objective.[21]

3.22 HREOC commented that the clear intention of the Bill is to ensure that 'civil aviation regulations should deal conclusively with relevant rights and responsibilities rather than be open to question through the SDA and DDA.'[22] However it went on to say that:

> There may … remain some doubt whether these amendments and making of regulations pursuant to them would be sufficient to remove the possibility that persons acting pursuant to such regulations could nonetheless remain subject to liability under the SDA or DDA.[23]

3.23 A representative from HREOC expanded on this during his evidence at the public hearing:

> … we are not convinced that this bill by itself achieves its stated objectives, … there is a need for clarification of the effect … of regulations … all this bill does is say, 'Okay, the regulations are valid for the purposes of the civil aviation regime.'[24]

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20 *Submission 5A*, Department of Transport and Regional Services, p.4.

21 See for example, *Submission 3*, HREOC, pp. 1-3; *Submission 8*, WA Equal Opportunity Commission, p. 2; *Submission 9*, National Association of Community Legal Centres Disability Rights Network, pp. 2-3.

22 *Submission 3*, HREOC, p.4.

23 *Submission 3*, HREOC, p.4.

24 *Committee Hansard*, 16 June 2004, Mr David Mason, p. 5.

3.24 He went on to cast doubt as to the effectiveness of the retrospective nature of the regulations.

> … we would question whether this bill actually validates past actions … It may well succeed in validating the regulations for the purpose of their existence under the civil aviation regime. We do not think that it necessarily validates discriminatory actions in terms of immunising them from potential liability under the anti-discrimination regime.[25]

3.25 He suggested that, consequently, it could be argued that persons acting pursuant to any new regulations may still be answerable to a discrimination claim and that this would therefore defeat the purpose of the Bill.[26]

3.26 In its submission, HREOC added that they were not arguing against proceeding with the Bill, but it was suggesting that:

> … further consideration of measures to ensure an appropriate relationship between anti-discrimination and civil aviation safety laws may be required.[27]

3.27 HREOC's submission noted that they had granted an exemption in November 2002 to persons acting in accordance with Civil Aviation Regulations regarding medical fitness, and that these exemptions were granted for the same reasons as this current Bill:

> …to ensure that the SDA and DDA operate with due regard for the necessity of ensuring aviation safety.[28]

3.28 The Griffith Law School was strongly opposed to the Bill. One of its concerns was the fact that:

> … it does not attempt to isolate the particular troubling aviation safety standards and make an actual assessment of whether they conflict with anti-discrimination statutes.[29]

3.29 In its submission, People with Disability agreed with this sentiment, stating:

> There is very little indication in the Bill or its supporting materials about specific 'mischief' sought to be remedied.[30]

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25 ibid, p. 9.

26 Ibid

27 *Submission 3*, HREOC, p.4.

28 ibid, p.4.

29 *Submission 6*, Griffith Law School, pp. 1-2.

Regulation-making power not the solution

3.30 The Griffith Law School submission commented that rather than adopt 'such a broad-brushed legislative approach'[31], the change should be effected through an amendment to the anti-discrimination legislation, rather than 'through the "back door" of regulations.'[32] It claimed that 'the question of whether there was actual inconsistency [with anti-discrimination legislation] ought to have been tested in court before … a … legislative approach is adopted.'[33]

3.31 In giving evidence at the public hearing, Professor Rosemary Hunter from Griffith University Law School agreed with HROEC's doubts that the making of regulations would remove any uncertainty that might exist, stating that:

> … regulations could also be equally open to challenge … words that are used in the proposed legislation allowing regulations … are entirely contestable concepts and therefore … would be equally open to litigation and challenge as would the current situation.[34]

3.32 Although it addressed only the DDA, the Law Institute Victoria (LIV) repeatedly stated that granting regulation-making power was an inappropriate solution:

> This submission does not support the view that there is a necessity to provide the Governor-General with a blanket authority to effectively legislate exemptions from the DDA.[35]
>
> … the DDA has adequate provisions that accommodate the interests of the air navigation industry.[36]
>
> … there is no necessity to empower the Governor-General to enact regulations … as there is proper scope for exclusion … in the DDA[37].

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30 *Submission 13*, People with Disability, p. 2.

31 *Submission 6*, Griffith Law School, p. 2.

32 *Ibid*, p. 3.

33 *Ibid*, p. 2.

34 *Committee Hansard*, 16 June 2004, Griffith Law School, p. 19.

35 *Submission 10*, Law Institute Victoria, p.1.

36 Ibid, p.2.

37 *Ibid*, p.3.

3.33 Professor Hunter also claimed that the Bill takes an unnecessarily broad approach to resolving limited scenarios of potential conflict. Her colleague, Ms Megan Dixon, agreed strongly on this point, stating that:

> As a matter of public policy, … blanket exemptions … are a dangerous mechanism for addressing the balancing exercise between people's rights and the safety concerns of industry. An … argument that it is simply more efficient to enact a blanket safety exemption … would defeat the purpose of such protections [the anti-discrimination legislations] ...[38]

3.34 Professor Hunter added that :

> … the conflict needs to be worked out in a context where both sets of concerns are given equal weight and equal consideration.[39]

3.35 HREOC concluded in its submission that a further exemption application, or the use of current provisions under the existing legislation, could be an alternative to the granting of regulation-making powers.[40]

3.36 The National Association of Community Legal Centres, Disability Rights Network concurred, saying it believed the regulation-making provisions were 'heavy-handed and inappropriate'. It continued:

> If a regulation making power that solely rests on the governor-general is allowed, it poses a danger that fundamental rights maybe sidestepped without recourse.[41]

3.37 It stated their preference for the granting of additional exemptions:

> With the benefit of consultation, any decision to grant an exemption has a better chance of accommodating the balance between air safety and the rights of vulnerable individuals compared with any regulation intended to achieve the same exemption. … A proposed blanket authority of regulation is clearly unnecessary when the needs of civil aviation stakeholders are already accommodated by HREOC powers of exemption.[42]

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38 *Committee Hansard*, 16 June 2004, Ms Megan Dixon, p. 20.

39 ibid, p. 21.

40 *Submission 3*, HREOC, p.4-5.

41 *Submission 9*, National Association of Community Legal Centres, Disability Rights Network, p. 3.

42 *Submission 9*, National Association of Community Legal Centres, Disability Rights Network, p. 4.

3.38 In a supplementary submission to the Committee, DoTARS addressed the issue of why it was preferable to amend the *Civil Aviation Act 1988*, as opposed to seeking extended or wider exemptions from HREOC:

> The decision to amend the Civil Aviation Act 1988 to ensure the validity of all air safety regulations which may be inconsistent with the SDA and the DDA, as opposed to seeking extended or wider exemptions from HREOC under those Acts, was a decision made in consultation with HREOC and was recommended by AGD.
>
> The Attorney-General's Department have advised the Department that there is no capacity under either the SDA or the DDA to seek permanent exemption, as the provisions of these Acts allow exemptions to be made for a maximum of five years. The policy underlying exemptions is that they enable the exempt organisation to bring itself into compliance with the relevant legislation over a period of time, or to maintain the status quo while the legislation is amended. Exemptions do not operate to validate otherwise inconsistent legislation.[43]

DDA already has sufficient mechanisms

3.39 LIV cites several examples of sections within the DDA that provide for lawful discrimination[44]. They also referred to case law, and gave the example of *McLean vs Airlines of Tasmania*, where it was determined that it was lawful discrimination, under the DDA, to not allow the plaintiff, who suffered from cerebral palsy, to travel unaccompanied on an airline[45].

3.40 Mr Mason from HREOC commented that:

> On the need to amend the DDA itself, we would say there are a number of mechanisms already provided within the act without the need to go to parliament for amendments to the DDA …by … the provision for … temporary exemptions and … the prescribed laws provision.[46]

3.41 Professor Hunter gave evidence along similar lines, saying that:

> We actually argue that there is unlikely to be any inconsistency between the Disability Discrimination Act … and the civil aviation regulations or safety provisions, because there are already exemptions within the disability

43 *Submission 5A*, Department of Transport and Regional Services, p.2.

44 *Submission 10*, Law Institute Victoria, pp. 2 - 3.

45 ibid, pp. 1- 5.

46 *Committee Hansard*, 16 June 2004, Mr Mason, p. 5.

> discrimination legislation that would enable airlines to discriminate lawfully in circumstances where that might be necessary.[47]

3.42 In its submission, People with Disability concurred with Professor Hunter's opinion, also citing the following sections of the DDA that they believe already provide adequate mechanisms: subsections 47(2) and (5), section 57, subsection 15(4), and section 11.[48]

3.43 LIV also commented that 'the needs of civil aviation stakeholders are already accommodated by the availability of a HREOC exemption'.[49] LIV stated its preference for an exemption application due to the fact that this would involve a consultation process, which 'ensures that a better balance is achieved between air safety and the rights of vulnerable individuals'. As an exemption is capable of being tailored, it 'offers the distinct advantage of restricted scope.'[50]

3.44 The National Association of Community Legal Centres' Disability Rights Network contained very similar wording to the LIV submission, reiterating LIV's concerns.[51]

3.45 The WA Equal Opportunity Commission, although not as strong in its criticism for the proposed regulation-making powers, stated its preference was that:

> … such significant changes to the law should be scrutinised by Parliament directly, by way of proposed amendments to the DDA and the SDA respectively.[52]

Does the Bill go far enough?

3.46 Qantas, although strongly in support of the Bill, believed that the Bill did not go far enough in effecting the changes required to remove the inconsistencies and ensuring air navigation safety. Qantas believed that the Bill 'only takes the first step'. It submitted that the second step would be:

> … to ensure that direct compliance with the Civil Aviation Legislation was an exemption to the general provisions prohibiting discrimination on the ground of disability and sex.[53]

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47 *Committee Hansard*, 16 June 2004, Professor Hunter, p. 19.

48 *Submission 13*, People with Disabilities, pp. 1 & 2.

49 *Submission 10*, Law Institute Victoria, p. [4].

50 ibid.

51 *Submission 9*, National Association of Community Legal Centres' Disability Rights Network.

52 *Submission 8*, WA Equal Opportunity Commission, p. 2.

3.47 At the hearing, Ms McKenzie added that :

> … if safety is paramount, then in those limited occasions the civil aviation regulations should be able to take precedence without resort to extended argument, …[54]

3.48 When questioned regarding this concern during the hearing, Qantas admitted that it had not sought consultation with HREOC to address their issues, despite the fact that at least one issue (the exit row issue) had existed for approximately 15 years.[55]

3.49 Commenting on the difficulty of defending claims of discrimination by passengers, Qantas noted particular difficulty with the DDA, stating that 'compliance with the Civil Aviation Legislation does not provide Qantas with a clear defence to claims of disability discrimination.'[56]

3.50 Although section 47(2) of the DDA provides an exemption in relation to an act done in direct compliance with a 'prescribed law', Qantas believes that the Civil Aviation Safety Regulations, are not 'prescribed law' for the purposes of s. 47, leaving Qantas to rely on satisfying the 'unjustifiable hardship' defence.

3.51 Consequently, Qantas submitted that the *Civil Aviation Act 1988*, or at least the *Civil Aviation Regulations 1988* and the *Civil Aviation Regulations 1998,* should be included as "prescribed law" for the purposes of section 47 of the DDA and the DDA Regulations.[57]

3.52 In addition, Qantas highlighted the fact that the SDA has no comparable exemption as that which is allowed under section 47 of the DDA; similarly, there is no 'unjustifiable hardship' defence available.[58]

> Qantas submits that a similar exemption should be included in the SDA in order to allow direct compliance with the Civil Aviation Legislation.[59]

3.53 HREOC confirmed this in its submission:

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53 *Submission 12*, Qantas, p. 2.

54 *Committee Hansard* , June 16 2004, p. 13

55 ibid.

56 *Submission 12*, Qantas, p. 2.

57 ibid.

58 ibid, p. 3.

59 ibid.

> The SDA does not contain a "prescribed laws" provision; nor does it have an explicit inherent requirements limitation or an unjustifiable hardship defence in relation to pregnancy discrimination.[60]

Committee View

3.54 The Committee notes the arguments of opponents of the Bill, that a regulation making power is not appropriate as there is the availability of exemptions, and relevant provisions of the SDA and DDA to allow discrimination in limited circumstances.

3.55 The Committee also notes the views of Qantas, that the Bill does not go far enough, and that (amongst other things) there needs to be an 'unjustifiable hardship' provision in the SDA. The Committee, however, does not agree with the suggestions proposed by Qantas. The Committee does not believe that the *Civil Aviation Act 1988* or Civil Aviation Regulations should be included as "prescribed law" for the purposes of the DDA. Furthermore, the Committee does not believe that there needs to be an "unjustifiable hardship" provision added to the SDA.

3.56 The Committee recognises the need for certainty for those seeking to comply with aviation safety regulations, and notes the argument of the DoTARS, that exemptions from HREOC are limited to a maximum of five years, and are not intended to validate otherwise inconsistent legislation.

3.57 The Committee notes the concerns expressed in submissions, that granting a regulation making power will enable "blanket" exemptions. However the Committee notes that as regulations, the provisions made under the Bill will be disallowable, and that DoTaRS has undertaken to engage in its usual consultation process when preparing such provisions.

Removal of the right to make a complaint

3.58 Several submissions were concerned that allowing regulations to be made effectively prevented people who felt aggrieved the avenue to have their complaint investigated.

3.59 The National Association of Community Legal Centres Disability Rights Network stated this repeatedly in its submission, saying that the Bill will displace 'necessary safeguards against human rights abuse.'[61]

> If a regulation-making power … is allowed, it poses a danger that fundamental rights maybe sidestepped without recourse.[62]

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60 *Submission 3*, HREOC, p. 1.

61 *Submission 9*, National Association of Community Legal Centres, Disability Rights Network, p. 7.

3.60 LIV added that:

> Further the DDA provides a process for complaining about an unfair exercise of exclusion, something unlikely where there has been indiscriminate application of a regulation.[63]

3.61 The WA Equal Opportunity Commissioner expressed concern over this issue, stating that:

> I value highly the right … that a person aggrieved by an act of discrimination can lodge a complaint … and have that complaint investigated, and, if necessary, determined by a court or tribunal. … In this way, the substance of the complaint and the conduct of the respondent can be examined in a fair and balanced manner, under the guidance of the relevant statute.[64]
>
> …with regulations of the kind the bill proposes, … conduct of civil air carriers … will no longer be subjected to the level of scrutiny that is currently possible under the DDA and SDA. … They are very likely to have the effect of diminishing the substantive rights of a significant and vulnerable section of the community[65]

3.62 The Commissioner added that she would ordinarily be opposed to such regulations, however was reassured by the fact that:

> … any proposed regulations potentially inconsistent with Commonwealth anti-discrimination law will be subject to clearance by the Human Rights Branch of the Attorney General's Department, and will undergo comprehensive consultation procedures and parliamentary scrutiny.[66]

3.63 Griffith Law School was also concerned at the possible erosion of human rights, stating that to allow the ability to make regulations 'gives the Executive power to exempt the operation of the substantive provisions of that human rights legislation without further scrutiny by the Parliament.'[67]

3.64 In direct contrast to these concerns, HREOC submitted that the purpose of the Bill was to ensure that any new regulations would 'deal conclusively with relevant

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62 ibid, p. 3.

63 *Submission 10*, Law Institute Victoria, p. 3.

64 *Submission 8*, WA Equal Opportunity Commission, p. 1.

65 ibid, p. 2.

66 ibid.

67 *Submission 6*, Griffith Law School, p. 3.

rights and responsibilities rather than these being open to question through the SDA and DDA.'[68] However HREOC believed that in reality there remained some doubt that this would be the case.

3.65 In evidence, HREOC explained that it believed even if the Bill was enacted, parties may still be able to make and possibly succeed in claims:

> [The Bill] may well succeed in validating the regulations for the purpose of their existence under the civil aviation regime. We do not think that it necessarily validates discriminatory actions in terms of immunising them from potential liability under the anti-discrimination regime.[69]

3.66 A representative from the Attorney General's Department helped to clarify the different interpretations of this issue. He stated that:

> … [the Bill] removed a ground of complaint to the validity of any regulations made … where the ground of complaint is inconsistency with the Sex Discrimination Act or the Disability Discrimination Act. Beyond that though it does not remove the capacity for a person who feels they have been discriminated against to bring their action to HREOC in the normal way.
>
> The text of the particular regulation might remove the prospects for a successful complaint, … but, … in respect of any particular actions taken or purported to be taken under the regulations …, they would still be amenable to complaint under the normal human rights and equal opportunity process.[70]

Committee View

3.67 The Committee notes the concerns, which were expressed by witnesses and within several submissions, that empowering the Governor-General to make regulations that may be inconsistent with existing anti-discrimination legislation would grant potentially wide-reaching exemptions to anti-discrimination legislation.

3.68 However, the Committee notes that the regulation making power is limited to provisions that are necessary for the safety of air navigation. This will involve the 'clearance process' discussed below, as well as proposed regulations being disallowable.

3.69 Furthermore, the Committee notes the comments of the Attorney-General's Department, that whilst regulations made under the Bill may reduce the prospects of a

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68 *Submission 3*, HREOC, p.p. 2-3.

69 *Committee Hansard* , 16 June 2004, p.8.

70 *Committee Hansard* , 16 June 2004, p.25.

successful complaint against actions taken under such regulations, there remains the ability to make complaints, and in such cases parties will be required to justify their actions under such regulations.

Opinions regarding the 'clearance' process

3.70 The Explanatory Memorandum notes:

> … regulations which may have the potential to be inconsistent with Commonwealth anti-discrimination legislation will be subject to clearance by the Human Rights Branch of the Attorney General's Department and will undergo comprehensive consultation procedures and parliamentary scrutiny.[71]

3.71 As noted above, the WA Equal Opportunity Commission was reassured by this undertaking. The Law Society of New South Wales also 'considered this was an important safeguard', and that 'any legislation inconsistent with Anti-Discrimination legislation ought to receive intense scrutiny.'[72]

3.72 The DoTARS submission also reaffirmed that this was an important feature of the Bill, stating that the 'extensive and well-established consultative procedures' would include passing 'through CASA's Standards Consultative Committee.'[73]

3.73 At the hearing, a DoTARS representative expanded on the current consultation process when drafting regulations. He explained that:

> … the key provisions , as in setting of medical standards and so on, are in the civil aviation regulations, which are made through an extensive consultative process. … I think there are about 10 steps that the Civil Aviation Authority goes through in establishing its regulatory standards.[74]

3.74 The Attorney General's Department reiterated this when they gave evidence that:

> … the consultation process that the Legislative Instruments Act puts in place would also bear upon any regulations made as well.[75]

3.75 However, both the LIV and the National Association of Community Legal Centres' Disability Rights Network doubted the rigour of this 'clearance' process

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71 Explanatory Memorandum, pp.1-2.

72 *Submission 1*, The Law Society of New South Wales, p. 1.

73 *Submission 5*, DoTARS, p. 4.

74 *Committee Hansard* , 16 June 2004, DoTARS, p. 24.

75 *Committee Hansard* , 16 June 2004, Attorney General's Department, p. 23.

would be sufficient to protect human rights. Both submissions used almost identical wording in their criticism of this process.

3.76 The LIV said that they believed that this 'clearance process' does not present an adequate or effective safeguard[76] and raised concerns as to the capacity of the Human Rights Branch of the Attorney General's Office to safeguard human rights of Australian citizens.[77]

3.77 The National Association of Community Legal Centres' Disability Rights Network added that:

> … in light of a number of decisions … casting aspersions on the proposed scrutiny by this branch. … it is troubling to note the apparent lack of legal advice from the point of view of human rights within the Attorney General's Department. … the seeming insensitivity to human rights within Government bodies bodes ill for the scrutiny of any regulations … by the Human Rights branch. … it is doubtful whether proposed air safety regulations will be subject to requisite rigorous scrutiny by this branch in a poor substitute for the HREOC.[78]

3.78 People with Disability submitted that:

> We lack the confidence that these clearance and consultation commitments will be honoured in the absence of a specific legislative duty to do so.[79]
>
> …
>
> In any case, scrutiny … by an agency of the executive arm of government, without the possibility of procedural or judicial review, seems to us to be a very weak safeguard indeed.[80]

3.79 Ms Megan Dixon, from Griffith Law School, expressed concern that:

> Despite the statements in the explanatory memorandum, that suggest wide consultation will be undertaken - … there is simply no mandated requirement for the government of the day - … to do so.[81]

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76 *Submission 10*, Law Institute Victoria, p. [5].

77 ibid, p. [2].

78 *Submission 9*, National Association of Community Legal Centres' Disability Rights Network, pp. 6 and 7.

79 *Submission 13*, People with Disability, p. 3.

80 ibid.

81 *Committee Hansard* , 16 June 2004, p. 20.

3.80 In contrast to these negative views, Qantas, when questioned on the consultation process required for the making of any regulations that may contradict discrimination laws, stated that it would be satisfied with the proposed Government scrutiny, through the Human Rights Branch of the Attorney General's Department.

3.81 Although welcoming of the 'commitment … to wide consultation before making regulations pursuant to the Bill', HREOC submitted that such a commitment 'might more appropriately be reflected in provisions on consultation, including with HREOC, being included within the Bill itself'[82]. This opinion was reiterated in their conclusion as a recommendation[83] and also in its opening statement, where Mr Mason stated that:

> We would certainly prefer that the bill, if it goes forward, provides for a public process of consultation. … Consultation within government is a good thing but it is not the same good thing as consultation beyond government with interested parties.[84]

3.82 His colleague, Ms Ball, added:

> … HREOC's view is that we welcome consultation and we would like to be part of any consultative process.[85]

Committee View

3.83 The Committee agrees that the consultation process when developing regulations should be seen to be thorough and transparent to allay the concerns expressed by some submissions.

3.84 The Committee believes that these concerns would be addressed by amending the Bill to require that consultation with HREOC be undertaken when preparing regulations in accordance with the Bill.

Recommendation 1

3.85 The Committee recommends that the Bill be amended to require that in preparing regulations in accordance with the Bill, consultation with HREOC be

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82 *Submission 3*, HREOC, p. 3.

83 ibid, p. 5

84 *Committee Hansard* , 16 June 2004, HREOC, p. 7.

85 ibid.

undertaken. Subject to such an amendment, the Committee recommends that the Bill proceed.

Senator Marise Payne

Chair