Submission to Senate Legal and Constitutional Committee Inquiry into the provisions of the *Civil Aviation Amendment (Relationship with Anti-Discrimination Legislation) Bill 2004*

Human Rights and Equal Opportunity Commission

Introduction

1. The Human Rights and Equal Opportunity Commission (HREOC) appreciates and endorses the objective of the Bill – to ensure that possible inconsistencies with the *Disability Discrimination Act 1992* ("DDA") and *Sex Discrimination Act 1984* ("SDA") do not prevent measures necessary to ensure aviation safety.

2. The Bill confirms that civil aviation safety regulations can be made notwithstanding that they may be inconsistent with the DDA and the SDA, where this inconsistency is "necessary" to ensure aviation safety.

3. Although HREOC endorses the importance of ensuring aviation safety it clearly remains important to ensure that the regulations do not require or permit unnecessary discrimination on the basis of either disability or pregnancy.

Disability Discrimination Act 1992 (Cth)

4. HREOC submits that the DDA already provides a suitable mechanism for resolving the issue of possible inconsistency between the DDA and the civil aviation regulations. The capacity to prescribe laws under subsection 47(2) effectively exempts discriminatory acts done in direct compliance with a prescribed law from being unlawful. Subsection 47(5) expressly includes regulations in the definition of 'law' in subsection 47(2).

5. The DDA also contains a number of relevant defences to claims of unlawful disability discrimination.

6. In relation to medical standards for aviation related licenses, the DDA, while seeking to eliminate discrimination based on disability "as far as possible", permits restrictions based on disability where these are based on the inherent requirements of the particular position concerned. (s.15(4) DDA)

7. In relation to provision of public transport services to people with disabilities, the DDA permits restrictions where provision of service would impose an unjustifiable hardship. (s.24(2) DDA)**Sex Discrimination Act 1984 (Cth)**

8. 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. However, in accordance with established principles of statutory interpretation the SDA should be interpreted in the light of the Convention on the Elimination of All Forms of Discrimination Against Women, which does recognise (Article 11.3) that there may be possible legitimate restrictions based on the right of pregnant women to work so long as these are subject to periodic review and based on objective analysis of scientific and technological knowledge.

9. It is important to emphasise that (as noted in the Report of the National Pregnancy and Work Inquiry, HREOC, Sydney, 1999, p12) such restrictions should be exceptional, and where possible, based on a case by case assessment of the health and

capacity of the individual woman rather than a blanket displacement policy banning pregnant women in the third trimester of their pregnancy from piloting a plane or working as air traffic controllers. Such an approach recognises that pregnancy is a normal part of life rather than pregnancy in itself being assumed to render women unfit for any particular activity.

10. Section 40 of the SDA provides exemptions for actions in direct compliance with industrial awards (paragraph 1(e)) and certified agreements under the
(f) a certified agreement (within the meaning of the Workplace Relations Act 1996 (Cth) (paragraph 1(e)). These exemptions provide significant avenues for recognition under the SDA of circumstances particular to specific working environments.

Uncertainty of what is meant by 'necessary for the safety of air navigation'
11.The SDA and DDA currently provide processes for people affected by restrictions based on pregnancy or disability to test whether these limitations are justified in the circumstances.

12. The temporary exemptions from the operation of sections 18 and 26 of the SDA and sections 19 and 29 of the DDA granted by HREOC to the Civil Aviation Safety Authority on 26 November 2002 are very limited in nature. They only apply where a woman's pregnancy (for the purposes of the SDA) or a person's disability (for the purposes of the DDA) prevents her or him safely fulfilling the inherent requirements of the role covered by the licence concerned.

13. The current Bill greatly extends the legitimacy of discriminatory restrictions based on pregnancy or disability by civil aviation regulations if these are "necessary for the safety of air navigation".

14. What is meant by "necessary" in this context is open to conjecture. Nevertheless, the Bill as currently drafted is far wider in scope in permitting discriminatory regulations to be made than the existing temporary exemptions allow.

15. The degree of restriction imposed by the word "necessary" has received judicial consideration in the context of other statutory instruments. For example, in dealing with the meaning of "necessary" within s.236(1) of the *Telecommunications Act 1991* in *General Newspapers Pty Limited and Others v Telstra Corporation* (1993) 117 ALR 629 Gummow J stated (at 665):

> The term "necessary" will take its colour from its context; in ordinary usage it may mean, at one end of the scale, "indispensable" and at the other end "useful" or "expedient": *Re an Inquiry under the Company Securities (Insider Dealing) Act 1985* [1988] AC 660 at 704.

16. Clearly, in achieving an appropriate relationship between discrimination laws and civil aviation safety, most practical importance lies not in what a court might ultimately find to be "necessary", but in appropriate judgments being made in advance by Government and Parliament in making regulations. For this reason, HREOC welcomes the commitment made in the Explanatory Memorandum and in Second Reading speeches to wide consultation before making of regulations pursuant to the Bill.

17. HREOC submits that this commitment might more appropriately be reflected in provisions on consultation, including with HREOC, being included within the Bill itself in the making of prospective civil aviation regulations.

18. Part 2 of Schedule 1 of the Bill also seeks to retrospectively make lawful existing civil aviation regulations that are inconsistent with the SDA or the DDA. Such a regulation is Reg 67.235 Suspension of medical certificates – pregnancy. The regulation provides:

> **Suspension of medical certificates — pregnancy**
>
> (1) A medical certificate held by a pregnant woman who holds, or is an applicant for, a licence is taken to be suspended:
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> (a) during the period beginning immediately after the end of the 30th week of gestation and ending when a DAME certifies that she is fully recovered following delivery or the termination of the pregnancy; or
> (b) if in a particular case CASA directs in writing that a different period should apply — during the period so directed by CASA; or
> (c) if, before the start of the period mentioned in paragraph (a), the pregnancy ends in miscarriage or premature labour, or is terminated by medical intervention — from the time of the miscarriage, premature labour or intervention until a DAME certifies that the woman is fully recovered.
>
> *Note* This regulation does not preclude a pilot who is pregnant from undertaking or receiving instruction in a flight simulator at any stage of the pilot's pregnancy.
>
> (2) Despite subregulation (1), a pregnant woman who holds an air traffic controller licence may continue to exercise the privileges of the licence until the end of the 38th week of gestation if:
>
> (a) the medical practitioner who is attending the woman certifies her continued medical fitness to do so each week beginning at the 31st week of gestation; and
> (b) a DAME certifies the woman's continuing fitness to do so each week beginning at the 31st week of gestation; and
> (c) another person who holds an air traffic controller licence, and is medically fit and able to take over responsibility for the function, is on duty and available at the times when she does so.

19. At the time of making this regulation and up to the expiry of the temporary exemptions granted by HREOC from the operation of the SDA and the DDA on 26 November 2007, the act of the Governor-General in exercising his regulations-making power under section 98 of the *Civil Aviation Act 1988* and making a discriminatory regulation, is not unlawful.

20. HREOC submits that at the expiry of the temporary exemptions, existing regulations such as Reg 67.235 – and in particular the severe restrictions applying to pilots beyond 30 weeks of pregnancy - should undergo the same scrutiny as prospective regulations under the Bill, with wide consultation being undertaken to determine whether their inconsistency is still necessary for the safety of air navigation. Such a procedure is in keeping with Article 11(3) of CEDAW in relation to legitimate restrictions based on pregnant women's right to work.

The effectiveness of the Bill

21. The intention of the Bill appears clearly to be that civil aviation regulations should deal conclusively with relevant rights and responsibilities rather than these being open

to question through the SDA and DDA. There may however 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.

22. Dicta from the joint judgment of Brennan CJ and Dawson J in *De L v Director General, NSW Department of Community Services (1997) 143 ALR 171* indicate that

- there may be some room for argument on whether it is constitutionally permissible for the parliament to authorise the making of a regulation that would amend or repeal a provision of an earlier Act; and
- if parliament were to authorise the making of a regulation to confine or repeal an earlier Act, it would require express words to convey that intention.

23. It could be argued that an express statement that regulations inconsistent with the SDA and DDA may be validly made does not amount to an express statement that the SDA and DDA are not to operate regarding conduct authorised or required by such a regulation.

24. In this respect it should be noted that section 47(2) of the DDA presupposes a distinction between discriminatory regulations under other laws being valid and being conclusive, since it contemplates the existence of regulations (as well as other laws) which although valid require prescription under the DDA so that actions in direct compliance with those laws are not unlawful for the purposes of the DDA.

25. HREOC raises this issue not to argue against proceeding with the Bill but to note that further consideration of measures to ensure an appropriate relationship between anti-discrimination and civil aviation safety laws may be required.

Effect of the temporary exemptions

26. HREOC submits that exemptions which HREOC granted on application by the Civil Aviation Safety Authority in 2002 resolve this issue satisfactorily, at least until the exemptions expire in 2007, in relation to medical standards for flight and ground crews. 27. On 26 November 2002, HREOC granted an exemption from sections 19 and 29 of the DDA, and from sections 18 and 26 of the SDA, to persons acting pursuant to Civil Aviation Regulations regarding medical fitness. (The full text of this decision and the recommendation on which it was based is publicly available on the HREOC website and is included as Appendix 1 to this submission.) These exemptions were granted with the same purpose as the present Bill – to ensure that the SDA and DDA operate with due regard for the necessity of ensuring aviation safety. The exemptions expire on 26 November 2007.

28. The exemptions 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.

29. As noted by the Explanatory Memorandum, however, issues may also arise under the DDA in relation to passengers and their equipment, which are not covered by the current exemption. These may require consideration of either a further exemption application or use of the provision under section 47 of the DDA to prescribe laws

such that actions in compliance with a prescribed law are not unlawful under the DDA.

Conclusions

As noted at the outset HREOC supports the objective of the Bill in ensuring that unintended inconsistencies with the SDA or DDA do not invalidate measures necessary to secure air safety.

Noting, however, that there are temporary exemptions in force under the SDA and DDA until 2007, and that there are a number of provisions of the SDA and particularly the DDA already allowing safety issues to be considered, HREOC recommends further consideration of whether this Bill is the most appropriate means to that objective.

If the Bill proceeds HREOC recommends inclusion of specific provisions requiring consultation before regulations inconsistent with the SDA or DDA are made.

Appendix 1:

Notice of HREOC exemption decision re: Civil Aviation Safety Authority

Notice of decision

Under section 57 of the Disability Discrimination Act 1992 ("DDA") and section 46 of the Sex Discrimination Act 1984 ("SDA") the Human Rights and Equal Opportunity Commission gives notice of a decision made on 26 November 2002.

Applicants

The exemption application was submitted by the Civil Aviation Safety Authority ("CASA").

Decision of the Commission

The Commission grants a conditional exemption from sections 19 and 29 of the DDA, and from sections 18 and 26 of the SDA, to persons acting pursuant to existing Civil Aviation Regulations regarding medical fitness, or pursuant to currently proposed amendments to those regulations.

The exemption is subject to the following conditions.

1. The exemptions commence on 26 November 2002 and expire on 26 November 2007.

2. The exemptions are 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.

Findings and reasons

In making this decision the Commission accepted the findings and reasons contained in the recommended decision submitted by its Directors of Disability Rights Policy and Sex Discrimination Policy and published by the Commission on the Internet at the following address: www.hreoc.gov.au/disability_rights

Review of decision

Subject to the Administrative Appeals Tribunal Act 1975, application may be made to the Administrative Appeals Tribunal for a review of the decision to which this notice relates by or on behalf of any person or persons whose interests are affected by the decision.

Alice Tay
President
on behalf of the Commission

Exemption application under Sex Discrimination Act and Disability Discrimination Act: CASA: recommended decision

Recommendation:

That, pursuant to an application by the Civil Aviation Safety Authority, the Commission grant a five year exemption under Sex Discrimination Act 1984 ("SDA"), section 44, and the Disability Discrimination Act 1992 ("DDA"), section 55, for persons acting pursuant to existing Civil Aviation Regulations regarding medical fitness and proposed amendments to those regulations; but this exemption only to apply where a person's pregnancy (under the SDA) or disability (under the DDA) prevents the person safely fulfilling the inherent requirements of the role covered by the licence concerned.

Application

On 29 July 2002 the Civil Aviation Safety Authority (CASA) applied for a five year exemption under Sex Discrimination Act 1984 ("SDA"), section 44, and the Disability Discrimination Act 1992 ("DDA"), section 55, for persons acting pursuant to existing Civil Aviation Regulations regarding medical fitness and proposed amendments to those regulations.

The exemption is sought from sections 19 and 29 of the DDA, and from sections 18 and 26 of the SDA. These sections prohibit discrimination on grounds of disability and sex (including pregnancy) respectively regarding decisions by qualifying bodies and administration of Commonwealth laws and programs.

CASA indicated concern that although the DDA provides an inherent requirements defence regarding occupational qualifications it was not clear that this would apply to licences for non-professional purposes. The SDA does not have an inherent requirements defence so far as pregnancy is concerned, and also lacks the DDA's provision for laws to be prescribed by regulation so as to exempt actions in direct compliance with those laws.

CASA stated that this exemption is sought as an interim measure pending possible legislative amendments to clarify the relationship between the civil aviation safety regime and the SDA and DDA.

Submissions

A public notice of inquiry was posted on the HREOC web site on 13 September. Submissions were requested by 24 October.

Eleven submissions were received, including from Airservices Australia, the Flight Attendants Association, the Aircraft Owners and Pilots Association and the Australan Women Pilots Association, and the Civil Air association representing air traffic controllers.

Individual submissions oppose the granting of the application, taking particular issue with colour blindness standards.

Airservices Australia supports the application for exemption. In relation to disability they take particular issue on safety grounds with contentions in several individual submissions that current colour blindness testing is inappropriately restrictive. In relation to pregnancy they note that the proposed regulations differentiate between the position of pilots and of air traffic controllers, the latter being recognised as not presenting the same risk.

The Civil Air association opposes the application, raising concerns regarding colour blindness and the requirement for testing of pregnant air traffic controllers after 30 weeks.

The Aircraft Owners and Pilots Association and the Australian Women Pilots Association oppose the application on similar grounds.

The Flight Attendants Association oppose the application on the basis that section 19 of the DDA which refers to inherent requirements provides sufficient protection for legitimate decisions and that any change in the relationship between the SDA and air safety regulation ought to be a matter for legislative rather than administrative decision.

Recommended decision

We recommend that the Commission decide to:

- Grant the application under the DDA, for a period of five years, but this exemption only to apply where a person's disability prevents him or her safely fulfilling the inherent requirements of the role covered by the licence concerned;
- Grant the application under the SDA, for a period of five years, but this exemption only to apply where a person's pregnancy prevents her from safely fulfilling the inherent requirements of the particular employment, occupation or role covered by the licence concerned.

Effect of recommended decision

This decision would not make any change to the present legal position under the Disability Discrimination Act in relation to professional employment or occupation. Refusal of licenses in this area would remain subject to review under the DDA.

Where a license is not for the purposes of employment, such a decision would confirm for DDA purposes (what may already be the case but is not certain) that the same inherent requirements test also applies as it does to employment related decisions. There is no reason apparent from the objects or terms of the DDA why non-professional pilots or other licence holders should not be subject to an inherent requirements test; rather, there are some obvious safety reasons why they should be subject to an inherent requirements test.

The recommended decision would confirm (what may already be implicit but is not certain) that the same inherent requirements test applies under the SDA. This would

be consistent with Australia's obligations under the Discrimination (Employment and Occupation) Convention, which requires that distinctions based on the inherent requirements of the particular job not be deemed to be discrimination, as well as with the recognition in the CEDAW Convention of possible legitimate restrictions based on pregnancy so long as these are subject to review and based on objective evidence.

Although CASA is clearly the principal regulator in this area, such a decision would mean that the DDA and SDA will continue to provide a safety net against possible wrongful administration of the CASA regulation, or against the regulations being overly restrictive in some respect, while ensuring that correct decisions to refuse licences are not unlawful.

That is, complaints will still be able to be made, but CASA should be able to defend them successfully so long as it is acting properly in pursuing the public interest in air safety.

Submitted by:
Director, Disability Rights policy;
Director, Sex Discrimination policy