20th May 2004

Senate Legal and Constitutional Legislation Committee
Parliament House
Canberra ACT 2600

Via Email on legcon.sen@aph.gov.au

Dear Committee Members

Re: Inquiry into the Civil Aviation Amendment (Relationship with Anti-Discrimination Legislation) Bill 2004

Thank you for your invitation to comment on the provisions of the Civil Aviation Amendment (Relationship with Anti-Discrimination Legislation) Bill 2004 ("CAA") which seek to amend the *Civil Aviation Act 1988* to allow regulations which may be inconsistent with current Commonwealth anti-discrimination laws if the inconsistency is necessary for aviation safety. We have a number of concerns with the proposed amendments, which are addressed below.

The Bill does not remove uncertainty, it merely shifts it to a different location

At page 1, paragraph 2 of the Explanatory Memorandum, it is stated that:

> "As the Act currently stands, there is some uncertainty in relation to the validity of some actions carried out in accordance with safety regulations where these actions may appear inconsistent with either the *Disability Discrimination Act 1992* or the *Sex Discrimination Act 1984*."
>
> However, the Bill specifies that the aviation regulations will take precedence "where those regulations are necessary for the safety of air navigation." What is "necessary", and what constitutes "safety" are contestable concepts. Thus, the question of whether regulations are necessary for the safety of air navigation may still give rise to uncertainty and litigation.

The CAA Bill is overly broad in its approach given the "mischief" it seeks to address.

The CAA Bill is a blunt instrument, and does not attempt to isolate the particular troubling aviation safety regulations and make an actual assessment of whether they

conflict with anti-discrimination statutes. The Explanatory Memorandum acknowledges that regulations may not actually be inconsistent with anti-discrimination legislation but "could be construed by some" to be inconsistent. This is an extremely flimsy basis on which to derogate from important legislation that, amongst other things, purports to fulfil Australia's obligations under International Human Rights Conventions. Surely the question of whether there is actual inconsistency ought to have been tested in court before such a broad-brush legislative approach is adopted.

It is submitted that there would be, in fact, no inconsistency with the Disability Discrimination Act 1992. The Disability Discrimination Act already contains adequate exceptions (e.g. s.15(4) and s.24(2)) that would cover actions taken pursuant to aviation safety regulations. The Disability Standards for Accessible Public Transport 2002 contain similar exceptions in relation to the provision of transport services. The High Court's decision in *Qantas Airways v Christie* [1998] HCA 18 (19 March 1998) clearly indicates that compliance with safety regulations would be taken to be an "inherent requirement" of the job for the purposes of s.15 of the DDA.

In relation to the Sex Discrimination Act 1984, the Bill proposes to immunise "medical standards inconsistent with the Sex Discrimination Act". The only example given in any of the explanatory material on the Bill as to how civil aviation regulations may conflict with the Sex Discrimination Act is the assertion in the second reading speech that there may be a need to impose special conditions on pregnant pilots in their final trimester, in order to minimise risk arising from sudden complications. A more appropriate way of dealing with this issue would be to name the specific regulation as an exception to the Sex Discrimination Act, in s.40 of that Act. This is the way that the Parliament has dealt with inconsistencies between the Sex Discrimination Act and other Commonwealth legislation.

The Bill sets a dangerous precedent

The notion that derogation from human rights laws may be easily achieved by enabling regulations to be made that have that effect would provide a temptation for the enactment of similar authorising legislation in other areas. This could result in the development of serious holes in the web of human rights protection.

In situations of conflict between human rights legislation and safety or other important public interest considerations, the conflict needs to be worked out in a context in which both sets of values are given full weight and attention. This can be done in the courts, or by consultation between relevant regulatory agencies. Such a weighing up of the issues between interested parties ensures that the optimal results are achieved for the Australian public. Optimal results are not achieved by allowing regulations to be made which privilege one set of considerations and disregard another.

It would set a dangerous trend in our system of parliamentary democracy if the Parliament were to establish in legislation, an ability for the Executive Government to make regulations **at any time**, that provide an escape from the provisions of human rights

legislation. The practical effect of the amendment is that it gives the Executive power to exempt the operation of the substantive provisions of that human rights legislation, without further scrutiny by the Parliament. Henry VIII provisions such as this one which give the Executive such power to affect the rights of citizens beyond the gaze of the elected Parliament should be rejected by the Committee.

This is particularly so in light of the effective retrospective operation of this Bill.

Any substantive change to the effect of human rights legislation in a particular area (such as Civil Aviation) should be effected through the vehicle of an amendment to the legislation itself (with appropriate scrutiny by the public's elected representatives) not through the "back door" of regulations.

In view of the foregoing, we strongly encourage the Senate Legal and Constitutional Legislation Committee to recommend that the proposed amendments to the CAA be rejected.

Yours faithfully,

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