

Submission to the

**Senate Legal & Constitutional References Committee
Inquiry Regarding The Civil Aviation Amendment (Relationship With Anti-Discrimination Legislation) Bill 2004**

Presented by the
National Association of Community Legal Centres'
Disability Rights Network

The Purpose of the Bill

The Bill proposes to amend Section 98 of the Civil Aviation Act 1988 ("CAA") and empowers the Governor General to make regulations in relation to safety of air navigation that may be inconsistent with the Disability Discrimination Act 1992("DDA") or the Sex Discrimination Act 1984 ("SDA"). The regulations will have retrospective application and may validate existing regulations and past actions based on those regulations.

The amendment confirms Australia's obligation to give effect to the provisions of the Chicago Convention relating to safety of air navigation. As a member of the International Civil Aviation Organisation ("ICAO"), Australia is obligated to implement ICAO standards in its aviation regulations.

The amendment will therefore make lawful any breach of the DDA or the SDA if the discriminator acts pursuant to Section 98 of the CAA.

What this submission supports

This submission supports the need to ensure and maintain safety of air navigation, be it domestic or international and the need to implement Standards and Recommended Practices for the safety of international civil aviation. It is accepted that the safety of passengers, flight crew and the general public is a paramount consideration that may excuse compliance with anti-discrimination legislation.

It is recognized and accepted that some form of discrimination may be necessary in the implementation of air navigation safety regulation. For instance, an applicant for a pilot licence who does not pass the medical assessment test because a disability may make the applicant likely to become suddenly unable either to operate an aircraft safely or to perform assigned duties safely.

In **McLean v Airlines of Tasmania**¹, the Human rights and Equal Opportunity Commission ("HREOC") held that the airlines did not discriminate against the complainant by not allowing him to travel unless accompanied by someone

¹ McLean v Airlines of Tasmania 1996 HREOCA 37 (13 December 1996).

without a disability. The aircraft had no flight attendants, and the aisle was too narrow for a wheelchair. For Mr. McLean to exit the aircraft, it required much effort and difficulty on the part of others. In the case of an emergency, McLean would not have been able to use the emergency exit, life jacket or oxygen mask without significant assistance.

What this Submission does not support

This submission does not support the view that there is a necessity to provide the Governor General with such a blanket authority to effectively legislate exemptions from the DDA. The current provisions of the DDA accommodate air navigation safety standards and practices. They also allow the HREOC to approve Action Plans or grant exemptions from the legislation. The DDA has provisions for making Disability Standards, i.e. Standards for Accessible Public Transport. Empowering the Governor General to have primary authority to take certain matters outside the operation of anti-discrimination legislation may negate or relax inappropriately the safeguards so far put in place for those who are more vulnerable to having their rights denied or ignored.

Air Navigation Safety and the DDA

The DDA is a beneficial legislation that provides and promotes the rights of a person with disability. It defines not only what constitute unlawful discrimination but also lawful discrimination. The DDA was not enacted oblivious of the predicament that service providers or employers may face in balancing their rights, business interest and obligations. It upholds the fundamental entitlement of individuals with disabilities without losing sight of the needs of other members of the community. Hence a bill that may undermine its objectives should be opposed unless it is found not capable of addressing duty of care in air navigation.

The DDA has adequate provisions that accommodate the needs of the Air Navigation Industry either as an employer or a provider of goods and services:

1. **Inability to carry out job-** ss 15(4) of the DDA **provides** that discrimination in employment against a person on the ground of the person's disability is not unlawful, if taking into account the person's past training, qualifications and experience relevant to the particular employment and if the person is already employed by the employer, the persons performance as an employee, and all other relevant factors that it is reasonable to take into account, the person, because of his or her disability:
 - a. Would be unable to carry out the inherent requirements of the particular employment; or
 - b. Would, in order to carry out those requirements, require services or facilities that are not required by persons without disability and the

provision of which would impose an unjustifiable hardship² on the employer.

Inherent requirement of the particular employment includes the ability to perform them in a safe manner³. This provision justifies the disqualification of applicants or employees whose disability prevents them from operating aviation equipment safely. There is no necessity to empower the Governor-General enacting regulations to that effect. This provision of the Act serves the demands of the aviation industry as it relates to safety yet without summarily dismissing the potential participation of a person with a disability. If a regulation making power that solely rests on the governor-general is allowed, it poses a danger that fundamental rights may be sidestepped without recourse. For instance, if the regulation would provide that a mere failure to comply with medical standards tests (that may not necessarily test the ability to perform the essential functions of the job accurately⁴) is a sufficient ground to refuse employment, the aggrieved person would have no remedy under the proposed s 98 of the CAA. The substance of the person's claim is no longer material because s 98 is determinative of liability.

2. **Goods, services and facilities-** s 24 of the DDA provides that it is not unlawful to discriminate against a person on the ground of the person's disability if the provision of goods, or services or making facilities available would impose unjustifiable hardship on the person who provides the goods or services or makes the facilities available.

In the McLean case cited above, the complainant has cerebral palsy. He had severe mobility problems and used a wheelchair. He had difficulties communicating and using his hands to grip objects. Airlines of Tasmania would not allow him to fly unless accompanied by someone without a disability. He did not want to comply with this, even though the airline offered the carer's ticket at half price. The Commission agreed with Airlines of Tasmania, that whilst it had discriminated against McLean, such discrimination was not unlawful because it came under s 24(2) of the DDA.

The issue was ultimately whether, in providing service to McLean, unjustifiable hardship would be imposed upon Airlines of Tasmania. The Commission found that if McLean flew unaccompanied, there would be a risk as to the safety of him

² **S 11 Unjustifiable hardship-** For the purposes of this Act, in determining what constitutes unjustifiable hardship, all relevant circumstances of the particular case are to be taken into account including:

- (a) The nature of the benefit or detriment likely to accrue or be suffered by any persons concerned; and
- (b) The effect of the disability of a person concerned; and
- (c) The financial circumstances and the estimated amount of expenditure required to be made by the person claiming unjustifiable hardship; and
- (d) In the case of the provision of services, or the making available of facilities—an action plan given to the Commission under section 64.

³ *Cosma v Qantas Airways Ltd* [2002] FCAFC 4

⁴ *Crombie v Commonwealth of Australia* [1998] HREOCA 37 (20 November 1998)

and others on the aircraft, especially in the case of an emergency. Further, Airlines of Tasmania's reputation and custom could be compromised with regard to any related potential safety issues.

3. **Public health-** s 48 provides that it is not unlawful to discriminate against another person on the ground of the other person's disability if:
 - a. The person's disability is an infectious disease; and
 - b. The discrimination is reasonably necessary to protect public health

This provision reinforces the strong legal position that the aviation industry on matters that concern safety of air travel.

4. **Commission may grant exemptions**⁵- s 55 of the DDA provides that HREOC may grant an applicant an exemption from the operation of Divisions 1 or 2 of the DDA. Exemptions so granted may be valid up to five years and may be extended on further application.

The HREOC exemption process takes into consideration the interests of parties through consultation. The Commission must consult a body (for example, an airline) that is so prescribed in the regulation before making an exemption from that regulation⁶ In addition, the Commission may consult any body or person (for example, service providers, government agencies, community organizations, disability discrimination advocates, etc) that it considers appropriate before granting an exemption⁷

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. In short, the HREOC exemption process has the advantage of more and active involvement by major stakeholders in air travel or a justified sex or disability discrimination cases.

Furthermore, an HREOC exemption is capable of being tailored to preempt a disability discrimination complaint. S 55(3) provides that an exemption may specify terms and conditions of exemption and restrict its scope to circumstances and activities set out in the exemption. In so far as a government regulation applies to the safety of air navigation, a HREOC exemption offers the distinct advantage of restricted scope. A proposed blanket authority of regulation is clearly unnecessary when the needs of civil aviation stakeholders are already accommodated by HREOC powers of exemption. A good example is the application for exemption of **Air North Airlines**.

⁵. **S 58 Effect of exemptions-** This Part does not render it unlawful for a person who has been granted an exemption from a provision of Division 1 or 2, or a person in the employment or under the direction or control of a person who has been granted such an exemption, to do an act in accordance with the provisions of the instrument by which the exemption was granted.

⁶ (S 55(1C)).

⁷ (S 55(1D)).

In this 2003 decision, HREOC granted a regional airline two years exemption for (i) lack of airline access to people in wheelchairs or with lifting needs and (ii) requiring reasonable notice of disability access needs. The exemption was granted subject to Air North implementing its proposals for disability access and reduced fares for passenger assistants and keeping the Commission informed of (i) any instances of lack of airline access as a result of the exemption and (ii) any means of overcoming difficulties in seating passengers with disabilities. The Commission received submissions from a variety of interested parties, including Air North and the Darwin Legal Service, while Air North issued a response to clarify its position in the light of the submissions.

As the Air North exemption demonstrates the Commission process allows for consultation and tailored exemptions in the context of air safety standards and practices. Hence the application or grant of exemption from the DDA is a much more appropriate departure from its application. By contrast, the proposed authority of regulation appears to be not only heavy-handed and inappropriate but also redundant.

5. Transport Standards

As a practical statute, the DDA provides flexible guidelines that assist parties, including aviation authorities, to comply with the provisions of the DDA. By virtue of ss 31(3) and (4) of the DDA, the *Disability Standards for Accessible Public Transport 2002* establish 'minimum accessibility requirements' for public transport.⁸ In this practical manner, the standards are meant to achieve a 'sensible balance between eliminating ... discrimination against people with disabilities and also ensuring that industry is not unduly burdened in the process'.

It is arguable that the Disability Standards imposed are reasonable and far from onerous in a civil aviation context, particularly in the light of the extended consultations with interested parties involved in drawing up the Standards⁹. Besides, for exceptional cases, cl. 33.7 of the Standards provides that it is not unlawful to fail to comply with one or more Standards if compliance would impose unjustifiable hardship on the person or organisation in their circumstances, including financial position, viability, and cost implications of compliance, along with any benefit and detriment that could flow on to all people with disabilities as a result of compliance or non-compliance.

Furthermore, cl. 33.3 enables civil aviation organisations to effectively comply by means of alternative, equivalent methods of access to public transport that preserve the same levels of 'amenity, availability, comfort, convenience, dignity, price, and safety', subject to consultation with either passengers with disabilities

⁸ Technical adjustments are set out in *Disability Standards for Accessible Public Transport Amendment 2004*.

⁹ Brendan Nelson Media Release 11 July 2003

or representative organisations about the equivalent access (cl. 33.4). In short, the Disability Transport Standards are further evidence of the impressive DDA-struck balance between expectations of civil aviation authorities, organisations, and people with disabilities. In this context the proposed authority of regulation is inappropriate and inherently flawed for its potential to ignore the consensus of the wider community as expressed under the DDA and Disability Standards formulated through it.

6. Role of the Human Rights Branch of the Attorney-General's Department

According to the Explanatory Memorandum, regulations made by the Governor-General under s 98 that may be inconsistent with the DDA will be subject to clearance by this branch. This "clearance process" does not present an adequate or an effective safeguard especially in the light of a number of decisions of the present Department casting aspersions on the proposed scrutiny by this branch.

Since 1986, HREOC had applied successfully to the court to intervene in at least eighteen where cases the commonwealth government has been a party and where except in two cases, the submission of the HREOC has always contradicted that of the government. This shows that the HREOC is an independent watchdog of human rights. In contrast, the position taken by the government in some human rights issues have been quite questionable as in the **Tampa Crisis** and *The Marriage of Kevin and Jennifer*¹⁰.

In a more widely known and criticised context, the high seas interception of the *Tampa*, carrying 438 survivors of a sinking ship, was intended to prevent the ship and its passengers coming within Australia's migration zone¹¹ and presumably the exercise by the passengers of refugee rights under Australian law. In the subsequent controversy, the Government proved its *mala fides* for human rights in several ways, including the introduction to the House of the retrospective *Border Protection Bill* 2001, the promise of economic assistance in return for Nauru processing passengers, and the refusal in breach of the *Protocol relating to the Status of Refugees* 1967 to comply with the request of the UNHCR to process the passengers on Christmas Island.¹² For the duration of the *Tampa* incident, the 'Department's Office of International Law provided legal advice to the Attorney and the Government.'¹³ In a matter that clearly touches on human

¹⁰ **Attorney-General for the Commonwealth v Kevin and Jennifer** [2003] FamCA 94. This case was an appeal by the Commonwealth Attorney-General against a decision by Chisholm J where his Honour declared valid the marriage between Kevin (a post-operative female to male transsexual person) and Jennifer. The Attorney-General took the view that Kevin was not a man and therefore that Kevin and Jennifer's marriage was not lawful

¹¹ **2002 Australian Journal of Human Rights** 11, 'The Tampa Case: Seeking Refuge in Domestic Law'.

¹² **2002 Australian Journal of Human Rights** 11, 'The Tampa Case: Seeking Refuge in Domestic Law', citing White M 'MV *Tampa* and Christmas Island Incident, August 2001', 'Bimco Review', London October 2001.

¹³ **Attorney General Annual Report 2001-2002**, 'Secretary's Review,' p 6.

rights, 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.

Even supposing that human rights advice was provided at the time, the seeming insensitivity to human rights within the Government bodes ill for the scrutiny of any regulations concerning disability discrimination by the Human Rights branch. From the perspective of disability discrimination, 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.

An indication of the unreliable protection of rights of people with disabilities by this Government occurs as recently as the **Disability Amendment Bill 2003**. That Bill renders discrimination based on drug addiction as lawful in important areas such as employment and education. The Government's view is that the Bill responds to community concerns that disability discrimination laws are being used in an unjustified manner. Even conceding this dubious view, the Bill fails to address the concerns of qualified bodies (e.g. the Victorian Aboriginal Legal Service) that lawful drug addiction discrimination will only increase the social and legal marginalization of people with disabilities.

Conclusion.

This submission opposes the Civil Aviation Bill 2004. The cause of safety in air navigation safety supersedes current anti-discrimination legislation. There are provisions under existing legislation that ensures so. The Bill intends to achieve the same by providing a more streamlined process of legitimising a breach of the SDA and the DDA. The underlying feature of the proposed law is to provide convenience to the government which by itself is not bad provided it not achieved by displacing necessary safeguards against human rights abuse. The industry has reliable and adequate recourse to the above described exception and exemption provisions.