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10 June 2004

Ms L Gell
Committee Secretary
Australian Senate Legal and Constitutional Legislation Committee
Parliament House
CANBERRA ACT 2600

Dear Ms Gell:

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

Thank you for the invitation to contribute our views to this Inquiry. Our comments relate to the impact of the Bill on the *Disability Discrimination Act,* 1992 (DDA).

In brief, we believe this Bill remedies no mischief, and is unnecessary to achieve its stated purpose. The Bill is not neutral in its impact, however, and may undermine the objectives of the DDA in eliminating discrimination on the ground of disability across large tracts of the civil aviation industry. We therefore urge the Committee to recommend that the Bill not be proceeded with.

Why is the Bill unnecessary?

The DDA seeks to eliminate discrimination on the ground of disability in specified areas of life 'as far as possible.' It does not impose an absolute obligation not to discriminate, but instead provides a number of exceptions and defences that permit or excuse discrimination in specific circumstances. Civil aviation safety is obviously a matter of paramount importance, and should there be an inconsistency between what is genuinely required for civil aviation safety and an implication of the DDA, civil aviation safety ought to prevail. The DDA already provides a number of mechanisms that ensures that this will be the case.

First, the DDA envisages that there will be occasions where acts done under statutory authority will necessarily or unavoidably discriminate on the ground of disability. Section 47(2) of the DDA provides that a 'law' may be 'prescribed' for the purpose of protecting acts done in direct compliance with that law from complaints of discrimination on the ground of disability. Section 47(5) defines 'law' to include regulations. It is therefore already possible for the Australian Government to prescribe the *Civil Aviation Act,* 1988, and the *Civil Aviation Regulations* 1988 and the *Civil Aviation Safety Regulations* 1998 under section 47(2) of the DDA to protect

acts done in direct compliance with the Act or Regulations from complaints of discrimination on the ground of disability.

Second, the DDA envisages that some sectors will require considerable time to make the necessary structural adjustments required to comply with the Act. In these circumstances, the DDA provides in section 57 that the Human Rights and Equal Opportunity Commission may grant a temporary exemption from the Act to allow time to take the steps necessary to achieve compliance. In practice such temporary exemptions are tailored to the very specific circumstances of the applicant, and are conditional on significant, concrete steps being taken to eliminate discrimination as far as possible during the period of the exemption. In this respect we note that the Human Rights and Equal Opportunity Commission granted a temporary exemption from the DDA to the Civil Aviation Safety Authority in November 2002 for a period of 5 years. It has also granted a temporary exemption to Air North. This demonstrates that the DDA is both capable, and is already being used by the aviation industry, to resolve its compliance concerns.

Third, the DDA provides two defences to complaints of discrimination on the ground of disability relevant to civil aviation.

In the area of employment, the employee must be capable of fulfilling the inherent requirements of the job (section 15(4) of the DDA). A person with disability who could not fulfil the inherent job requirements of a position in civil aviation would therefore not succeed with a complaint of disability discrimination. In the area of both employment (section 15) and services, including transport, (section 24), the DDA excuses discrimination where avoidance of this discrimination would constitute an unjustifiable hardship (section 11). If measures to secure aviation safety on a non-discriminatory basis would be so onerous as to constitute an unjustifiable hardship, the discriminatory act would be excused.

The exception and defences outlined above provide a simple means of resolving inconsistencies between acts required by civil aviation regulations and the requirements of the DDA. Very importantly, however, they are very specific in their application, excepting only acts done in 'direct compliance' and excusing discrimination only where a person cannot meet 'inherent requirements' or where non-discrimination would constitute an 'unjustifiable hardship.'

Complaints that raise questions as to what is an inherent job requirement and what constitutes an unjustifiable hardship are also reviewable by the Federal Magistracy and Federal Court, ensuring that these claims can be tested before an independent arbiter. This promotes the overall policy objective of the DDA of eliminating discrimination as far as possible.

There is very little indication in the Bill or its supporting materials about the specific 'mischief' sought to be remedied. The *Explanatory Memorandum* states that one of the reasons the Bill is necessary is to permit Australia to comply with its international obligations under the Convention on International Civil Aviation, 1944 (Chicago Convention). Under this Convention the International Civil Aviation Organisation (ICAO) sets Standards and Recommended Practices for the Safety of International Civil Aviation. These Standards require in Annex 1, Chapter 6.3.2 that to obtain a

Class 1 Medical Assessment, and thereby to exercise the privileges of a commercial or transport pilot licence, flight navigator licence or flight engineer licence, the applicant shall not 'suffer' (sic) from any disease or disability which could render that applicant likely to become suddenly unable either to operate an aircraft safely or to perform assigned duties safely. These are clearly inherent job requirements the integrity of which would be supported, not challenged, by the DDA. There is therefore no question whatsoever of Australia's capacity to comply with its international obligations in this respect, and consequently this provides no proper foundation for the Bill.

The *Explanatory Memorandum* also refers to a regulatory requirement that when 'handicapped persons' (sic) are carried in an aircraft, all reasonable precautions shall be taken to prevent hazards to other occupants. It notes that this may mean that a person must be both physically and mentally capable of opening emergency exits if seated in an exit row, implying that the DDA may interfere with this requirement. We fail to see how seating a passenger with disability in a non-exit row could constitute 'less favourable treatment' and therefore cannot see how a claim of discrimination on the ground of disability could arise. However, if it did, we are confident that compliance with safety obligations would prevail over any claim of disability discrimination: *Purvis v State of New South Wales (Department of Education and Training) CLR 2004.*

The potential of the Bill to undermine the DDA

We are concerned that the broad and uncertain formulation of the exception 'necessary for the safety of air navigation' may permit unnecessary and unreasonable discrimination on the ground of disability in civil aviation 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 'necessary' and 'aviation safety' in the regulations to be made.

In this respect we note the comfort offered in the *Explanatory Memorandum* to the effect that any regulations made will be subject to the clearance of the Human Rights Branch of the Attorney-General's Department, and will undergo comprehensive consultation processes and parliamentary scrutiny. In fact, this comfort is not to be legislated in the Bill. We lack confidence that these clearance and consultation commitments will be honoured in the absence of a specific legislative duty to do so. In any case, scrutiny of human rights compliance 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.

Employers and service providers routinely claim that discriminatory conduct towards people with disability is 'necessary' for one reason or another. In some cases these claims are justified. In many others, they are not. The DDA, through its various functions, and the avenue of judicial determination of disputes, provides the means for such claims to be tested in a fair and impartial manner. The DDA also provides an ongoing structural incentive for industry and technological development in the area of civil aviation safety to take into account the need to eliminate as far as possible of discrimination on the ground of disability.

The Bill will entirely remove discriminatory conduct in the area of civil aviation safety from the operation of the DDA. There will be no avenue of independent review or determination of disputes, and no structural incentive for industry and technological development to continue to take into the requirement to eliminate disability discrimination in aviation safety as far as possible. These are serious and substantial detriments to the policy objectives of the DDA.

In conclusion, we reiterate our firm view that civil aviation safety is of paramount importance, and where this requires measures to be taken that necessarily or unavoidably discriminate on the ground of disability, these measures must be permitted or excused. The DDA already provides that this is the case. This Bill therefore remedies no mischief and is unnecessary to achieve its stated purpose. The Bill would not be neutral in its impact, however, as it would remove, potentially, large tracts of the aviation industry from the policy requirements of the DDA, and prevent independent review and determination of disputes about aviation safety and disability discrimination. Australia has an obligation to comply with its international obligations in the area of human rights, as much as it does its international obligations in the area of civil aviation. This Bill would sacrifice the former to the latter in a manner that is totally unnecessary and irresponsible. It therefore ought not to proceed.

Thank you for the opportunity to contribute these views. We would welcome the opportunity to discuss our submission further, if this would be of assistance to the Committee.

Yours sincerely

PHILLIP FRENCH
Executive Director