



COMMONWEALTH OF AUSTRALIA

Official Committee Hansard

SENATE

LEGAL AND CONSTITUTIONAL LEGISLATION COMMITTEE

**Reference: Civil Aviation Amendment (Relationship with Anti-discrimination
Legislation) Bill 2004**

WEDNESDAY, 16 JUNE 2004

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WITNESSES

BALL, Ms Jodie, Principal Investigation Conciliation Officer, Human Rights and Equal Opportunity Commission.....	2
CHILVERS, Mrs Merrilyn, Assistant Secretary, Aviation Operations Branch, Department of Transport and Regional Services.....	31
DIXON, Ms Megan Louise, PhD student, Griffith Law School, Griffith University.....	26
DOLAN, Mr Martin, First Assistant Secretary, Aviation and Airports Regulation, Department of Transport and Regional Services.....	31
HUNTER, Professor Rosemary Claire, Dean, Griffith Law School, Griffith University	26
HUNTLEY, Mr Adam, Domestic Brands Executive, Qantas Airways Ltd.....	12
MASON, Mr David John, Director Disability Rights Policy, Human Rights and Equal Opportunity Commission.....	2
McKENZIE, Ms Alison Louise, Senior Corporate Lawyer, Qantas Airways Ltd.....	12
MEANEY, Ms Mary, Principal Legal Officer, Attorney-General's Department.....	31
MINOGUE, Mr Matt, Assistant Secretary, Attorney-General's Department	31
STOJKOVSKI, Mr Miso, Legal Counsel, Virgin Blue Airlines Pty Ltd	21
TOOHEY, Ms Karen, Principal Investigation Conciliation Officer, Human Rights and Equal Opportunity Commission.....	2
YATRAS, Mr James Peter, Manager Compliance and Business Systems, Virgin Blue Airlines Pty Ltd.....	21

SENATE**LEGAL AND CONSTITUTIONAL LEGISLATION COMMITTEE****Wednesday, 16 June 2004**

Members: Senator Payne (*Chair*), Senator Bolkus (*Deputy Chair*), Senators Greig, Ludwig, Mason and Scullion

Participating members: Senators Abetz, Bishop, Brandis, Brown, Carr, Chapman, Eggleston, Chris Evans, Faulkner, Ferguson, Ferris, Harradine, Harris, Humphries, Kirk, Knowles, Lees, Lightfoot, Mackay, McGauran, McLucas, Murphy, Nettle, Ray, Sherry, Stephens, Stott Despoja, Tchen, Tierney and Watson

Senators in attendance: Senator Paine (*Chair*), Senator Bolkus (*Acting Chair*), Senators Ludwig, Mason and Scullion

Terms of reference for the inquiry:

Civil Aviation Amendment (Relationship with Anti-discrimination Legislation) Bill 2004.

Committee met at 5.00 p.m.

CHAIR—Good evening, ladies and gentlemen. This is the hearing for the Senate Legal and Constitutional Legislation Committee's inquiry into the provisions of the Civil Aviation Amendment (Relationship with Anti-discrimination Legislation) Bill 2004. This bill was referred to the committee by the Senate on 24 March 2004 for report by 30 June 2004. The Civil Aviation Amendment (Relationship with Anti-discrimination Legislation) Bill 2004 proposes to amend the Civil Aviation Act 1988 to empower the Governor-General to make regulations that may be inconsistent with the Disability Discrimination Act 1992 and the Sex Discrimination Act 1984. It also seeks to validate existing regulations and past actions based on those regulations in accordance with safety regulations and standards which may appear to be inconsistent with anti-discrimination laws.

The committee has received 12 submissions for this inquiry, all of which have been authorised for publication and are available on the committee's web site. Witnesses are reminded of the notes they have received relating to parliamentary privilege and the protection of official witnesses. Further copies are available from the secretariat.

Witnesses are also reminded that the giving of false or misleading evidence to the committee may constitute a contempt of the Senate. The committee prefers all evidence to be given in public but, under the Senate's resolutions, witnesses do have the right to request to be heard in private session. It is important that witnesses give the committee notice if they intend to ask to give evidence in camera. I would also ask witnesses to remain behind for a few moments at the conclusion of their evidence in the event the Hansard staff need to clarify any terms or references.

[5.01 p.m.]

BALL, Ms Jodie, Principal Investigation Conciliation Officer, Human Rights and Equal Opportunity Commission

MASON, Mr David John, Director Disability Rights Policy, Human Rights and Equal Opportunity Commission

TOOHEY, Ms Karen, Principal Investigation Conciliation Officer, Human Rights and Equal Opportunity Commission

CHAIR—Welcome. HREOC has lodged a submission with the committee which we have numbered 3. Do you need to make any amendments or alterations to that submission?

Mr Mason—No, thank you, Senator.

CHAIR—I am going to invite you to make a short opening statement and at the conclusion of that seek questions from my committee colleagues. I would note that we are meeting while the Senate is in session, so we are subject to the demands of the chamber. If there should be a call for a quorum or a division, senators will have to attend and we will have to suspend proceedings for that period.

Mr Mason—Thank you, Senator. I will be as brief as I can in view of the demands on your time in particular. To start at the end of our submission, to re-emphasise the conclusions that we come to, we want to make clear that we do not oppose—in fact, we support—the objectives of the bill in ensuring that there is certainty for appropriate regulation of air safety. We are concerned, however, about the detail of this bill as a means to that end, both in terms of its potentially broad effect in displacing protection of the Sex Discrimination Act and the Disability Discrimination Act but also—and I note that the submission from Qantas raises a similar concern—the issue of whether the bill actually achieves the objective of providing certainty that has been contemplated for it. In particular, we emphasise the desirability of specific provisions in the bill to reinforce the welcome commitments that the government has made in relation to consultation on introduction of any regulations which are inconsistent. That is all I would like to say in opening at this point.

CHAIR—Ms Ball or Ms Toohey, do you wish to add anything?

Ms Ball—Not at this stage.

Ms Toohey—No, thanks, senator.

CHAIR—Thank you for HREOC's constructive submission. One of the other submissions we have received, in fact more than one of them, have observed that it is their view that the DSA and DDA really do already have sufficient measures to allow discrimination where it is necessary for air navigation safety purposes. Is that HREOC's view on the current provisions?

Mr Mason—As a matter of law it is. Our submission draws attention to the provisions in the DDA in relation to inherent requirements so far as employment goes and to unjustifiable hardship so far as issues around the carriage of passengers with disabilities goes. Although the SDA does not contain precisely similar exemptions, it is our view that any issues realistically likely to arise are dealt with, and at any rate have to date been dealt with, via the exemption

for provisions in accordance with industrial awards, given that those regulate relevant matters in relation to pregnancy fairly closely.

And further, as far as the DDA is concerned, if there be a need for additional certainty in practice, the provision to prescribe laws—and laws for that purpose includes regulations—provides an appropriate avenue. Further to that, in relation at least to medical standards in employment and occupation, the temporary exemptions which the commission granted and which run until 2007 confirm that there is no present problem. So if it be accepted, as we submit, that this bill in its current form is not ideal, there is an opportunity for further reflection before proceeding.

CHAIR—Is that what you mean in paragraph 25 of your submission where you talk about there may be a requirement:

... for further consideration of measures to ensure an appropriate relationship between anti-discrimination and civil aviation safety laws ...

Mr Mason—Yes, and also consequent on our observations that merely to provide, as this bill does, that regulations may validly be made inconsistent with the SDA and DDA says nothing about the subsequent effect of those regulations once in place. As I think our submission points out, the DDA itself contemplates that there can be valid inconsistent laws in place and it still goes on to provide a mechanism for the DDA to step aside and defer to those valid laws, rather than people being in the position of having to either calculate some means of complying with both regimes or make a difficult and untenable choice as to which part of the law they should comply with.

CHAIR—Although as you indicated in the beginning of your remarks and as your submission indicates you are generally supportive of the aims and objectives of the bill, do you think it should be postponed to further consider the issue, or pursued?

Mr Mason—It is our submission that the bill in this form ought to be postponed and if there could be suitable amendments devised to take account of the concerns that we have raised. I regret we have not been able to devise those ourselves to this point.

CHAIR—We do not expect you to raise the amendments to the legislation, Mr Mason. We have enough trouble ourselves.

Mr Mason—We try our best to be helpful, Senator. But that is our position. We do not at all mean to be dismissive of the desire for certainty from industry. We have just flown down here ourselves. We are well aware that we are not intended by the parliament to be the principal regulator of aviation safety in Australia. But we are entrusted with the responsibility for the Sex Discrimination and Disability Discrimination Acts and we seek a means of ensuring that the objects of those acts are appropriately observed in all aspects of public administration, even one so important as air safety.

Senator SCULLION—In your submission you have some difficulties with the actual definitional aspects of ‘necessary’ and ‘unnecessary’. I wonder if you could give me some examples of what sort of mischief or misadventure that people could fall into when you would see it would be unnecessary whereas the airline or people providing for aviation safety may see that is the case, just so that I can get my head around potential examples.

Mr Mason—I might ask my colleagues who handle complaints to provide some examples in a moment but, just in general terms, one of our concerns on that issue is that it is not clear by what mechanism necessity is to be appropriately assessed. Given that the aim is the pursuit of certainty, if it is still going to be possible for someone, after a dispute as to whether they should or should not be permitted onto a plane or should or should not be permitted to perform a role in aviation, 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, certainly in the interests of prevention of discrimination, to see more upfront processes. We expect that would be a better approach for safety purposes as well.

I might ask my colleagues to address some of the actual or hypothetical examples that we might see, both in the area of disability and also in relation to pregnancy.

Ms Toohey—Certainly in the area of disability we get a range of complaints to do with both employment and access to goods, services and facilities, and access to premises, which is what a plane would be. The complaints I guess that we get are often about the manner in which the service is provided; they are not necessarily raising issues that relate to safety specifically, in that they are about how a person has been treated when they approach the airline or how they are treated on a plane.

We do certainly have complaints about people being required to have a carer with them when they travel, and sometimes the basis for that assessment is not clear. I note some of the submissions refer to a preference for people with disabilities to sit in the exit row. Having just had a look at the complaints that we have received to do with a number of the airlines and with some of the administrative bodies, we do not have specific complaints about that issue. We do have complaints about people's disabilities being accommodated on planes, and that may include equipment that they carry—for example, oxygen, wheelchairs and things like that that they need to carry either on the plane or at least as luggage. The exit row issue has not been raised specifically as a complaint that I can see. I guess the reason for that is most people would see that it is a reasonable requirement that the people who sit in the exit row can perform the duties that they are being asked to perform.

To do with employment, certainly we have some complaints to do with medical standards in that employees in a whole range of roles—ground staff, people who operate the fire trucks, people who operate transport vehicles—are also required to comply with medical standards. I guess the question that arises under the DDA is: how do those standards relate to the inherent requirements of their job? For example, if the standard relates to pilots, how relevant is that to a firefighter? The introduction of medical standards often leads to complaints from people who have been employed in the same job for years but who are suddenly required to comply with the particular standard.

Senator SCULLION—Are there currently some requirements under DDA that they provide for medical standards—it is very hard for a pilot if he is blind, for example, as an extreme case.

Ms Toohey—Sure.

Senator SCULLION—Is that already a part of the regulations?

Ms Toohey—There is an inherent requirements defence in the DDA already which says that, if you cannot do the job by reason of your disability, clearly it is not unlawful to not have that person doing the job. And that is both at application and at dismissal.

Senator SCULLION—And by suggestion you are saying that the amendments we are looking at may provide for further than what is currently prescribed under the DDA?

Ms Toohey—It would certainly broaden that in that it would suggest it is not about the individual consideration; it is about applying a blanket policy without considering the individual circumstances.

Senator SCULLION—So specifically, have there been any complaints in regard to any discrimination specifically regarding safety issues? Somebody has put their hand on the heart and said, ‘The reason that we are discriminating against you is because of a safety issue.’

Ms Toohey—Bear in mind I have to speak generally because I cannot talk about particulars—

Senator SCULLION—I understand.

Ms Toohey—We certainly have had complaints where safety has been raised, for example, with the carriage of guide dogs and the circumstances in which those dogs are carried. Sometimes safety is raised at the beginning of an inquiry and then, when we have investigated it further, it may or may not be the issue that perhaps the airline thought it was going to be. I guess the issue of how guide dogs are carried and how many guide dogs might be carried has been around for a while, and in our experience that has not been an enormous issue. Speaking off the top of my head, that is certainly one issue that has been raised in terms of safety.

My colleague has just referred me to an earlier HREOC decision in the matter of *McLean v. Airlines of Tasmania* where there was a person with significant disabilities who made a complaint that he could not travel on the planes. The commission found that it was not unlawful because there were no attendees on the plane, so there was no staff other than the pilot, and in the event of an emergency he would not be able to get off the plane on his own. So certainly safety was raised as an issue in that case, and the commission found that it was not unlawful.

Similar issues have been raised with an exemption that my colleagues in the Disability Rights Unit, DRU, have dealt with to do with some of the small airlines and one particularly small airline, again those issues about how many staff are on the plane and what assistance can they provide to people with significant disabilities who are unable to move around the plane themselves or who are unable to assist themselves in an emergency.

Senator SCULLION—Thank you.

Ms Ball—If I might provide some information in terms of the Sex Discrimination Act and pregnancy, the commission would consider that the restrictions might be in place that are more than are necessary in circumstances where there is a blanket ban on a pregnant pilot or an air traffic controller that is not justified by, say, safety data or medical data. The views of the commission have been expressed in documents such as the *Report of the national inquiry into pregnancy and work*. I suppose the fundamental premise is that pregnancy is not a disease, that pregnant women have a right to work and that any restrictions placed on this

right should be exceptional and should be decided on a case-by-case basis taking into account the health and the capacity of the individual woman concerned.

Senator SCULLION—Perhaps you can help me with the grey area of people who said that in their view their decision that it would be a safety issue was flawed because they did not understand the circumstances and later it came out it was not a big issue. Have you met any circumstances where the issue of safety is actually being used mischievously?

Ms Ball—Again, I can talk from my experience. The first important thing to note is that in my knowledge the commission has not received a complaint from, say, a pregnant pilot who wants to keep flying after a certain period in her pregnancy and has not been able to. We have received a few complaints over the years that have dealt with not so much refuting a person being banned from flying or being suspended from flying. They are more about what duties would you do if you were a flight attendant and you cannot fly after a certain period of time: what alternative duties; are they of a lesser value; do you receive lesser pay? In a lot of the cases it seems that it is something that individuals and the airlines involved can work out at a local level by discussing the needs of the woman, the medical evidence and any requirements that might be in place under enterprise agreements or awards.

Senator SCULLION—Are there any subjective requirements, prescriptive requirements, about the state of the pregnancy and whether or not they should be flying; or is it still a non-subjective thing? Is there something like a recommendation in the standards of the aviation industry that says, ‘You will not fly after this time’?

Ms Ball—I should say first that I am not an expert on medical standards in the area of aviation. But in terms of my general knowledge, for example, the enterprise agreement of long-haul flight attendants working for Qantas specifies that, after 26 weeks of your pregnancy, at that point in time you are suspended from flying. In terms of how that comes within the Sex Discrimination Act, under the exemption provided in section 40 things that happen in direct compliance with an industrial award or enterprise agreement as defined are exempt from the operation of the Sex Discrimination Act. So, while it may be discriminatory, it would not constitute unlawful discrimination for the purposes of our act. There are also, I understand, aviation regulations that specify—I think regulation 67.235—and put in place time periods for when pilots and air traffic controllers who are pregnant are suspended from flying.

Mr Mason—There is certainly no suggestion on the commission’s behalf that airlines, regulators or anyone else are in the business of advancing safety concerns in other than good faith. In relation to your reference to mischief, it is important to make that point. Our concern is rather that the breadth of the bill being put forward at present could permit exclusions motivated in all good faith on safety grounds but that are broader than is justified by consideration of the circumstances of a particular person.

CHAIR—Any further questions?

Senator LUDWIG—Unfortunately I had to attend another meeting so I may have missed some of the earlier issues. I do not want to cover some of the matters that have already been addressed within the substantive questions by the senators. If you have had an opportunity to read the Qantas submission, it seems then to go to the second step. The second step seems to

suggest that there should be amendments to the SDA or DDA as a consequence. In your view, would this bill be necessary as a consequence if we went to the Qantas second step?

Mr Mason—I think I really ought to defer to my colleagues from the Attorney-General's department who, as I understand it, will be before you later in the afternoon for a view on the need for this bill—

Senator LUDWIG—I am happy to rephrase it and ask them that, but sometimes they appear with you and help you.

Mr Mason—We would agree with Qantas that we are not convinced that this bill by itself achieves its stated objectives, because there is a need for clarification of the effect under the Sex Discrimination Act and under the Disability Discrimination Act of the effect of regulations, valid though they be, and all this bill does is to say, 'Okay, the regulations are valid for the purposes of the civil aviation regime.'

Senator LUDWIG—Yes, there's always a problem.

Mr Mason—So thus far with Qantas. 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 the parliament for amendments to the DDA by virtue of the provision for temporary exemptions and by virtue of the prescribed laws provision.

One of the attractions to our minds of the temporary exemption power is not because it is exercised by us—that is really beside the point—but because it does allow for a process of regular review and reassessment of the necessity of limitations on the general principle of non-discrimination. Because exemptions granted under that power, both under the DDA and the equivalent power under the SDA, can only be granted for a maximum of five years at a time so that there is in effect a sunseting and a need for a further look, which we think in this area is an important element of accountability in view of the continuing development of both medical knowledge and medical treatment as far as pregnancy goes and also the development of technology in particular as far as disability goes. We certainly would not contemplate that a blind person could hold a pilot's licence now, but in 100 years who knows.

Senator LUDWIG—How many exemptions have you currently provided under the DDA or SDA?

Mr Mason—In relation to these matters, there is a single exemption in place but which is available for the benefit of anyone acting pursuant to the relevant CASA standards. So there is not a series of separate exemptions for each airline, each other relevant aviation participant in terms of airports and so on. I could not give you off the top of my head how many exemptions under the two acts together on all matters have been granted, but we could certainly provide that.

Senator LUDWIG—It would be good if you could provide that. I was interested that you also provide a range of other exemptions for other industries or other groups: is that right?

Mr Mason—Yes.

Senator LUDWIG—How many exist generally?

Mr Mason—Again, I would have to take that on notice.

Senator LUDWIG—Perhaps a snapshot might be helpful.

Mr Mason—There are a number of uses for the exemption process. One is to manage a transition from discriminatory to non-discriminatory practice over time. The decision which the commission announced last week on subscription television captioning—which I noticed the Minister for Communications, Information Technology and the Arts was kind enough to put out a press release welcoming—was one of those where in effect there was provision of a standard of phased introduction of captioning for that industry. And a very similar exemption the previous year was granted in relation to captioning on broadcast television to increase beyond the standards provided under the Broadcasting Services Act itself.

Senator LUDWIG—Do any exemptions relate to public health or safety that you have already granted, that you can recall?

Mr Mason—The one in relation to CASA regs would be the big one.

Senator LUDWIG—Other than CASA.

Mr Mason—In the main, under the DDA at least, exemptions have been about phased programs of transition. But as my colleague Ms Toohey referred to, there was a safety element in the exemption that we granted to Air North about carriage of persons using wheelchairs in small planes. That was principally about occupational health and safety issues for the staff of the airline in seeking to lift people in spaces where, as the applicants submitted and as the commission found, there is not sufficient safe standing room to perform a lift safely. That was one of the bases on which that exemption was granted. But, again, part of that exemption contemplated a process of reviewing and reporting over time to see if the industry could find any means of moving forward so that people, particularly in remote areas where small planes are the only viable means of rapid long distance transport, should not be contemplating being excluded forever if there be some means of moving beyond that.

Senator LUDWIG—Have you considered whether or not it has the potential to open up a Pandora's box in relation to other industries or other departments seeking regulations to achieve the same result on the basis of public safety, public health or some other basis?

Mr Mason—I am sorry, the granting of exemptions opening up?

Senator LUDWIG—Following a similar process as this in seeking regulations to exclude the DDA or SDA to achieve a similar purpose where you then do not get to have a look at or grant the exemption; in other words, it sets a precedent.

Mr Mason—Using the prescribed laws provision to set aside the DDA, the custodians of that power in the first instance are the Attorney-General and secondly the parliament, and we trust in both to exercise those powers accountably. That is the safeguard as far as those go. My colleague just wanted to raise another matter in response to that question.

Ms Toohey—The DDA does also have a specific section that relates to a public health defence. Section 48 of the DDA provides an exemption if there is a public health issue. Irrespective of whether an exemption has been granted or a standard, there is already a provision in the DDA that relates to that.

Mr Mason—That is specifically in relation to infectious diseases. But there is a recognition in the act that there are legitimate limits to the application of anti-discrimination laws and that it is not the only public interest to be served.

Senator LUDWIG—Were you consulted on the process that it would be the human rights branch that would examine the issue rather than it being referred to the Human Rights and Equal Opportunity Commission to have a look at? In other words, how will you know about the regulations other than going and reading them and seeing them for yourself?

Mr Mason—We would certainly prefer that the bill, if it goes forward, provides for a public process of consultation. With all respect to our colleagues in the human rights branch, they are not in a position to be independent of government. They do their duties conscientiously and professionally, of course. Consultation within government is a good thing but it is not the same good thing as consultation beyond government with interested parties.

Ms Ball—If I might just add something briefly: in our submission HREOC's view is that we welcome consultation and we would like to be part of any consultative process.

Senator LUDWIG—You raised the issue of 'necessary' as a concern. Is there another way of expressing it, or is it the concept that troubles you?

Mr Mason—I think the concern is not so much about the meaning of the word but that simply putting the word 'necessary' into a bill does not seem to provide a process for assessment of whether a particular restriction and as it applies to a particular person really is justified. It is a touchstone and no doubt a statement of aspiration that people involved in developing regulations would look towards, but it does not seem to provide the same sort of interactive process in relation to the circumstances of a particular person's pregnancy or a particular person's disability that, for example, the current complaint processes available through the commission do. As I say, we are not by any means insisting that that process is the only proper process for assessing the interaction of safety and discrimination but we are concerned that the circumstances of individuals ought to be able to be appropriately taken into account. We do not see a simple reference to 'necessity' in this bill as getting us all the way on that issue.

Senator LUDWIG—Are you aware of any complaint or indication that the current regime for seeking an exemption and the current CASA exemption has failed or is insufficient to meet the demands of the industry?

Mr Mason—We did note the reference in the submission from the Department of Transport and Regional Services that the exemption granted by the commission was narrowly based. That is true to the extent that it applies to occupational medical standards and not to issues of carriage of passengers with disabilities. The first observation would be that an occupationally related exemption is what was asked for and what was granted. Secondly, it would be available to either regulators or the regulated industry participants to apply for an exemption applying to issues relating to passengers with disabilities if they saw the need. Thirdly, the prescribed laws provision is already available to pick up issues there if there be any concerns about the interaction between safety standards and either the general provisions of the Disability Discrimination Act or the disability standards for accessible public transport,

because both the general provisions of the act and the effect of the standards are subject to possible prescribed laws action.

Senator LUDWIG—So no-one has asked you whether they could enter into negotiation to seek a broader exemption than what is currently available to them or the department of transport or CASA or sought to negotiate a new one which might cover the specific circumstances that seem to have been described by them in these submissions?

Mr Mason—Not on these issues. In fairness I should say that there have been issues raised by the Airports Association in relation to the practicability of some of the strict letter of the disability standards for accessible public transport so far as some of the access measures on the ground go. We have stated fairly clearly, I think, the availability of the exemption provision on those issues and to date they have not approached us for an exemption on those.

Senator MASON—You may have already touched on this, I suspect, but are there any precedents for this sort of legislation that allows the Governor-General to make regulations contrary to anti-discrimination legislation?

Mr Mason—I am not aware of any specifically in relation to anti-discrimination legislation. I think there have been—again, my colleagues appearing later from the two departments most closely concerned could probably assist you, Senator, in terms of other validating legislation, if you like, to deal with issues of the ability to make regulations inconsistent with other acts.

Sorry, I am concerned that I may have just misled you, because I think there may have been some provisions in the immigration area in relation to the Racial Discrimination Act, but I would have to check that.

Senator MASON—But you cannot think of any off the top of your head?

Mr Mason—No. If you will allow me just to pause for a minute to make sure that I have not misled you there.

Senator LUDWIG—Perhaps the department can check.

Mr Mason—I would have to confirm that, but I think there may have been some in the immigration area.

Senator MASON—Mr Mason, can you take it on notice and let us know if there is any similar legislation, any precedent?

Mr Mason—Yes, of course.

Senator MASON—Secondly, the aim of this legislation is as well to validate past actions by airlines and their staff and crew while also covering possible future inconsistencies that compliance with international standards may produce. So in particular it seeks to validate past actions under existing regulations that may have appeared to be inconsistent with current anti-discrimination laws. If the committee were to adopt your suggestion of exemption, would exemption be sufficiently broad to cover past actions?

Mr Mason—No, the commission cannot grant retrospective exemptions. But, in common with the submission from Qantas, we would question whether this bill actually validates past actions by airlines at any rate. 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.

Senator MASON—For past acts?

Mr Mason—That is right, nor future acts.

Senator MASON—Okay. So the exemption would not cover past acts, but you are not certain that this legislation would do that in any case.

Mr Mason—Yes.

CHAIR—Thank you very much, Mr Mason, Ms Ball and Ms Toohey. Thank you for assisting the committee. If you can provide any of those responses on notice, that would be helpful to the committee.

Mr Mason—Of course. Thank you, senators.

[5.38 p.m.]

HUNTLEY, Mr Adam, Domestic Brands Executive, Qantas Airways Ltd

McKENZIE, Ms Alison Louise, Senior Corporate Lawyer, Qantas Airways Ltd

CHAIR—I welcome our witnesses from Qantas Airways Ltd. Qantas has lodged a submission with the committee which we have numbered 12. Do you wish to make any amendments or alterations to that submission?

Ms McKenzie—No, thank you.

CHAIR—I will invite you to make an opening submission and, at the conclusion of that, we will go to questions from committee members.

Ms McKenzie—Thank you, Chair. Firstly, on behalf of Qantas I would like to thank the committee for inviting Qantas to appear before you today. We have prepared a brief opening statement, which I would like to read if I may.

As a domestic and international airline, Qantas is bound to comply with the various aviation safety regulations and standards set out in the civil aviation legislation and, as such, we have a keen interest in legislation which amends or otherwise impacts upon this framework. The safety of our passengers and aircraft is of paramount concern to Qantas and is in no small part dependent upon an effective regulatory regime that operates with certainty and clarity. The prospect that the validity of the civil aviation legislation may be called into question as a result of a possible inconsistency with provisions in the anti-discrimination legislation is contrary to the objectives of an effective system of safety regulations. If there is room for doubt, there should be clarification and the safety regime should prevail.

Notwithstanding this, it should not be assumed that there are broad areas of discrimination permitted or encouraged by the regulations made under the civil aviation legislation. In our experience, there are three main areas where the regulations appear to operate in a way that would not otherwise meet the objectives of the legislation concerned with discrimination: where the regulations operate to ensure that exit rows are occupied by people who are capable of assisting in the release of the emergency exit and whose presence would not impede the quick evacuation of the aircraft; where the regulations restrict the presence of animals inside the aircraft cabin; and where flight crew have to meet specific medical requirements. Qantas considers that the bill appropriately limits the scope of the power to make inconsistent regulations, as the power is confined to circumstances where the inconsistency is necessary for the safety of air transport. In Qantas's view, the bill represents the first step in a two-step process to appropriately address the conflict between the civil aviation legislation and the state and federal discrimination legislation. The second step is to ensure that direct compliance with the civil aviation legislation is an exemption to the general provisions prohibiting discrimination on the ground of disability and sex.

Qantas's experience and concern is that passenger complaints are made and disability discrimination commission complaints initiated in relation to circumstances where Qantas is simply complying with its obligations under the civil aviation legislation. However, under the current regime, compliance with the civil aviation legislation does not provide Qantas with a

clear defence to claims of disability discrimination. Accordingly, Qantas would like to see the civil aviation legislation, or at least its regulations, included as a prescribed law for the purposes of section 47 of the DDA and the Disability Discrimination Regulations 1996. We would advocate a similar exception in the Sex Discrimination Act 1984 in order to allow direct compliance with the civil aviation legislation.

Finally, in Qantas's view the reference to 'air navigation' in the bill provides opportunity for further argument as to whether issues raised in relation to the carriage of passengers within the cabin of the aircraft, such as the issue of exit row seating, and aircraft design issues, rather than issues relevant only to navigation of the aircraft, are intended to come within the amendment. Qantas submits that the proposed amendments to the legislation should not be restricted to the inconsistencies necessary for the safety of 'air navigation' but should instead refer to 'air transport'. I would be pleased to answer any questions in relation to our submission.

CHAIR—Mr Huntley, did you wish to add anything?

Mr Huntley—No, I did not.

CHAIR—I just have one question, Ms McKenzie, and it relates to the point you were making towards the end, about your view that this is a two-step process and you want to go on and deal with Qantas's concern about complaints being made about treatment, notwithstanding the fact that your actions are covered by the exemptions. What if it is a complex complaint based on more than just a single issue that is covered by the exemptions?

Ms McKenzie—In our experience, a complaint outside of these limited criteria which relate to the civil aviation legislation would come to us from HREOC or from any of the disability groups, and we would deal with each matter in turn. What we would like is to be able, when we get to the exit row seating complaint, for example, to say, 'Our response to that is this bill, which gives precedence over the disability discrimination legislation, so in relation to that point alone that is resolved: can we now deal with the rest of the complaint?'

CHAIR—But how would that protect the individual, if, by happenstance, Qantas was acting in excess of its powers under the bill—if one of your staff was perhaps behaving in a vindictive manner—

Senator MASON—Or excessive.

CHAIR—or in an excessive manner? Then the individual would not be protected.

Ms McKenzie—No, because that would be a separate element to the complaint. The complaint would come through and there might be a range of issues. One of them would be, 'I was not allowed to sit in the exit row seating. That is discrimination.' We would say, 'That is not discrimination. That is a requirement of the civil aviation regulations.'

CHAIR—But it might be discrimination, Ms McKenzie. It might be a Qantas employee acting excessively.

Ms McKenzie—But they would be complying with the legislation.

CHAIR—They might not be.

Ms McKenzie—In what way?

CHAIR—We have a range of disabilities and we have a range of issues under which this Disability Discrimination Act applies. My personal observation at this point in the discussion, and I have to form a view on this as we proceed through the discussion this evening, is that it is not appropriate to say that you can blanketly deal with the exit row issue. It should be examined on the circumstances of the case.

Ms McKenzie—Qantas's position is that the reason—

Senator LUDWIG—And on the disability.

CHAIR—And on the disability, indeed, as Senator Ludwig observes.

Ms McKenzie—The requirement for exit row seating does not apply only to disabled passengers but to anyone who cannot get up and assist to open the exit row door or who will obstruct the evacuation of the aircraft. It applies to elderly passengers and to anyone who is incapacitated at that time. There are obviously words to cover that under the regulations. When we are imposing that requirement, we are actually not imposing a requirement, we are complying with our obligations under the Civil Aviation Act and the civil aviation regulations.

CHAIR—How are you going to comply, in terms of exit row seating, with the age discrimination laws that the parliament has passed this week, which preclude discrimination against people based on age?

Ms McKenzie—Again, that is another requirement under the civil aviation regulations.

CHAIR—Do you have an exemption on that?

Ms McKenzie—No, we do not.

CHAIR—Would you seek one?

Ms McKenzie—The only exemption that I am aware of that has been sought—and it is not sought by us but by the Civil Aviation Safety Authority—is in relation to the pregnancy of pilots issue. The other issues we have to deal with on a day-to-day basis.

CHAIR—I am not persuaded by your two-step proposition at this stage.

Senator LUDWIG—You have not, as I understood it, spoken or discussed with HREOC some of your concerns: is that right?

Ms McKenzie—In relation to this, no, we have not discussed them directly.

Senator LUDWIG—So you know that you have got an exemption and you know you have got other problems that are associated with the way you operate your business in terms of two acts of parliament: is that right?

Ms McKenzie—Yes.

Senator LUDWIG—And you know that HREOC provide exemptions, although narrowly focused in one—

Ms McKenzie—That exemption was obtained by the Civil Aviation Authority not by us.

Senator LUDWIG—But you benefit by it.

Ms McKenzie—Yes.

Senator LUDWIG—You have not then sought to talk to HREOC or negotiate with HREOC or otherwise seek exemptions that might affect or assist you in your business—

Ms McKenzie—My concern with continual exemptions—

Senator LUDWIG—I just want to ask that question. Perhaps if you focus on that question and answer that, we can then move on.

Ms McKenzie—Okay. My concern with exemptions is that they are for a limited time—

Senator LUDWIG—No, I thought my question was a bit more specific than that. I asked you whether you had spoken to HREOC about it.

Ms McKenzie—No, I have not.

Senator LUDWIG—Now you might like to add whatever you want to add.

Ms McKenzie—I have not done so, but our reason for being here was simply to give our submissions in relation to why we think this bill would provide a lot of clarity—

Senator LUDWIG—Yes, that might be your reason for being here, but I am not limited by your reasons.

Ms McKenzie—Okay.

Senator LUDWIG—I take it you are here to assist the inquiry into this bill. You support the bill?

Ms McKenzie—Yes.

Senator LUDWIG—You support the need for the bill then?

Ms McKenzie—Yes, I do.

Senator LUDWIG—And the need for the bill relates to what purpose?

Ms McKenzie—It is to clarify the position between two bits of legislation that effectively conflict and raise issues for Qantas as an operator versus our passengers who have disabilities.

Senator LUDWIG—All right. Which two bits of legislation are you talking about that conflict?

Ms McKenzie—I am talking about the Disability Discrimination Act 1992, the Sex Discrimination Act 1984 and the civil aviation regulations 1998.

Senator LUDWIG—And there are exemptions under both of those pieces of legislation which—

Ms McKenzie—There is only one exemption that I am aware of. If there are others, I am not aware of them. There are certainly not any exemptions in relation to exit row seating or the presence of animals inside the aircraft cabin. There are some exemptions in the CASA regulations which we comply with, but it does not reduce the number—

Senator LUDWIG—Have you sought advice from or spoken to HREOC about seeking in relation to some of the operational issues that you have raised—such as animals on board, exit row seating and the like—a broader exemption from that legislation that you say conflicts with the civil aviation—

Ms McKenzie—No, I have not.

Senator LUDWIG—Why not?

Ms McKenzie—I did not know that the sex discrimination exemption existed until this process that we have gone through. So I was not aware of that exemption process.

Senator LUDWIG—Do you think you will talk to them about seeking an exemption now that you are aware that you may be able to, just so that you can then determine how much of this legislation you actually require—or do you prefer this legislation?

Ms McKenzie—It does not solve the problem of the retrospective part of this bill which would validate the inconsistencies that have existed in the past. It would not solve that problem. We may be able to seek an agreement on the exit row seating issue, potentially, but it could be subject to HREOC's agreement—

Senator LUDWIG—Yes, it is always a process and it has to sometimes be engaged.

Ms McKenzie—That is right. We feel that the exit row seating issue is fairly straightforward and should not be an issue, and therefore potentially that could be agreed, but it could potentially not be agreed as well.

Senator LUDWIG—I will deal with the exit row seating then. If the age based discrimination legislation will soon be law—I suspect it either has an operational date or it will start within 28 days, one or the other, and I think it is the latter—then do you say that if a person is elderly a flight attendant can exclude someone from sitting in a particular exit seat, if they perceive them to be of an age that may not allow them to sit in that seat and open the exit door?

Ms McKenzie—We would say that, if they were complying with the civil aviation regulations then, yes, the flight attendant should, but, if they are complying with the age discrimination new laws, they probably should not, which is the problem.

Senator LUDWIG—Who makes that determination that they are aged or insufficiently capable of opening the exit door? What happens if the person sitting in the seat says, for argument's sake, 'I know I am elderly. I am 65 or 75, but I am fit and capable of opening the door,' and the flight attendant says, 'I do not think you are. You look frail to me'?

Ms McKenzie—I think the flight attendant would have the say there. The responsibility for safety rests with Qantas—with our staff. A decision would be made at check-in originally by the check-in staff. If someone was on board that the flight attendant did not believe satisfied that requirement, she would probably move them, at the moment—under the current system.

Senator LUDWIG—Is it the intention that the proposed bill would give the flight attendant the absolute right to be able to just move them?

Ms McKenzie—Yes, it is to remove the uncertainty and obtain clarity in this situation—because, to maintain our air operator's certificate, et cetera, we have to comply with CASA requirements, and this is a CASA requirement. It would be a breach of CASA requirements and a fairly serious safety issue from CASA's perspective—and from ours too. The object here is in no way to discriminate against passengers with disabilities or with issues of age in any way. The whole focus for Qantas is safety. That is our paramount concern and that is in

the interests of all passengers, including the passengers in those exit row seats. We want to be in the best position in an emergency—in an evacuation—having all the people that we can in those seats who can assist.

Senator LUDWIG—I think we all agree with that, as a general statement of principle. I do not think anyone would cavil with that. But let us take that a little bit further: if that person disagreed and was shifted in any event, because of safety concerns, and they wished to make a complaint, under the new regime, if this bill was to pass, there would not be a place to complain to that they were treated inappropriately or perhaps overly aggressively or vindictively by the flight attendant for no real reason.

Ms McKenzie—They would be able to complain to Qantas, and I am sure they would complain to Qantas. In response to that we would say to them, ‘You were moved due to compliance with civil aviation requirements and the paramountcy of safety. In relation to the way the flight attendant spoke to you or treated you, that is unacceptable and we are very sorry,’ because the flight attendant should be able to remove that person to another seat without offending or upsetting the passenger.

Senator LUDWIG—When you say there is a two-stage step, do you say the regulations as such do not go far enough—that the current bill does not go far enough?

Ms McKenzie—No—

Senator LUDWIG—Do you want then amendments to the SDA and DDA legislation? I am just not quite clear. Perhaps you could articulate that.

Ms McKenzie—Actually what we are saying is that the first step is the proposed bill, which I think is a very comprehensive bill in terms of what it is trying to achieve in clarity and certainty. It is retrospective. It has to be passed through the department of human rights in terms of future regulations.

The reason we have said that it should also be mentioned in the DDA is that, when a complainant is discussing the matter with HREOC and other disability groups, they do not need to necessarily be aware of this bill. As I understand it, there are only two acts of parliament that are prescribed laws in this bill. If they can see that parliament has considered it necessary that the Civil Aviation Act and its regulations, or at least its regulations, be excluded as well, I think that gives credence to the fact that this is not airlines trying to be difficult but rather airlines trying to just obtain a balance that is fair and reasonable to both parties.

Senator LUDWIG—If we approached the second stage that you have outlined, would the original bill—this bill—be still relevant?

Ms McKenzie—Yes, because I have concerns that have been raised which talk of perhaps putting in certain regulations, for example, rather than the civil aviation regulations—or limiting what would be included in those prescribed laws. That would probably suffice for the present but in the future, were there to be more regulations made that might conflict and place us back in the same position where we had a conflict, we would potentially have to go through the same process. The issue really is 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, because they are there for the safety of all passengers, including passengers with disabilities. There is also the retrospective nature of that.

Senator LUDWIG—So what area would be still alive in relation to this bill if your second stage was to be effected?

Ms McKenzie—The retrospective aspect of anything that is currently—

Senator LUDWIG—So how long has this exit row seating issue, for instance, been around? I recall it for quite some time now.

Ms McKenzie—Yes, I am not sure of that.

Mr Huntley—It is at least 15 years.

Ms McKenzie—At least 15 years.

Senator LUDWIG—So it has taken 15 years for legislation to be drafted and brought before parliament in respect of this issue or for you to agitate the issue or for you to talk to HREOC? Well, you have not talked to HREOC yet, in 15 years, about this issue.

Ms McKenzie—No, we have not been involved to my knowledge in this bill coming forward.

Senator LUDWIG—Why has it taken so long if safety is paramount?

CHAIR—I do not think the witnesses can comment on the bringing of a bill to the parliament. They can comment from their perspective.

Senator LUDWIG—Yes, in their perspective of either raising with HREOC that there is a concern or raising with government that there is a concern. When did you raise it with government?

Ms McKenzie—We have not raised it with government to my knowledge. I am not aware that we have raised it, have we?

Mr Huntley—No.

Senator LUDWIG—And you have not raised it with HREOC in the 15 years that it has been a problem or an issue?

Ms McKenzie—We have certainly raised it in terms of defending ourselves in a complaint, but we have not gone to them, as we did not go to them in the last exemption. CASA did that.

Senator LUDWIG—But you still say safety is paramount, although in the 15 years you have been aware of the issue you have not sought a solution to it to your satisfaction.

Ms McKenzie—We deal with our passengers on a case-by-case basis, and that is how we have been—

Senator LUDWIG—All right. I am just trying to understand the urgency of the legislation and why we need the legislation—some of the things that we would ordinarily turn our mind to—and you have been of some assistance in that. The last issue I was interested in asking you about was the process of the way the legislation will work. It will go to the Human Rights Branch of the Attorney-General's Department for them to consider as to whether or not it is a matter that should be looked at. Would you object if it was HREOC themselves? Do you mind

who looks at it? Is it particularly important that the Attorney-General's Department is the one that looks at it or does it not matter as long as the concerns are met and the outcome is the same or similar?

Ms McKenzie—I would have thought myself that the Attorney-General's Human Rights Branch would have been sufficient, because then—

Senator LUDWIG—Why is that? The Human Rights and Equal Opportunity Commission deals with all these things on a day-to-day basis, I suspect, and has some knowledge of disabilities, exemptions and those sorts of things. I suspect the Human Rights Branch also has that knowledge and may equally be able to examine these matters. Upon what basis do you say that the Human Rights Branch might be better? Have you had some experience with them in the past?

Ms McKenzie—No. I would have thought that the government can adequately provide those protections. Once it was effectively put out into the community for advice and review by, for example, HREOC, then equally Qantas or airlines who have the same vested interest as Qantas would be able to comment as well, in which case it would become a much longer process.

Senator MASON—Ms McKenzie, in your response to questions from Senator Ludwig you said that you did not favour an exemption because it did not relate to past activities that may have been contrary to anti-discrimination legislation: is that right?

Ms McKenzie—Yes.

Senator MASON—What past activities are you referring to?

Ms McKenzie—I do not know every specific example, but there are exit row seating issues and there are issues about animals in cabins and so forth—

Senator MASON—Did you say 'animals in cabins.'

Ms McKenzie—Yes, animals in the cabin of an aircraft, guide dogs. Because our focus is clarity and certainty about safety, we support the idea that it would be retrospective. If there are any other claims out there that are currently under way that have these same issues, they should have the same benefit of clarity and certainty—not that I know of any, and there may well be none.

Senator MASON—I was just going to ask you that.

Ms McKenzie—There may well be none. But, from our perspective, if there are the same clarity and certainty should be accorded to those current claims or claims that are on foot.

Senator MASON—Do you accept that the legislation would relate to past acts? We had evidence from HREOC before that in fact the legislation may not refer to past actions.

Ms McKenzie—From my reading of it I understood that it was intended to be retrospective. I do not have any comment.

Senator MASON—So in effect there are some activities, such as animals in cabins and exit row seating, that you think may leave Qantas open to potential liability and this legislation will clarify issues of safety and liability in a way that an exemption would not?

Ms McKenzie—An exemption is limited, as well as the other concerns. If safety is paramount, which we believe it to be, what is the point of making exemptions which have a lifetime to them? These issues are very discrete. They do not relate to some of the examples which have been given.

CHAIR—Just to wrap up, Ms McKenzie, the Qantas submission suggests that the word ‘navigation’ should be removed and substituted with the word ‘transport’ when we are talking about ‘air navigation safety’. Most of the other submissions are trying to make this a tailored and refined approach; whereas Qantas appears to be trying to broaden it quite substantially by suggesting that. How do you justify that suggested terminology, while trying to deal with the concerns of individuals—who might be the complainants in this process—and other stakeholders?

Ms McKenzie—We do not see that as broadening it that significantly. To me, air navigation is what occurs in the cockpit of an aircraft and arguably there would be arguments that this bill does not extend that far. Air transport, to me, is the whole aircraft. Out of the three issues that I have raised, two of them occur in the cabin of the aircraft. It is arguable, when discussing exit row seating or the presence of animals inside the aircraft cabin with complainants, that those issues do not relate to air navigation but to air transport. If there is a better way of phrasing it, making it clearer that it relates to flight or to some other way, we would support that. Our main aim is not to restrict it to any pedantic arguments about whether it actually is navigation versus the actual transport of passengers in an aircraft.

CHAIR—I think the concern would be that if you expand it to ‘air transport, which is a very broad term—and we can take this up with officers later—then you are enabling the regulations to apply extremely broadly. We would be worried about protecting the rights of individuals who might come within their purview.

Ms McKenzie—It could be narrowed somehow to apply to airlines, but I think air navigation is quite specific from a regulatory perspective.

CHAIR—We can check that with officers. I do not have any further questions. Ms McKenzie and Mr Huntley, thank you very much for appearing. If on reading the transcript you decide there is more information with which you would wish to supply the committee, then please by all means do that through our secretariat.

[6.08 p.m.]

STOJKOVSKI, Mr Miso, Legal Counsel, Virgin Blue Airlines Pty Ltd

YATRAS, Mr James Peter, Manager Compliance and Business Systems, Virgin Blue Airlines Pty Ltd

CHAIR—Good afternoon. Welcome. Virgin Blue has lodged a submission with the committee which we have made submission No.4. Do you wish to make any amendments or alterations to that submission?

Mr Stojkovski—No.

CHAIR—I invite you to make an opening statement and we will go to questions after that.

Mr Stojkovski—In the interests of time, I will not make too long a statement. We wanted to thank the committee for allowing us the opportunity to submit to it and also to appear before it this afternoon. As with any other airline that operates in Australia, Virgin Blue Airlines have competing interests which we must balance. Safety is our number one priority and that is something that we do not compromise on. We try to keep that at the forefront of our minds and at the forefront of all of our operations. There are instances where we do encounter situations where we are forced to balance the competing interests of safety and compliance with discrimination legislation. We believe that this not only reduces the efficiency with which we operate our operations but also we do not think it is appropriate that it should be done at our level. We think that it should be done at a higher level, with consultation with all key stakeholders, and then it should be put into regulations and have that power of law. That is where we are coming from on this issue.

CHAIR—Mr Yatras, do you wish to add anything?

Mr Yatras—No, thank you.

CHAIR—Let me just clarify that point you are making there, Mr Stojkovski. Are you saying that you think the development of policy in this area is better done through government and the parliaments than by individual airlines?

Mr Stojkovski—I think so. There are certain issues that are I guess higher level than the operational issues that we should encounter. We do not believe that we have the power or that we have the authority or indeed that we are the appropriate people to be making certain policy decisions. We think that is better done within the institutions of parliament, and we think it would more efficient for our operations if it was done that way. We believe that this bill would go towards that aim.

Senator LUDWIG—Have you had discussions with CASA or the department about the proposed regulations?

Mr Stojkovski—With CASA or DOTARS?

Senator LUDWIG—Yes.

Mr Yatras—Not the proposed regulations, with CASA, no.

Senator LUDWIG—So when did you first see them?

Mr Stojkovski—Like the last speaker, we were made aware of this when it was brought to our attention via certain alerts that this bill was coming up. We are in constant contact with HREOC and the state disability and human rights and equal opportunity authorities, when we have complaints and when we are answering those complaints and working through them. So we are in constant contact with those authorities, but this bill itself has not been discussed with any of them to my knowledge.

Senator LUDWIG—So when were you first consulted about the bill?

Mr Stojkovski—About the bill?

Senator LUDWIG—Yes, by the department.

Mr Stojkovski—By the department—

Senator LUDWIG—By CASA or the department of transport?

Mr Stojkovski—To my knowledge, we have not been consulted by those agencies.

Senator LUDWIG—I take it you will be a beneficiary of the bill—it will provide you with assistance in the way you do your business—is that right?

Mr Stojkovski—Yes, it will provide assistance. I do not think beneficiary is quite the right term—

Senator LUDWIG—I am happy for you to choose a better word.

Mr Stojkovski—I just think the framework in which we and other airlines operate and in which passengers can expect services will be better defined. It will benefit all key stakeholders, not just airlines.

Senator LUDWIG—Regarding the range of circumstances that you say it will apply to, are there some examples you can provide to the committee which will give us an understanding of how it currently impacts upon your business and how this legislation will assist in mitigating some of those issues?

Mr Stojkovski—Sure. There are two aspects to this. There is the employment aspect, which has been touched on—the pregnancy issue has been touched on. That would provide more clarity to us and give us better guidance as to what stage in the pregnancy it becomes a risk to airline safety.

Senator LUDWIG—Yes.

Mr Stojkovski—Also in the employment process there is the need for medicals to ensure that potential candidates are medically fit, both physically and mentally. It would be of great assistance to us if there was guidance on those issues as well. On the passenger side, if I can use that term, there are various instances, and some have been identified by the previous speakers. There is the emergency exit issue and there is the animals in the cabin issue. We also have others. For example, we have encountered issues with the provision of in-flight wheelchairs. The issue that we do get quite a bit is the issue of travelling independently and whether certain passengers are capable of doing that.

Senator LUDWIG—On any of those issues have you sought assistance from HREOC to resolve them, so that you are provided with certainty?

Mr Stojkovski—In the process of responding to a complaint we discuss those issues with HREOC, yes.

Senator LUDWIG—But in terms of seeking a more certain solution.

Mr Stojkovski—To be honest, I am not exactly sure that we can—

Senator LUDWIG—Or seek exemption or—

Mr Stojkovski—Exemptions, as has been mentioned, are limited in both scope and life, and from my understanding are not a particularly straightforward process.

Senator LUDWIG—But have you spoken to HREOC about exemptions—whether they be limited in scope or life or those particular issues—as to whether they can in fact be narrower and longer?

Mr Stojkovski—Exemptions have come up in our discussions, yes. We have not extensively dealt with that issue, but we have discussed with HREOC whether exemptions might be the way forward. This bill though, we believe, would be better suited to the purpose that we are trying to achieve here.

Senator LUDWIG—Have you had the opportunity of reading Qantas's submission?

Mr Stojkovski—Actually I have not.

Senator LUDWIG—All right. They mention a two-step process. You have not had a look at that?

Mr Stojkovski—I have not contemplated that. I have not thought about it. Having heard what Qantas had to say, I cannot say that I disagree with that. I think that that would be a prudent step, although I would have to think about it a bit.

Senator LUDWIG—If you did want to think about it, I am quite willing for you to follow up with a letter to advise the committee. It is a matter of whether or not you want to provide that evidence now or turn your mind to it.

Mr Stojkovski—Sure, I am happy to.

Senator LUDWIG—Have you turned your mind to the issue of whether the phrase 'air navigation' or 'air transport' is better—which Qantas mentioned? Have you turned your mind to whether or not it restricts the legislation to the flight deck or, alternatively, the passengers?

Mr Stojkovski—That is also a good point that Qantas has raised. Thinking about it just before we came on here, if indeed there is scope for it to be narrowed to just the flight deck, then we would request that that term be changed to 'air transport' or made a little bit wider. It has to apply to the whole aircraft and to all of the employees that surround the aircraft.

Senator LUDWIG—If you wanted to take some time to come back to the committee with a response in relation to that, that would be all right as well, but you can make that decision for yourself.

Mr Stojkovski—Sure.

Senator LUDWIG—Because 'air transport' is a very broad term in itself as well. It might pose the other problem in being too broad, rather than only applying to regular public transport or to airlines such as you.

Mr Stojkovski—Yes.

Senator LUDWIG—How do you currently deal with complaints of discrimination made against your airline? I know it is difficult to discuss individual cases because we have to consider the Privacy Act, but do you have in place a process or guidelines that deal with this issue?

Mr Stojkovski—Complaints of this nature are referred through what we call our guest relations department—essentially, our complaints department. They are referred to that department and are initially assessed and looked at and then are referred over to my department, the legal department, to analyse, to review the complaint, to review the acts of the employees and to review the relevant laws or regulations that surround the issue and they are then dealt with with the complainant.

Senator LUDWIG—So someone might write in and complain and it ends up on your table and you write a response accordingly or negotiate an outcome, and you talk to HREOC about that as well, if there is a need?

Mr Stojkovski—Yes, absolutely. We also do a fair bit of work internally within the company with relevant people—the flight crew, the cabin crew, ground crew, engineers, whatever is required—to understand fully the issues and to understand whether we can be accommodating on the issue and, if we cannot, then to give the best response possible to explain as best we can why we cannot accommodate a certain request.

Senator LUDWIG—So there are issues of discrimination that are raised and that are identified. How many would be identified? Do you keep statistics or records of that?

Mr Stojkovski—We are a young company and growing quite fast. We may have had complaints early that we do not have records of. In my time there, I would say that we would maybe average one a month or one every month and a half or two months. But the number hides the fact that these complaints are quite serious and quite a lot of time is devoted to them—and rightly so. I do not think there is anything more serious than the competing interests we have between safety and discrimination. So it does take a lot of our resources to deal with complaints, and that goes to the reduction in efficiency with which we can operate our airline operations. Resources we would otherwise have working positively to increase flights or improve services and scheduling need to be diverted for a particular period of time to answer complaints. Now, if this bill is passed and we get regulations made pursuant to it that clarify issues which we see from time to time come through, that would be great, because that would then minimise the need to divert resources.

Senator LUDWIG—Have you had a case before HREOC at all?

Mr Stojkovski—Yes, we have.

Senator LUDWIG—How many have you had there?

Mr Stojkovski—This is off the top of my head, but in my time—I have been with the company for 14 months—I would say we have gone through maybe five.

Senator LUDWIG—Were they resolved successfully or satisfactorily to both the airline, the complainant and HREOC or are any outstanding?

Mr Stojkovski—In our opinion they were resolved amicably and all parties walked away satisfied.

CHAIR—I do not think we have any more questions. Mr Stojkovski and Mr Yatras, thank you very much for joining the committee this evening. As I said to the previous witnesses, when you examine the *Hansard* of the proceedings, if there are matters on which you would like to provide further information, then we would be happy to receive that from you. Thank you for your submission.

Mr Stojkovski—Thank you, senators.

Mr Yatras—Thank you.

[6.23 p.m.]

DIXON, Ms Megan Louise, PhD student, Griffith Law School, Griffith University

HUNTER, Professor Rosemary Claire, Dean, Griffith Law School, Griffith University

CHAIR—Good evening. Welcome and thank you for agreeing to appear and thank you for doing it via teleconference. I know it is not the optimal approach to these things. Your submission, which you lodged with the committee has been made submission No. 6. Do you wish to make any amendments or alterations to that submission?

Prof. Hunter—No, we do not.

CHAIR—Would you like to make an opening statement, and then we will proceed to questions.

Prof. Hunter—Can I just acknowledge that in fact the primary author of this submission, Dr Bridget Cullen-Mandikos, who is a lecturer in the Griffith Law School, unfortunately was not able to join the teleconference this evening, but I would like it noted that she in fact was largely responsible for the submission.

We wrote this submission in our capacities as experts and teachers in the area of anti-discrimination law. I have been researching and teaching in this area for quite a number of years now, and I teach a course on anti-discrimination law at the Griffith Law School with Dr Cullen-Mandikos. Megan Dixon is our PhD student who is writing a PhD on the enforcement of anti-discrimination legislation and optimal ways of enforcing human rights legislation in Australia. So that gives some background about our expertise in this area.

In our submission we outline three major concerns with this bill. The first is the notion that enshrining exemptions from the sex discrimination and disability discrimination legislation through regulations can actually remove any uncertainty that might exist in this area. It might well be the case that it is unclear whether current practices and regulations are inconsistent with the Sex Discrimination Act and the Disability Discrimination Act, but the regulations could also be equally open to challenge as perhaps being beyond power. Certainly the Commonwealth parliament is familiar with challenges to regulations as being ultra vires and not authorised by the legislation that purportedly enables them. It seems to me that words that are used in the proposed legislation allowing regulations which are necessary for the safety of air navigation are entirely contestable concepts and therefore in the hands of an aggrieved party would be equally open to litigation and challenge as would the current situation.

Our second point is that the bill takes what is likely to be a couple of fairly limited scenarios in terms of the potential conflict between sex discrimination and disability discrimination legislation and aviation safety and uses a very large sledgehammer to attempt to crack those small nuts—and that sledgehammer along the way derogates from a set of obligations that Australia has undertaken in the international community to implement in Australia a set of international human rights conventions.

We actually argue that there is unlikely to be any inconsistency between the Disability Discrimination Act or disability discrimination standards and civil aviation safety regulations or safety provisions, because there are already exemptions within the disability discrimination legislation that would enable airlines to discriminate lawfully in circumstances where that

might be necessary. In relation to sex discrimination, we consider that there is a potential inconsistency there in relation to pregnant pilots, but again this is not exactly a huge issue. We are not aware that there are scores of pregnant pilots out there posing a safety risk to civil aviation and we feel that a more appropriate way of dealing with that issue would be through an amendment on the face of the Sex Discrimination Act rather than enabling very broad and blanket regulations to take a whole set of activities outside the realm of the discrimination legislation.

Our final point is the dangerous precedent that we believe this bill would set if passed by the Senate. It allows for both retrospective operation and also regulation to remove the effect of important legislation without any scrutiny at the stroke of a pen by the executive. That, we think, would certainly not be a method of proceeding that should be adopted within a democratic parliamentary system. Ms Dixon is going to elaborate on that point.

Ms Dixon—I just want to build on the points that Professor Hunter has already made in relation to our submission. Traditionally in our system of parliamentary democracy, each time the government of the day proposes substantive amendments to the effect or reach of anti-discrimination legislation in this country it does so via amendment to the provisions of the legislation, and Professor Hunter has foreshadowed that in relation to the Sex Discrimination Act as it relates to pregnant workers. In this way the substantive amendments that are proposed actually receive proper scrutiny by the House, by the Senate and indeed this committee.

A recent example of this, which the Senate will be aware of, is the substantive exemption proposed for the employment of workers in the teaching profession in the Sex Discrimination Amendment Bill. As our submission spells out, this bill will allow the Governor-General an ability to make regulations that will allow substantive exemptions from discrimination legislation, beyond the gaze of our elected representatives.

Despite any constitutional issues about this approach that Professor Hunter has already raised, this is actually a dangerous public policy precedent, in our submission, particularly as it deals with the abrogation of people's human rights and avenues for redress. Despite the statements in the explanatory memorandum that suggest wide consultation will be undertaken—I think it mentions the Attorney-General's department in that regard as well—before any regulations are actually made that are inconsistent with discrimination legislation, the fact is that there is simply no mandated requirement for the government of the day—or the Governor-General—to do so. That is of great concern to us particularly as, as Professor Hunter has already pointed out, it may allow a capricious government to drive holes through our web of human rights protection in this country. I have described it as a Henry VIII clause, because it gives enormous power to any government of the day to make regulations beyond the scrutiny of our reps. This is particularly dangerous as it has a retrospective effect. The Victorian Bar submission adequately deals with that particular injustice, particularly where proceedings are contemplated but not yet commenced.

As a matter of public policy, in our submission, blanket exemptions or certainly the capacity to make regulations which could encompass blanket exemptions are a dangerous mechanism for addressing the balancing exercise between people's rights and the safety concerns of industry. An industry lobby group argument that it is simply more efficient to

enact a blanket safety exemption for their particular industry to avoid anti-discrimination legislation altogether would defeat the purpose of such protections that are in the Disability Discrimination Act. It would also allow the gradual accretion of prejudicial and presumptuous decision making about the abilities of persons with disabilities and women. Without this important legislative requirement for industry to factor in the rights of people in their decision making about safety practices, there will be little impetus to find alternative ways to accommodate persons with disabilities or indeed women.

As our submission and HREOC's submission identifies, there are already certain safety exemptions and inherent requirements exemptions in relation to disability discrimination legislation in the existing legislation that allow for the avoidance of anti-discrimination legislation in certain circumstances. As the committee is probably aware, the High Court, in cases like *Christie* and also *X v the Commonwealth*, has already laid down the tests for employers and industry to clarify how those exemptions should operate. I would submit that these tests are now well-settled law, and many industries, including those with other dangerous working environments, have already adopted policies and implemented in their workplaces and businesses procedures which are based on these tests and which also protect the dignity of their workers and consumers.

More importantly, in our view there is simply no evidence to suggest that the industry will be overwhelmed by a flood of discrimination litigation that would warrant the arbitrary watering down of human rights obligations as proposed in this bill. We realise there is an exemption in relation to certain forms of discrimination that HREOC has granted in 2002 but we just do not believe that there is going to be a flood of litigation following the expiry of that exemption. I have no doubt the senators will have certain questions for the departmental representatives about any proposed litigation or knowledge of litigation that may be in contemplation. Thank you, that is my submission.

CHAIR—Thank you very much. In the HREOC submission they certainly endorse the objective of the bill. Does that surprise you, Professor Hunter?

Prof. Hunter—I have to apologise that I have not read any of the other submissions. I have not had time to become familiar with those submissions, so it is difficult for me to comment.

CHAIR—If you will allow me, Professor Hunter, I will read you the first paragraph of the HREOC submission. I do not expect you to try and imagine the entire rest of their submission, but let me begin by reading this:

1. HREOC appreciates and endorses the objective of the Bill—to ensure that possible inconsistencies with the Disability Discrimination Act 1992 and Sex Discrimination Act 1994 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.

To go back to my question, HREOC appreciate and endorse the objective of the bill: does that surprise you?

Prof. Hunter—Having now heard the context in which that was framed, to the extent that the bill seeks to produce resolution between an area of potential conflict, which is an area that has arisen in this industry and in a range of other industries historically—for example, in relation to lead processing in mining and in various other contexts—where there is a potential conflict between in some cases anti-discrimination legislation and occupational health and safety legislation and in some cases anti-discrimination legislation and other forms of safety legislation, it is useful to think of ways to resolve that potential conflict. I absolutely agree that an approach that attempts to resolve that conflict is always much more useful than simply letting it lie.

However, in our submission, the point that we make is that that conflict needs to be worked out in a context where both sets of concerns are given equal weight and equal consideration. Saying that the way we are going to resolve this conflict is to completely privilege one side of the equation and completely wipe out the other side is not, to me, an appropriate, thoughtful or optimal way of dealing with that situation. It seems to me that there needs to be an informed discussion about the best way—for the Australian public—that this potential conflict may be resolved.

There are a number of models for doing that. One is through the litigation process on a case-by-case basis, where a court sits down and works out, in the circumstances of a particular case, where the balance of public interest lies or where the balance of legislative precedence lies. That is one way to do it. Clearly that is not necessarily the most efficient way of doing it. Another way to do it is through discussion and the issuing of guidelines between regulatory bodies. So the Civil Aviation Safety Authority and HREOC could engage in a dialogue around the best way to deal with this issue so as to maximise the protection of rights while maximising the protection of safety. A third way to do it is to engage in a debate in the parliament, which in previous instances has resulted in amendments to the actual discrimination legislation, which allows for limited exemptions in particular kinds of circumstances. All of those models seem to be much more appropriate than the model that is before us tonight.

CHAIR—The argument of one of the airline representatives, Qantas in fact, was that this should only represent the first step in a two-step process. They suggest that the second step would be, and I will quote from their submission:

... 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.

The point that you make in relation to balancing both sides I assume you would also use in relation to that argument: that is to say, there is a very definite need to take into account the rights of the individuals in this process and not just the preferences of the industry.

Prof. Hunter—Absolutely.

CHAIR—I do not think we have any further questions at this stage. After we review the *Hansard* from this evening's proceedings in terms of the evidence we have already taken from the Human Rights and Equal Opportunity Commission and the airlines that have appeared, there may be other questions that we may need to follow up with you, if that is possible, on notice.

Prof. Hunter—That is certainly fine.

CHAIR—I thank both Professor Hunter and Ms Dixon for your contribution this evening, and please convey the committee's thanks to Dr Cullen-Mandikos for your submission.

Prof. Hunter—I will certainly do that, and thank you for the opportunity to address the committee.

CHAIR—Thank you, Professor Hunter. the committee is meeting at the same time as the Senate is meeting, and we are subject to attendance in the chamber as there is a division there. We will attend that and return to resume with the departments.

Proceedings suspended from 6.41 p.m. to 6.50 p.m.

[6.50 p.m.]

CHILVERS, Mrs Marilyn, Assistant Secretary, Aviation Operations Branch, Department of Transport and Regional Services

DOLAN, Mr Martin, First Assistant Secretary, Aviation and Airports Regulation, Department of Transport and Regional Services

MEANEY, Ms Mary, Principal Legal Officer, Attorney-General's Department

MINOGUE, Mr Matt, Assistant Secretary, Attorney-General's Department

CHAIR—Good evening. Welcome. Before we begin, I remind senators that under the Senate's procedures for the protection of witnesses departmental representatives should not be asked for opinions on matters of policy. If necessary, they must also be given the opportunity to refer those matters to the appropriate minister. The Department of Transport and Regional Services has lodged a submission with the committee which we have made submission No. 5. Do you need to make any alterations or amendments to that submission?

Mr Dolan—We have no amendments or alterations to the submission.

CHAIR—I am not sure how you wish to proceed this evening. I would like to invite either or both departments to make an opening statement and then we will go to questions. Do you have an opening statement, Mr Minogue?

Mr Minogue—We do not have an opening statement.

CHAIR—Mr Dolan, would you like to make any opening remarks?

Mr Dolan—I would like to make just a very short remark regarding some context that perhaps has not been drawn out as clearly as it should have been. The regulations we have in place for the safety of air navigation draw on and are in response to an international agreement, the Chicago convention. We are giving expression through Australian law to the requirements under those conventions. In essence, what is being proposed with these changes is a way of ensuring that we can give effect to our requirements under that convention with minimal impact on our separate requirements under various human rights conventions. We are trying to find through this proposal the appropriate balance there. I just wanted to set that international law context, so that we understood that we are dealing not just with an Australian law but with a treaty obligation.

CHAIR—Thank you very much. Can I just ask you first off about the phrase 'air navigation.' You used the term then, and it has been used in the discussion this evening, with submissions suggesting it should be replaced with the phrase 'air transport'. Do you use the term 'air navigation' because it is a term of art, as it were?

Mr Dolan—Yes. The piece of legislation that gives effect to the Chicago convention in Australia is the Air Navigation Act. The convention itself—and I am relying on memory here, which is always dangerous—is to ensure the safety, efficiency and regularity of air navigation. That is the sort of context in which the term 'air navigation' is used. It has a long history and certainly it is one that we would prefer to stick with.

CHAIR—So what do you make of the point that Qantas proposes?

Mr Dolan—I can understand why viewed in isolation ‘air navigation’ might be seen as limiting, but in fact there is a long history of what it means in Australian law. We would not want to move from that.

CHAIR—I see, all right.

Mrs Chilvers—If I might just add to 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 convention into the Civil Aviation Act as well.

CHAIR—I would have thought Qantas would already be familiar with that then.

Mrs Chilvers—I am not sure why Qantas would not be familiar. In fact, I would have thought they would be. I am not sure of their motive.

CHAIR—Thank you.

Senator LUDWIG—You say the setting is that there is a requirement to comply with international obligations—are you required to comply in this way, by making a regulation or giving a regulation power under this bill? Is it that specific or is it broader, in the sense that it requires you to ensure (a), (b) or (c)?

Mr Dolan—What we are required to do is adopt the standards that are set internationally to ensure safety in air navigation. There is certainly no requirement that we specifically make legislation to find a particular balance between that requirement and requirements in human rights arrangements. That is a decision that has been made by the government and brought forward to the parliament.

Senator LUDWIG—In respect of the consultative process that surrounded this legislation, I do not know whether you were in the room but I asked Qantas and Virgin whether they had been consulted about this piece of legislation and they seemed to indicate that they had not been. Why would that be?

Mr Dolan—From our point of view, the matters on which we would consult—or CASA would consult—with a range of operators in the aviation industry is when there are proposals to change the standards which govern the way they carry out their business. This is not a proposal to change standards but merely to make sure that appropriate effect is given to them. So we did not undertake the normal full-fledged consultation that goes with proposed changes to regulations under the Civil Aviation Act.

Senator LUDWIG—So where did the idea come from to use the regulation power under the relevant act, instead of perhaps seeking exemptions from HREOC or amending the DDA or the SDA, for argument’s sake?

Mr Dolan—My colleagues from Attorney-General’s Department may be able to assist here, but my understanding is that we took as the starting point that there was a time limited and in other ways limited exemption under the two pieces of anti-discrimination legislation. My understanding is the normal intent of such exemptions is to allow someone to actually move to the point where they comply with the provisions of the legislation. In this case, it was clear to us that there were some elements where, if we were to comply with appropriate

international standards, it would not be possible to shift towards the anti-discrimination legislation. So this bill was brought forward to solve that on a permanent basis.

Ms Meaney—If I can just add to that, at that time when that temporary exemption was being sought from HREOC, there were indications that further measures were going to be taken to implement more completely those measures.

Senator LUDWIG—I do not quite understand that. Can you say that again please?

Ms Meaney—When CASA sought the exemption from HREOC in regard to the Sex Discrimination Act, HREOC were told that the permanent measures were going to be put in place: that is, legislation was going to be sought to assist in the problem that had been identified.

Senator LUDWIG—I may not have asked HREOC the appropriate question—I think you were in the room—but they did not seem to respond in the positive in respect of my question about whether they had been consulted or understood this legislation was going to be brought forward. Was I wrong about that or was their response wrong? Are you saying they were consulted about this?

Ms Meaney—I do not think they were consulted. I think at the time of the exemption they were advised that legislation was going to be brought forward.

Senator LUDWIG—So I should have asked, ‘Were you told legislation was going to be brought forward’ perhaps.

Mr Minogue—This is not an Attorney-General’s issue, it is a Transport and CASA issue, but I think the history that my colleague has given—

Senator LUDWIG—I understand.

CHAIR—We are very grateful for that.

Mr Minogue—The history that my colleague is talking about is this: I think it was flagged with HREOC at the time the initial exemption was sought that the agencies would be seeking further measures.

Senator LUDWIG—Perhaps you can help me then, Mr Minogue: the purpose of seeking further assistance in this regard was that the exemptions were life limited and were going to run out in time?

Mr Minogue—I think that is right, but that is possibly the danger of trying to be helpful, because I was not involved in those discussions.

Senator LUDWIG—It just struck me that the Legislative Instruments Act now ensures that regulations have a life as well.

Mr Minogue—They are subject to the sunseting regime. Indeed, as another issue that has been raised through the debate, the consultation process that the Legislative Instruments Act puts in place would also bear upon any regulations made as well.

Senator LUDWIG—Yes, from now on in. I am not with you in that argument yet. Perhaps Mr Dolan can explain to me why a legislative instrument which also has a sunset provision is preferred to an exemption with a sunset provision out of the particular act?

Mr Dolan—The assessment that was come to is that there will always be potential conflicts between the restrictions that we would be placing on activities of people in the aviation industry and the provisions of the anti-discrimination legislation and so the view was that a permanent finding of the appropriate balance was the best way forward, rather than an exemption provision, which would always be limited and would not always pick up unforeseen elements of standards and so on. We wanted to establish in law a principle that could be used in the future for determining when these conflicts arose.

Senator LUDWIG—So what you are proposing then is that as each conflict arises you would then make a regulation to resolve it: is that how it is going to work?

Mr Dolan—No.

Senator LUDWIG—This is the power that you are being given, and it seems unfettered in that respect. I asked Qantas or Virgin to tell me the circumstances, and they have talked about animals in the cabin, exit seats and medical issues which their pilots might be subject to. Are those the regulations that you are going to make that give them the ability to be able to make those decisions—and in what manner—or are there others that you have considered as well; and when will we see those? I have asked a lot and will draw breath.

Mr Dolan—The provisions in terms of inconsistency with the Sex Discrimination Act relate particularly to medical standards. There is a range of matters where pregnancy in particular may have an impact on the safety of air navigation. The intention is that, to the extent that those sorts of standards would be seen to be inconsistent with anti-discrimination provisions and necessary for the safety of air navigation, they would continue to have force. Similarly in terms of disability—

Senator LUDWIG—I am not sure what you mean by that. Do you mean that there will be regulation made to provide—

Mr Dolan—To establish the broader context, the whole issue of ensuring aviation safety is a matter of managing risk. When people are involved in an aviation system, some medical conditions add a greater level of risk in terms of aviation operations, and some of these are related to matters where, on the face of it, one is not allowed to discriminate either under the Disability Discrimination Act or the Sex Discrimination Act, but it is necessary for safety—

Senator LUDWIG—That is not completely limited. There are inherent requirements of the job employment which then can be used as a defence. But that was not the question I was asking. I did not want to particularly explore that just yet. I was asking about what sort of regulation were you proposing to deal with that issue?

Mr Dolan—The sorts of regulations that are currently in place and may be changed in the future that relate to the circumstances in which someone can be cleared medically to fly an aircraft; the circumstances in which someone meets the medical or other standards to operate in the cabin of an aircraft; the circumstances where, to allow the safe evacuation of an aircraft in the possible case of an accident, people with disabilities cannot be located in certain seats of an aircraft and so on. They are the sorts of regulations and standards currently in existence that we would wish to see continued and, to the extent that there is seen to be inconsistency with the two discrimination acts, that is addressed.

Senator LUDWIG—Where do these standards currently exist? Are they written down somewhere?

Mr Dolan—They are in the civil aviation regulations and in subordinate material that goes with those. But the key provisions, as in setting of medical standards and so on, are in civil aviation regulations, which are made through an extensive consultative process. Just to put some context, I think there are about 10 steps that the Civil Aviation Safety Authority goes through in establishing its regulatory standards. There is a requirement that, to the extent there are objections to a proposed regulation, those objections be dealt with before it is finalised and brought to the Governor-General for consideration. There is an extensive consultative process that arises in those regulations. They are not secret documents. They are not ones that are made on the sly. There are quite considerable processes for arriving at them.

Senator LUDWIG—Most of your documents are available on the web, aren't they? There is a whole range of documents, including CAOs. In fact, if I remember correctly in terms of legislation that the scrutiny of regulations deals with, you hold the record for the amount of pieces that you produce. I do not think there is any suggestion of secrecy, but what I was keen on appreciating was how it would be utilised as well: is it designed to be used as a shield to protect the various airlines from cases that may be raised against them by complainants. In other words, how do you see it operating in the field?

Mr Dolan—We see it in essence as operating to give continuing and slightly broader effect to the current temporary exemption. We do not see it as a way of removing rights currently under action, and I do not understand there are any. But certainly to the extent that people are in the process of bringing action against CASA or against the airlines, under anti-discrimination provisions, we certainly would not want to interfere with the merits of those.

Senator LUDWIG—But it will though, won't it, if it has retrospective operation? I am happy to be corrected by you, Mr Minogue, but if there is a case on foot now then it will effectively override it.

Mr Dolan—It is certainly not intended to give effect to that. I am not aware of any case on foot. We can certainly check and get back to you with a response to that.

Senator LUDWIG—That is right though, isn't it?

Mr Minogue—Our view of the amendments is that they are actually quite limited. They are a head of power for the Governor-General to make regulations, as Mr Dolan has said. It removes a ground of complaint to the validity of any regulations made under that head of power 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, depending on how specific the regulation or the standard that is being applied is, but that is a matter for the regulation. In terms of the amendment itself, it insulates the regulation making head of power from claims of ultra vires on the basis of inconsistency but, in the circumstance where the inconsistency is necessary for the safety of air navigation, in respect of any particular actions taken or purported to be taken under the regulations as they are now or as

they might be promulgated in the future, they would still be amenable to complaint under the normal human rights and equal opportunity processes.

Senator LUDWIG—I would just like to explore this a bit further. Perhaps you might be able to provide an answer to this, Mr Minogue. It provides a head of power and then therefore a regulation will have to be made. As Mr Dolan has indicated, standards and regulations currently exist. Is it the intention to incorporate those into the regulation or to remake regulations? I am just unfamiliar with the process. I was trying to understand what was going to happen next.

Mr Minogue—As I understand it, the standards now are in regulation form, so nothing would change the process by which the standards are applied in Australia. They would have to go through a regulation making process, as they are now, and be subject to the scrutiny and disallowance provisions.

Mr Dolan—But you have the nature of the retrospective element of this legislation. There are regulations in existence. There are standards in existence that could be seen to be inconsistent. Subject to the limitations that are in the wording of the proposed amendment, to the extent that there was uncertainty it would validate their continuing in effect and to that extent resolve the inconsistency with the anti-discrimination legislation in favour of safety.

Senator LUDWIG—Has the Attorney-General's Department had a look at the Qantas submission which then goes to the next step? Is it contemplated that we are going to then see the next step undertaken in this regime? Have you had a look at that submission?

Mr Minogue—Yes, I am certainly aware of the proposal and we listened to as much of the evidence tonight as we could before we came up. But, no, that is not a proposal that has been raised with us. They would not raise it with us, and I do not know that it is a matter that has been raised with the department of transport or CASA.

Senator LUDWIG—Has it been raised with the department of transport?

Mr Dolan—It certainly has not been raised to my knowledge with the department or with CASA. Our view is that the drafting of this bill goes as far as is necessary to achieve the purposes that we have set out to achieve.

Senator LUDWIG—Qantas state in their submission:

... the Bill only takes the first step in what should be a two step process to appropriately address the conflict between the Civil Aviation Legislation and State and Federal discrimination legislation, principally the DDA. The second step would be to ensure that direct compliance with the Civil Aviation Legislation with an exemption to the general provision prohibiting discrimination on the ground of disability and sex.

So that is not being contemplated, that general exemption?

Mr Dolan—No.

Senator LUDWIG—Have you spoken to Qantas as to whether or not this process that you have adopted actually fulfils their requirements to ensure that they can operate with safety as their paramount concern? Because they seem to suggest that in fact this is only a part way solution to their problem and they require a second stage to ensure they are adequately protected. If you say it is your final step, then we seem to have a gap that has developed.

Mr Dolan—I would not necessarily characterise it as a gap. I think there are different perspectives on where the appropriate balance is between anti-discrimination provisions and safety provisions. This is the government's view as to where the appropriate balance should be struck, and I am not aware of any proposal to shift the balance in the direction that Qantas intends. I certainly see no argument for it personally.

Senator LUDWIG—Qantas have not discussed it with you?

Mrs Chilvers—Qantas have not to my knowledge raised it with the department in the time that I have been working in this area.

Senator LUDWIG—And you have not consulted Qantas or Virgin Blue in respect of this proposed bill?

Mrs Chilvers—We did not consult specifically with them on this. Our discussions with the Attorney-General's Department led us to believe that this was an adequate measure, as Mr Dolan said, to strike an appropriate balance between the rights of people covered by the SDA and the DDA and the safety of the travelling public.

CHAIR—What was the nature of the information paper to which you refer in your submission?

Mrs Chilvers—That was a general discussion paper that we made available—

CHAIR—About what?

Mrs Chilvers—That set out what we were doing and why we were doing it.

CHAIR—About this bill?

Mrs Chilvers—About this bill, yes.

CHAIR—But you do not call that consultation?

Mrs Chilvers—It was not consultation, in that we did not—

CHAIR—I understand the difference between consultation and information, but you do advert to it in some detail under the heading of 'consultation' in your submission.

Mrs Chilvers—Yes, but we did not invite them in and sit round and have a roundtable, which I suppose I tend to think of as full consultation.

CHAIR—But you have provided information to them about what you have described in the submission as the intent and nature of the bill.

Mrs Chilvers—That is correct.

CHAIR—So why do you think they said—both Qantas and Virgin Blue—that they had not been part of this process?

Mrs Chilvers—Perhaps because we did not ring them up and invite them in. I do not know what was in their mind in saying that.

CHAIR—It flows then to the rest of your submission which said that at the time of lodging you had had no feedback on your information paper. Is that still the case?

Mrs Chilvers—That is correct, senator.

CHAIR—Are you sure it reached its intended targets? Would you be surprised that you would send a document on this issue to over 20 organisations, which has prompted at least some of them to make submissions to this committee, and get no feedback on it?

Mrs Chilvers—Again it is difficult to know what is in the minds of people when they receive information from government departments.

CHAIR—I do not want to know what is in their minds, with respect, Mrs Chilvers, I was wondering what you thought of that.

Mrs Chilvers—I must admit I was surprised but assumed that they decided that the submission to your committee was perhaps a more effective way of making their views known.

CHAIR—Are you sure that your information paper got to them?

Mrs Chilvers—No—

Mr Dolan—We are not absolutely sure but we can check and get back to the committee.

CHAIR—I find it interesting that there are people who have submitted to the committee—I have not got all the submissions in front of me immediately, but some of those included in your over 20 groups there, particularly the airlines—who did not indicate they had received any information paper. Can I also say, just to conclude on that point, that we are grateful for the department's submission. It is not often we are blessed with submissions from departments, so we are very pleased we have had that and we are pleased to have had the consultation outlined. That does not happen very often either. Thank you.

Senator LUDWIG—Perhaps the Attorney-General's Department might be able to help me with this. The Griffith Law School has put forward an argument which I might put to you. The argument has two parts: firstly, that it is a Henry VIII clause; and, secondly, if I can shorten it, that the stream cannot rise above its source in relation to regulations overriding substantive legislation. Do you have a view about that?

Mr Minogue—We do, and our view would be not to agree with either of those. Provision in the bill affects the regulation making power under the Civil Aviation Act, and that is all it does. It does not remove any regulations made under the existing regulation making power from any scrutiny or from any or all limits or controls. In terms of the stream rising above the source, it is appropriate and within the power of the Commonwealth parliament to define the scope of the application of acts of parliament. That is precisely what the bill proposes to do to define the scope of two pieces of legislation in respect of another piece, to ensure there is no overlap—but, as I said earlier, in a quite specific circumstance where it is necessary for the safety of air navigation.

Senator LUDWIG—So what you effectively say is that you can provide a power within an act which is to make regulations, which then allow an order or document to override the SDA or DDA's effect. Is that the way it is going to work?

Mr Minogue—The regulation would not override. The regulation would be made within the head of power provided by the principal legislation—in this case, the Civil Aviation Act—so there would be no overriding—

Senator LUDWIG—Or exclusion of the operation of the SDA.

Mr Minogue—Certainly, ‘exclusion’ is a term that I would not disagree with. It would carve out where the application is and if the regulations within the regulation making power—

Senator LUDWIG—I am just trying to understand your argument—as to why you can effectively use a regulation that could end up being inconsistent with the statute and it would still be able to operate to the exclusion of the statute: in other words, the statute would then not be able to operate and a person could not then go and complain and exercise their rights.

Mr Minogue—The statute that would apply in that circumstance is the Civil Aviation Act which provides the head of power for making such a regulation. As long as the regulation is within that head of power, the two acts of parliament have resolved the application between them.

Senator LUDWIG—Isn’t the issue of inherent requirements of the job, the employment field, not sufficient to provide certainty in respect of medical or other areas for an airline?

Mr Minogue—That is really a policy question. I would have to defer to my colleagues on that.

Mr Dolan—I am sorry, senator, I was actually checking the head of power in the Civil Aviation Act.

Senator LUDWIG—It is an interesting argument that one.

CHAIR—Senator Ludwig had moved on, Mr Dolan, I am sorry.

Senator LUDWIG—I had not accepted Mr Minogue’s suggestion but I will go and ponder it a bit further. In relation to the inherent requirements of the job, you are aware of the Christie case. Does that not provide you with sufficient certainty that you then do not require any other legislative backing to provide certainty? What I am trying to understand is the need for the legislation as well. I understand the objectives of the legislation. I understand a little bit more about how it is going to operate. But I perhaps wanted to understand the need for it, especially in that area where it seems to me the High Court has already agreed with you about defining areas where a pilot is faced with certain conditions. In those circumstances the High Court will say, ‘Yes, you are right, the particular SDA does not apply.’

Mr Dolan—As I understand it, and I am open to correction, Christie assumed validity of the standards and then went on to talk about how they related to the inherent requirements of the job. The issue that we are trying to deal with in this proposed legislation is the validity of the medical standards. So that question was not addressed directly in the Christie case.

Senator LUDWIG—Was that mentioned in obiter remarks in that case or are you not that familiar with it?

Mr Dolan—I am not that familiar with it, no

Senator LUDWIG—All right. I will have a look at that myself.

Senator SCULLION—Like my colleague, I understand basically the thrust of the bill. In fact, I am pretty convinced it is very necessary process we are going down. But I would like to hear some answers to some of the concerns from some of the other witnesses. I think it was Professor Hunter who said that both sets of concerns need to be given equal weight and

consideration. In the environment potentially where a fairly subjective term ‘necessary’ is perhaps being applied, for example, by a cabin attendant in a fairly high pressure situation, saying, ‘That is necessary. I am sorry, you have got to move,’ later we may decide we have been discriminated against in some sense. What sort of recourse exists, because it has already happened? They are the sort of situations where it has already happened. In a practical sense, those are the sorts of day-to-day things that people are going to have to apply. Perhaps you can talk to me about how the sort of people who may be making those decisions are going to apply the term ‘necessary’ in those circumstances. If it is unfairly applied and people are discriminated against, and that may be clear later, what sort of recourse may they have after this amendment is made?

Mr Dolan—I think the point needs to be made that the necessity applies to the regulations—to the standards. So the question of necessity is: is this a standard that should apply in particular circumstances? A flight attendant or someone else who is actually giving effect to those standards does not have to make decision about the necessity of the standards. They have to make a decision as to—

Senator SCULLION—So you are saying the standards will be sufficiently prescriptive for the attendant to be able look down the exit aisle where there may be three people in the exit aisle and a whole number of issues may present themselves? You believe that we can have a series of standards that we can point to that are sufficiently prescriptive to give guidance in those circumstances?

Mr Dolan—There is always going to be an element of judgment involved. There can be no set of standards sufficiently prescriptive to deal with all cases. I suppose the point would be that, to the extent that the standards turn their minds to particular physical disabilities, for example, what is being sought from the parliament is that some level of discrimination can be entered into in setting the standards in the first place. The question of whether a disabled person would have the ability to comply with the standards necessary for sitting in the appropriate row, assisting with the operation of a door and so on, is the same sort of judgment as a range of other things that have nothing to do with discrimination but with simple capacity questions. A lot of it should be dealt with through the appropriate training of cabin attendants and finding courteous ways of establishing someone’s willingness to undertake a particular role, their physical capacity and so on. The standards are made reasonably clear, I think, in the information that is available to passengers. The way it is given effect by an airline is something that always has to be under review but it is not the point that is at issue here.

Senator SCULLION—Thank you.

Senator LUDWIG—Just in relation to the submission by the Griffith Law School—you might want to take this on notice—they have two paragraphs on page 2 of their submission that seem to indicate, and I am summarising their arguments perhaps badly, that there would be in fact no inconsistency with the Disability Discrimination Act 1992. Firstly, they say that the DDA already contains adequate exceptions and secondly, they argue that, in relation to the Sex Discrimination Act 1984, the bill proposes to immunise medical standards inconsistent with the Sex Discrimination Act. I was wondering if you could have a look at that and tell me whether or not you say that their arguments are invalid or wrong or whether there is

something that they have missed—because in that instance there would be no need for your proposal. I am trying to understand why you say there is a need.

Mr Dolan—My colleagues from the Attorney-General's Department may wish to comment as well. If I have understood it, there are two points of objection to what is being proposed. The first is that the provisions of the anti-discrimination acts themselves give sufficient flexibility to deal with the ongoing issue of inconsistency that we are dealing with. Certainly, our view is that is not the case. The exemption provisions of the act, as we understand them, are temporary and designed to permit future compliance, and as a result there is always going to be an inconsistency which those exemption provisions are not designed to deal with.

The second is that it is hard to envisage a particular circumstance that could not appropriately be covered is one where I suppose we looked at the range of possible examples and said, 'There are a range of examples where we think there is always going to be some level of inconsistency and, in the view of CASA and those that consider appropriate safety standards, there needs to be some capacity to deal with those.' So it is a matter of judgment. It is a matter of where you locate yourself on a spectrum, rather than a yes or no, black and white argument. I do not know, Mr Minogue, whether you want to comment further.

Mr Minogue—I think we will take that on notice to give you a comprehensive answer. My initial response is that the references that the Griffith University submission makes to the DDA are quite limited and do not cover the range of policy concerns that CASA and the department of transport have: section 15(4) being related to employment—and there might be non-employment related issues—and section 24(2) relating to goods and services and facilities. The carve-out or remedy there for the airline is purported to be unjustifiable hardship, but it is unjustifiable hardship on the person who is providing the goods and services. It may be difficult for an airline to demonstrate unjustifiable hardship when in fact the concept of air safety might not be as direct as unjustifiable hardship would tend to imply it needs to be—it may be more for the preservation of good and safe methods of operation.

Senator LUDWIG—The other argument is that it seems to me that no-one has talked to HREOC about whether or not you can get a more permanent or wider exemption from the SDA or the DDA. Is that right or have you already discussed that with them? Am I wrong about that?

Mr Minogue—It is a policy matter for the minister for transport, so it is not one I can comment on.

Senator LUDWIG—Mr Dolan, can you comment on that?

Mr Dolan—If it is for the minister, I might have to consult with the minister. If I could answer that one on notice, I would prefer to do so.

Senator LUDWIG—Yes, by all means, just to clarify that position.

CHAIR—On behalf of the committee I would like to thank the officers from DOTARS and from the Attorney-General's Department. That brings this evening's hearing to a close. I thank all the other witnesses who have appeared this evening and declare this meeting of the Senate Legal and Constitutional Legislation Committee closed.

Committee adjourned at 7.32 p.m.

