ASMS
Aviation Safety Management Systems

Submission on the Civil Aviation Bill Exposure Draft

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1 Executive Summary

This submission is provided in response to the exposure draft of the Civil Aviation Bill and the associated commentary document, published by the Ministry of Transport on 13 May 2019.

For the most part this submission is limited to answering the questions posed in the commentary document. However, there are a number of particularly important issues which deserve further attention.

The discussion in the commentary document around Just Culture is admirable, but it does not reflect the realities of dealing with CAA. Personality conflicts and conflicts of interest can see an operator suspended, the bureaucratic system can elevate non-compliances with little or no safety impact to being a major issue, and CAA seems incapable of apologising.

The other items of most concern in the exposure draft and commentary document are associated with institutional design. There are two particular areas where this concern is relevant. First, the continuation of current arrangements for accident and incident reporting to be administered by CAA is subject to considerable conflicts of interest. An example is presented of how CAA was unable to manage this conflict and used information from incident reporting to try and influence the Courts during a prosecution. The Bill does nothing to manage this conflict of interest, and there is no indication in the commentary that other alternative institutional arrangements for managing the conflict were considered.

Second, in response to concerns over conflicts of interest between CAA and AvSec, the proposal is to further obfuscate the issue by removing the requirement for AvSec to be certificated. It is a good thing if the CAA Board feels uncomfortable about the conflict of interest, as that means some attention will be given to managing that conflict, whereas if there is no separation then the inherent conflict still exists but little or no attention will be paid to managing it. At the same time, the proposal is that AvSec is not certificated to provide aviation security services while other providers would be certificated. There is no discussion of core AvSec functions that should only be provided by a government entity, no discussion of where that entity should be located in government, and no discussion of why one entity providing the non-core function should not be certificated while others should be.

The exposure draft introduces new provisions related to drones, encompassing the definition of an accident, the definition of a pilot-in-command, and the provisions relating to the detention, seizure and destruction of drones. The Ministry's specific questions are addressed in this submission, with the definitions of accident and pilot-in-command requiring more work. Reference is also made to a separate report for an alternative option for allowing the use of drone detection systems and counter-drone systems.

In addition to the above points, I also note that a number of the additions to the Act are, in effect, the conversion of existing Civil Aviation Rules and associated penalties in the Civil Aviation (Offences) Regulations into new clauses. For example, Subpart 2 of Part 10 – protections in relation to accident and incident notifications – is essentially a codification of selected rules from the Civil Aviation Rules Part 12. Other changes include rules currently in the Civil Aviation Rules Part 19.

Much of the exposure draft seems to largely be change for change sake. Why, for example, is s97 of the Civil Aviation Act 1990 to be split into four sections (ss 39-42 in the exposure draft)? Other changes seem hastily made (such as the change to the definition of pilot-in-command). The intent to combine economic regulation in with safety regulation does not sit well, and the aviation security proposals could be advanced as a separate package independent of the rest of the proposed changes.

Finally, it should be noted that the policy making process around the draft Civil Aviation Bill has been exceptional in its opacity. It was not until some 5 years after submissions were made on the consultation paper that those submissions have been released to the public. Cabinet papers and Regulatory Impact Statements were not released until 3 July 2019, affording very little time to submitters who are very busy running their aviation businesses. The cynical might suggest that the entire process was designed to ensure that it was difficult to effectively challenge changes proposed in the exposure draft.

2 Recommendations

The key recommendations made in this submission are:

- The protection against law enforcement action will be ineffective as it leaves open the potential for CAA to prosecute under other legislation such as the Health and Safety in Employment Act 2015.
- Aviation safety reports should be received and processed by an entity other than the CAA, with TAIC being the logical entity for New Zealand.
- Additional consideration is given to the definition of accident, with particular focus on the beginning of the time that an aircraft is defined to be “in operation”.
- A clause is introduced to the Bill specifying that the rules relating to the operation of a class of aircraft must specify a natural person who is to act as PIC;
- Clause (c) is deleted from the definition of PIC and appropriate amendments are made to clause (b); and
- A separate workstream considers the legal issues associated with the introduction of autonomous vehicles of all kinds. This may be an issue that would also benefit from the attention of the Law Commission.
- A rules-based certification regime is used to enable the detention, seizure, and destruction of drones.
- All provisions relating to airline cooperative arrangements should be removed from the exposure draft and place in the Commerce Act 1986.
- All economic regulatory provisions are moved to the Commerce Act 1986;
- Airports are classified as either “large” or “not large”;
- The three major airports (Auckland, Wellington, Christchurch) be designated as “large”;
- The regulatory regime for large airports would be that already included in the Commerce Act 1986 (including amendments proposed by MBIE);
- The regulatory regime for airports that are “not large” should reflect the existing s4A.
- aviation security officers receive appropriate training so that they are thoroughly conversant with the requirements for a “reasonable grounds” search
- Section 139 of the exposure draft be redrafted as an amendment to the Search and Surveillance Act 2012, which is the primary legislative instrument specifying Police powers to search with and without a warrant.
- The power to take possession of dangerous goods in s152 of the exposure draft can be exercised at any aerodrome.
- The only core function of AvSec is the issuance of airport identity cards. Every other function can be performed by a certificated third party organisation. This core function should be provided by a stand-alone unit within CAA.
- All other functions performed by AvSec should remain subject to certification against Civil Aviation Rule requirements.

- The issuance of airport identity cards should include at least a basic assessment of whether a person presents a potential national security risk.
- The fit and proper person assessment process should also include a basic assessment of whether a person presents a potential national security risk, performed by the same unit that issues airport identity cards.
- As holders of airport identity cards, all AvSec personnel should also be required to undergo the same assessment.
- The unit responsible for issuing airport identity cards and collating information on fit and proper person applications should be subject to a separate clearance issued by the SIS.
- That consideration be given to establishing an independent oversight body for AvSec.
- If the intent is that the Minister is required to provide aviation security services at Tier 1 designated aerodromes then the Gazette notice should be revoked, and s113 of the exposure draft should be amended to clearly state the Minister's responsibility.
- All economic regulatory provisions in the exposure draft are moved to appropriate primary legislation such as the Commerce Act.
- Section 4(a) and 4(e) of the exposure draft are deleted.
- Sections 4(b), (c), and (d) of the exposure draft are incorporated into s3 to provide a single purpose statement.
- The magnitude of the penalty specified in s344 for failing to make a return is reviewed to ensure that the penalty is commensurate with the seriousness of the offence when judged against civil aviation safety offences.

3 Aviation Safety

3.1 Just Culture

Does the current drafting in the exposure draft achieve this policy decision?

No. The CAA has identified that it can prosecute under either the Civil Aviation Act 1990 or the Health and Safety at Work Act 2015, selecting whichever piece of legislation best achieves its enforcement objectives. The proposed definition of **law enforcement action** only refers to the Civil Aviation Act so would tilt the balance in favour of prosecutions under any other legislation. Furthermore, because operators would know that any accident and incident reports made could be used against them in prosecutions under the Health and Safety at Work Act 2015 there would be a strong disincentive to report.

What should be changed: change the definition of law enforcement action so that it encompasses all legislation under which CAA may file a charging document.

Should the full suite of protections apply to accident reports, or are the non-statutory Just Culture principles which the CAA currently practice sufficient?

The CAA does not practice Just Culture. The suggestion that CAA does practice Just Culture can only have come from the CAA; it is not a view held by industry. By definition, a Just Culture is associated with an atmosphere of trust. In a 2018 survey, aviation industry participants rated CAA just 1.6 out of 10 in response to the statement that CAA "is openly accountable for its actions", 2.5 out of 10 in response to the statement that CAA "treats stakeholders fairly", and 2.58 out of 10 in response to "takes actions that are appropriate to the circumstances".[1] While this was a self-selected sample, it was a relatively large sample (248), and it reflects a fundamental lack of trust and lack of relationship between CAA and parts of the industry. The low rating for all of these questions directly suggests that the survey participants do not consider that CAA practices Just Culture.

Prosecution for aviation safety failings – whether those failings resulted in an accident or not – is known as the criminalisation of aviation safety. There is a strong body of literature indicating that the criminalisation of aviation safety is detrimental to reporting, and consequently ultimately detrimental to aviation safety. It may be that CAA's assurances about Just Culture and non-prosecution in response to reporting would be better accepted by industry if other aspects of its behaviour were conducive to a trust-based relationship

Are the protections adequate to incentivise safety reporting to the CAA?

No. As discussed above, the narrow definition of **law enforcement action** will not provide protection against prosecution under other primary legislation such as the Health and Safety at Work Act 2015. This is less restrictive than the current policy embodied in CAR Part 12, and will therefore raise the opportunity cost of reporting and is likely to reduce reporting rates.

The aviation industry as a whole will have no confidence in the proposed balancing test.

The protection against self-incrimination will be welcomed by the industry.

Are there any unintended consequences as a result of the drafting?

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[1] General Aviation Advocacy Network. *GAA Independent Client Satisfaction Survey of the New Zealand Civil Aviation Authority*. Final Report, March 2018. https://www.caa.gen.nz/wp-content/uploads/2018/04/GAA-2018-Survey.pdf

Yes. As discussed above, the narrow definition of **law enforcement action** will not provide protection against prosecution under other legislation. This is less restrictive than the current policy embodied in CAR Part 12, and will therefore raise the opportunity cost of reporting and is likely to reduce reporting rates.

Recommended approach to collection of safety information

There is an inherent conflict of interest in accident and incident data being collected by the CAA for safety information purposes and CAA's role as prosecutor of safety failings. The Ministry has missed the opportunity to critically evaluate this conflict of interest and whether there are alternative institutional arrangements that would better promote safety reporting or aviation safety.

As an example of the conflict of interest, when CAA was pursuing the prosecution of an operator in the Queenstown District Court, the prosecution held a sheaf of incident reports up and claimed to the judge that this operator had a much higher reporting rate than the average and that this was evidence that the operator was unsafe. The operator in question strongly disputes CAA's allegations, and instead maintains that this was a result of a pro-active reporting culture which the operator had worked hard to achieve. These actions of the CAA prosecution team are known by many in the general aviation sector, and inform their decisions on what and how much to report to CAA.

We have previously reported that participants in New Zealand's civil aviation system are deeply suspicious of the CAA's collection and use of accident and incident information.[2] We looked at the example of the United States, where accident and incident reports are collected by NASA, a completely separate entity from either the Federal Aviation Administration (FAA) or National Transportation Safety Board (NTSB). Due to the lack of an equivalent entity to NASA. the same arrangements cannot be replicated in New Zealand. However, it would be possible for the Transport Accident Investigation Commission (TAIC) to administer the collection of accident and incident reports. While some participants in the civil aviation system also distrust TAIC, this would give TAIC first hand access to safety reporting information, potentially strengthening TAIC's ability to provide independent oversight. TAIC also lacks the conflict of interest that is inherent in CAA managing this function.

[2] Andrews, H. and Shelley, A. *Review of Joining Procedures at Uncontrolled Aerodromes*. Aviation Safety Management Systems Ltd, 2 July 2013.

4 Amendments Related to Drones

The proposed amendments relating to drones require further work. None are currently fit for purpose.

4.1 Definition of Accident to Include Unmanned Aircraft

Aviation Safety Management Systems Ltd (ASMS) is a Part 141 certificated aviation training organisation. One of the key areas of training that we provide is for pilots of unmanned aircraft. As part of that training we address is the definition of accident. We acknowledge that the existing definition is unsuited to unmanned aircraft and instead teach that the definition should be interpreted as applying from the time that a drone is "armed". This is largely equivalent to "the time that the aircraft is ready to move with the purpose of flight" as contained in the exposure draft.

Unintended Consequences

It should be recognised that the beginning of the time period that an aircraft is considered to be in operation is not equivalent for manned and unmanned aircraft. The pilot of a manned aircraft will conduct an exterior pre-flight inspection of the aircraft, and then board the aircraft to commence internal and cockpit checks. The pilot is boarding the aircraft with the intention of flight, so the aircraft is in operation from that point in time onwards. Engine start will occur after this point in time, and even at that point the aircraft will not immediately be ready for flight.

The pilot of an unmanned aircraft should similarly conduct an exterior pre-flight inspection of the unmanned aircraft. With the current generation of small unmanned aircraft, the flight controller will then be turned on, the unmanned aircraft will be turned on and calibrated, pre-flight checks will be conducted – these steps are all equivalent to the manned aircraft pilot's onboard pre-flight. After all these steps the unmanned aircraft will be "armed" for flight, and then typically be ready for flight. The beginning of the time period that an unmanned aircraft is considered to be in operation is, therefore, after the point in time that a manned aircraft is considered to be in operation.

This difference in the beginning of the time period that an aircraft is considered to be in operation is not likely to give rise to any significant issues for as long as drones remain relatively small. But when a large jet is used as an unmanned freighter, the difference will be significant. If manned, the jet freighter will be an aircraft in operation from the moment a person (probably a pilot) boards the aircraft with the intention of flight. But if unmanned, the jet freighter will not be an aircraft in operation until the engines have started and the aircraft is ready to taxi.

Recommendation

It is recommended that additional consideration is given to the definition of accident, with particular focus on the beginning of the time that an aircraft is defined to be "in operation".

4.2 Amendments to Pilot in Command provisions to allow for drones

Does the proposal relating to PIC present any significant issues to aviation operations now and those expected in future?

Yes, the proposal does present significant issues.

The definition of pilot-in-command (PIC) must be read in conjunction with the definition of operator. These definitions both refer to a "person". A person may be a natural person (i.e. a human) or a legal person including any incorporated entity such as a company or an incorporated society. The normal use of the word "operator" in the context of New Zealand's civil aviation regulatory framework is an entity that holds an operating certificate.

The definition of pilot-in-command also refers to “an individual nominated by the operator” which is consistent with the proposition that an operator may be a legal person and not just a single natural person.

The use of the word person in the definition of operator suggests that it is intended that only natural or legal persons may be operators, and that other entities such as unincorporated joint ventures may not be an operator. Is this intended?

The definition of pilot-in-command then needs to be considered in the context of potential use cases. Three potential cases are:

A. A small unmanned aircraft operated by a remote pilot;

B. An “unmanned” aircraft carrying one or more people, utilising autopilot software, but with a remote safety pilot;

C. An “unmanned” aircraft carrying one or more people and relying solely on autopilot software. The passenger(s) select a location or address from an onscreen application, and the aircraft flies to that location.

Cases A and B will be captured by part (b) of the definition of PIC to the extent that the rules specify that the remote pilot is the PIC.

Case C presents some issues. The person who presses “start” on the onscreen application would appear to be the person who causes the aircraft to fly, and therefore appears to be the operator of the aircraft. However, with that person being a passenger and relying solely on autopilot, it seems unreasonable for that person to have the responsibilities of PIC. The operator might instead be the manufacturer or manufacturer’s representative, or perhaps software developer if separate from the vehicle manufacturer. There are some significant issues to be addressed about which party should bear liability and responsibility, and to what extent. A thorough evaluation of these issues needs to at least consider the interaction between strict liability for damage imposed by the Civil Aviation Act, and limited liability for harm and potential harm to persons imposed by the Health and Safety at Work Act 2015. These same issues will need to be evaluated with the potential introduction of driverless cars.

Rather than introducing a piecemeal amendment intended to open the door to autonomous flying vehicles, I recommend that:

1) A clause is introduced to the Bill specifying that the rules relating to the operation of a class of aircraft must specify a natural person who is to act as PIC;

2) Clause (c) is deleted from the definition of PIC and appropriate amendments are made to clause (b); and

3) A separate workstream considers the legal issues associated with the introduction of autonomous vehicles of all kinds. This may be an issue that would also benefit from the attention of the Law Commission.

4.3 Detention, Seizure, and Destruction of Drones

What are the potential costs and benefits of the proposed options for the detention, seizure and destruction of drones? Are there other, better, options?

To evaluate the costs and benefits of the options proposed, and hence the suitability of those options, it is important to consider the cases in which a counter-drone capability might be deployed. Obvious examples are:

- Drones being flown at airports (the “Gatwick” scenario)

- Drones damaging an aircraft in flight, potentially causing a crash and fatalities or serious injuries;
- Contraband, weapons, and other prohibited items being delivered to an airport security area or security enhanced area;
- Contraband, weapons, and other prohibited items being delivered to prisons;
- Harm to crowds at mass events including sporting fixtures; and
- Drones being crashed into an electricity substation, causing a significant power outage.

The commentary document proposes three options for the detention, seizure, and destruction of drones:

- Option 1 – status quo;
- Option 2 – expand power to the Director or delegates to take action;
- Option 3 – general defence to take action.

As noted in the commentary document, Option 1 "does not provide for an appropriate balance for the ability to take action against a drone that is operating in breach of the rules, but does not pose an immediate danger to people or property".

Option 2 would appear to be the Ministry's preferred option on the basis that it is the most well-developed option. Delegation suggests that the relevant power will be tightly controlled with very few entities able to exercise the power. Obvious examples would be a delegation to Police, AvSec personnel, and the Department of Corrections.

However, tightly controlled delegation is not capable of providing protection against the range of threats listed above. The delegations I have suggested will address drones being flown at a major airport, delivery of contraband etc to airport security areas, and delivery of contraband etc to prisons. It will not, however, address issues at aerodromes other than security designated aerodromes, nor will it address harm to crowds at mass events, or damage to critical infrastructure.

Option 3 – a general defence to take action – is consistent with the common law principles upon which New Zealand's law is based, many of which have been codified in the Crimes Act 1961. The Ministry expresses concern that a "defence that was too broad might encourage reckless or disproportionate behaviour." If properly grounded in common law principles this should not be an issue, as reckless behaviour is itself potentially a criminal act (see, for example, s269 Crimes Act 1961).

An option not considered in the commentary paper is the adoption of a rules-based certification regime. This option is proposed in the enclosed report:

> Shelley, Andrew. *Enabling Counter-UAS and UAS-Detection Systems in New Zealand*. Aviation Safety Management Systems Ltd, 19 November 2018.

A rules-based certification regime would provide a flexible approach to the approval of organisations and/or individuals to operate counter-drone systems. It enables the use of such systems to be monitored and controlled, but without unduly restricting which entities could utilise such systems. This would enable:

- private security companies to obtain certification to provide counter-drone services at regional airports and stadiums;
- airport operators to obtain certification to operate counter-drone systems at regional airports;

- infrastructure providers such as Transpower and the New Zealand Refining Company to obtain certification to operate counter-drone systems at critical infrastructure sites.

An additional benefit of a rules-based certification regime is that one or more individuals responsible for the operation of the system would have to meet the requirements of the fit and proper person test. Delegation enables the requirements of that test to be bypassed – a point that is not lost on participants in the civil aviation system.

Are any other changes required to primary legislation to take account of unmanned aircraft technology? If so, what?

Yes. For an analysis of changes required to other primary legislation please see the enclosed report:

> Shelley, Andrew. *Enabling Counter-UAS and UAS-Detection Systems in New Zealand*. Aviation Safety Management Systems Ltd, 19 November 2018.

This report identifies that the following three statutes potentially affect the ability to utilise drone detection systems and counter-drone systems:

- Aviation Crimes Act 1972
- Crimes Act 1961
- Radiocommunications Act 1989

The report proposes minor legislative changes to enable drone detection systems and counter-drone systems, while requiring counter-drone systems to be operated under the authority of an aviation document.

Does the current drafting in the exposure draft achieve the policy objectives?

There is no clear statement of the police objectives. However, it can be inferred from the commentary document that the policy objective is to allow drones to be seized, detained, or destroyed in order to prevent damage to property or harm to people in contravention of the Civil Aviation Act, Aviation Crimes Act 1972, and Crimes Act 1961.

Section 255 of the exposure draft provides powers for the Director of Civil Aviation to seize and detain aircraft or aeronautical products. This section does not achieve the policy objective for the following two reasons:

1) First, there may be times where destruction of an unmanned aircraft is necessary to prevent greater property damage or harm; and
2) Second, the provision only applies to the Director, and by extension to a delegate of the Director. This does not admit a wide range of circumstances in which

Are there any unintended consequences as a result of the drafting?

Section 255(1) specifies a power that may only be exercised by warrant. It is less clear whether the power to detain aircraft under s255(2) requires a warrant or may be warrantless. The ambiguity in respect of s255(2) reflects poor drafting. Any action that may be taken on a warrantless basis must be explicitly stated as such. As drafted it is possible that actions taken without a warrant will be ruled unlawful.

5 Aviation Economic Regulation

Contrary to the exposure draft's intent to combine all aviation related regulation into one Act, I strongly recommend that economic regulatory provisions are removed and placed in the Commerce Act 1986. Economic regulation should be placed in the primary legislation regulating economic activity.

5.1 Airline Cooperative Arrangements

Consistent with MBIE's preferred approach (refer 2019 Cabinet Paper), all provisions relating to airline cooperative arrangements should be removed from the exposure draft and place in the Commerce Act 1986.

5.2 Airport Price Setting

All provisions relating to airport price setting should be removed from the Civil Aviation Bill and placed in Subpart 11 of the Commerce Act 1986. Note that electricity lines businesses are required to consult on certain aspects of capital expenditure, and these requirements are covered by the Commerce Act regulatory regime.

It would be appropriate, however, to retain the "circuit breaker" provisions of s4A for small airports. Without the ability to set prices as they see fit, small airports are in the position of setting default prices and default terms and conditions, but are at the mercy of the airlines as to whether those prices will be paid. In such situations an airline may be able to exercise monopoly power as the buyer of airport services and thus drive prices down to an unreasonable level. The electricity network industry has previously experienced a similar problem, which resulted in some very expensive litigation.

It is recommended that:

1) All economic regulatory provisions are moved to the Commerce Act 1986;
2) Airports are classified as either "large" or "not large";
3) The three major airports (Auckland, Wellington, Christchurch) be designated as "large";
4) The regulatory regime for large airports would be that already included in the Commerce Act 1986 (including amendments proposed by MBIE);
5) The regulatory regime for airports that are "not large" should reflect the existing s4A.

5.3 Airport Authorities Powers

The proposed amendments appear reasonable and to achieve the intent of the policy decision.

5.4 International Airline Licencing

The proposed amendments appear reasonable and to achieve the intent of the policy decision.

5.5 Airline Liability

Section 328 as drafted achieves the stated policy goal of enabling passengers to better exercise their rights to obtain compensation via proceedings in the Disputes Tribunal.

Section 330 regarding information disclosure has absolutely no relevance to passenger rights or information. Section 330 is concerned with information disclosure by providers of air traffic services. It does not apply to an air service or an air transport service.

6 Aviation Security

The proposed changes to aviation security provisions in the Civil Aviation Bill are a mix of:

- Minor and generally reasonable clarifications to AvSec's powers, although perhaps without a clear understanding of "reasonable grounds" for a search;
- Codification in statute of elements of the National Aviation Security Plan; and
- Somewhat baffling changes designed to deliberately obscure conflicts of interest that will continue to exist even after the changes have been made.

6.1 AvSec search powers on landside of security designated aerodrome

The exposure draft of the Bill appears to achieve the policy decision to clarify any potential uncertainty regarding AvSec's powers.

As drafted the Bill provides that searches conducted under s132 may only be conducted if the person consents (s134), unless the aviation security officer has reasonable grounds to suspect there is an imminent risk to aviation safety and security and the risk requires an immediate response. This restriction on the powers of aviation security officers is very important, and particularly that the aviation security officer has "reasonable grounds" for conducting a search without consent. At least at a general level reflects the restrictions on search powers contained in the Search and Surveillance Act 2012.

It will be important to ensure that aviation security officers receive appropriate training so that they are thoroughly conversant with the requirements for a "reasonable grounds" search. The courts have held that:[3]

> *Reasonable grounds for suspicion require the suspicion to be "inherently likely". Speculation or concern is not enough.*

It is unclear why s139 is included in the exposure draft. It would be more appropriate to include this section as an amendment to the Search and Surveillance Act 2012, which is the primary legislative instrument specifying Police powers to search with and without a warrant.

6.2 Search of Suspicious Hold Baggage without Passenger Consent

The commentary document states that the policy decision is that "Avsec can conduct hold baggage searches without the consent of the passenger for both domestic and international travel, where there is a risk to aviation safety or security."

The exposure draft of the Bill does not achieve this policy decision.

The policy decision implies that all items of hold baggage can be searched regardless of whether there is reasonable grounds to conduct such a search. The Bill as drafted only allows such a search to be conducted where there the aviation security officer has reasonable grounds to suspect there is an imminent risk to aviation safety and security and the risk requires an immediate response. As noted above, reasonable grounds for suspicion requires the suspicion to be "inherently likely", and speculation or concern is not enough. A purely preventative search would be non-compliant with the reasonable grounds requirement.

[3] New Zealand Police v Lincoln [2017] NZDC 15411 at [27].

6.3 AvSec's powers to deal with dangerous goods

The Bill as drafted achieves the policy decision. However, it is unclear why the power to take possession of dangerous goods is restricted to when an aircraft has landed at a security designated aerodrome. For example, an airline representative acting as an aviation security officer should be able to take possession of dangerous goods at an aerodrome that is not security designated. It is illegal to carry certain dangerous goods on aircraft, regardless of the destination of the aircraft, and s152 should reflect this.

Recommendation

It is recommended that the power to take possession of dangerous goods in s152 of the exposure draft can be exercised at any aerodrome.

6.4 AvSec's Institutional Arrangements

The commentary document correctly identifies that there are some conflicts of interest inherent in the existing institutional arrangements for AvSec. However, rather than analysing the benefits of alternative institutional arrangements, the commentary document proposes to blur the conflicts of interest even further by removing the requirement for AvSec to hold an aviation document. That the existing CAA Board are keenly aware of the conflict of interest is a *good* thing: it means that the Board is more likely to take care in managing that conflict of interest. The proposed changes do not remove the conflict of interest, they just hide it.

Furthermore, the commentary document proposes that AvSec would not be required to comply with Civil Aviation Rule requirements, but any other entity providing aviation security services would be required to comply with Civil Aviation Rule requirements. The suggestion is made that "requirements and standards commensurate with those provided in Civil Aviation Rules." If the requirements and standards are intended to be commensurate with the Civil Aviation Rules, then why not just apply the Civil Aviation Rules? The suggestion that some vague framework enforced by the CAA Board would be sufficient for AvSec while all other parties must be certified appears to have no grounding in any form of institutional design analysis.

The core functions of AvSec – functions that no other entity can reasonably perform – should be identified, and the appropriate instutional arrangements for provision of those functions should be considered. All other AvSec functions – such as airport screening and perimeter patrols – can potentially be performed by other parties, and every party that performs those functions should be subject to the same rules and same certification requirements, without exception.

The requirement to hold an aviation document and the associated certification rule also means that the senior persons of AvSec are currently required to be fit and proper persons. In general, CAA staff are the only people in positions of responsibility in the civil aviation system who are not required to be fit and proper persons. This is not an ideal situation.

Finally, if effective oversight of AvSec by the rest of CAA was to be removed then it would be critical that an independent oversight body be established. Given the evident intent to establish AvSec as a quasi-Police force, it would be appropriate that a body like the Independent Police Conduct Authority had oversight over AvSec, or that the powers of the Ombudsman in relation to AvSec were clarified.

Recommendations

It is recommended that:

1) AvSec's function of issuing airport identity cards be established as a separate function within CAA.

2) All other functions performed by AvSec should remain subject to certification against Civil Aviation Rule requirements.

3) That consideration be given to establishing an independent oversight body for AvSec.

6.5 New security designation framework for aerodromes

The exposure draft does not achieve the policy decision.

The exposure draft clearly states that aerodromes may be designated as a Tier 1 security designated aerodrome or a Tier 2 security designated aerodrome. The exposure draft does not make it clear that an aerodrome

Section 113 of the exposure draft does not state that the Minister is required to provide aviation security services at Tier 1 designated aerodromes. This follows only as an implication of the 1997 Gazette notice. If the intent is that the Minister is required to provide aviation security services at Tier 1 designated aerodromes then the Gazette notice should be revoked, and s113 of the exposure draft should be amended to clearly state the Minister's responsibility.

6.6 Provisions for alternative airport terminal configurations

The provision for alternative airport terminal configurations is reasonable and reflects current practice. While security screening points state "passengers only beyond this point", it is a simple matter to proceed through screening as existing procedures do not require a person to produce a boarding pass.

6.7 Enabling NZDF Personnel to act as ASOs

Given that some NZDF personnel are already trained to provide ASO services this is a logical provision. This also codifies an aspect of the National Aviation Security Plan.

However, this is clearly an emergency power, and it is far from clear that the Civil Aviation Bill is the right place for an emergency power to be codified.

The government should also be exceptionally careful in utilising this provision. The New Zealand public were not universally accepting of the measures put in place after 15 March 2019, and were a future event of that nature used as a reason to effectively deploy troops to New Zealand's regional airports then the public may be even less accepting. I note that, all provisions in the 2019 Cabinet Paper that relate to the 15 March event and associated security issues are redacted so it is not possible to comment properly on those matters.

6.8 Notices made under Section 77A

The proposal to allow the Minister to delegate to the Director of Civil Aviation the power to excuse any flight from any screening requirements is reasonable.

6.9 Addition of Airlines to the list of organisations permitted to provide aviation security services

This is a reasonable change.

This change also reinforces the need for all aviation security services to be provided pursuant to an aviation document. It is recommended that the statutory monopoly afforded to AvSec is removed, for all services other than airport identity cards see also the discussion in Section 6.15 below).

6.10 Section 79A amendment

It is difficult to see why this provision is even required. There should be no presumption that just because AvSec is a division of CAA that it is necessarily the best entity to provide aviation security services. Similarly, no incumbent provider of aviation security services – AvSec or otherwise – should be protected from competition from another provider. To require the Minister to "consult" rather than requiring the consent of the incumbent provider is more consistent with contestability, but the prospect of sham consultation with a private sector provider being replaced by the State sector provider is concerning. This should perhaps be balanced by making all AvSec services contestable, other than the core function of providing airport identity cards (see also the discussion in Section 6.15 below).

6.11 Assaulting an ASO and killing, injuring, or obstructing an AvSec dog

The exposure draft appears to achieve the intent of the stated policy decision.

6.12 Airport Identity Cards

The exposure draft achieves the stated policy decision, but aspects of the exposure draft are likely to be difficult to comply with at all times. In particular, at times it may be difficult to provide "satisfactory evidence of the correctness of the person's stated name and authority to enter the area." If the person is the holder of an airport identity card then that card should generally provide evidence of the person's stated name and authority to enter the area. At times, however, the holder of an airport identity card may be asked to temporarily perform a duty that differs from the role stated on their airport identity card. Similarly, there may be occasions where an individual is issued a temporary ID ("visitor pass") from an organisation that has airside access. Such a temporary ID will provide evidence of the organisation authorising entry to the area, but not of the extent of that authority, and is unlikely to provide evidence of the person's name. The proposed requirements in the exposure draft are reasonable, but guidelines may be required to ensure that the implementation of those requirements is also reasonable.

6.13 In-flight Security Officers

It is appropriate to retain the latent provisions to allow In Flight Security Officers.

6.14 Offence for being found in a security area without being screened or without authorisation

Section 159 achieves the policy decision, but offence provisions are not required in the primary legislation. An alternative approach is to specify the requirement for security screening or authorisation in a Civil Aviation Rule, and then include the relevant fine in the Civil Aviation (Offences) Regulations 2006. The relevant provisions are currently contained in Rule 19.357. Although Rule Part 19 is a "transition rule", there is no requirement that the provisions transition to the primary legislation.

6.15 National Security

The proposed national security provisions are not unreasonable, but the case has not been made as to how situations prejudicial to national security might arise in the application for an operating certificate. The 2019 Cabinet Paper also does nothing to elucidate the nature of national security threats.

If the concern is that an entity such as a company owned directly or indirectly by the government of a potentially hostile foreign power may gain an operating certificate, then the commentary document should say so. Even then, it is unclear whether denial of an operating certificate would necessarily

eliminate risks to national security. Foreign-owned civil aircraft are able to fly to New Zealand pursuant to the provisions of the Chicago Convention on Civil Aviation.

Contrary to the 2019 Cabinet Paper (para 74 75), it is individuals who are most likely to give rise to a national security risk. Individuals may have undertaken paramilitary training, or have been members of a foreign intelligence agency, or have exhibited other behaviours that suggest they are "at risk". It was individuals that took control of the airliners on 11 September 2001. It is individuals that manufacture bombs, and individuals that place bombs on board aircraft. It was one or more individuals, including a baggage handler, that placed the "Schweppes bomb" on board a Russian A321 airliner on 31 October 2015.

Despite the fact that it is individuals that give rise to aviation security and national security risks, there is no existing process to readily identify which individuals might present such a risk, or even for security concerns to be raised. [redacted] We consider it important that there is a formal process in place that will take reasonable steps to ensure that individuals who may pose a national security risk are identified.

Withheld pursuant to s6(a), s6(c), and s9(2)(ba) of the Official Information Act 1982.

Recommendations

1) The only core function of AvSec is the issuance of airport identity cards. Every other function can be performed by a certificated third party organisation. This core function should be provided by a stand-alone unit within CAA.
2) The issuance of airport identity cards should include at least a basic assessment of whether a person presents a potential national security risk.
3) The fit and proper person assessment process should also include a basic assessment of whether a person presents a potential national security risk, performed by the same unit that issues airport identity cards.
4) As holders of airport identity cards, all AvSec personnel should also be required to undergo the same assessment.
5) The unit responsible for issuing airport identity cards and collating information on fit and proper person applications should be subject to a separate clearance issued by the SIS.

7 Legislative Framework

7.1 Transport Instruments

The intent behind the idea of transport instruments is reasonable. The existing rule making process is inefficient, and a faster process could be beneficial. At the same time, there will be many participants in the civil aviation system who are wary of CAA's ability to apply arbitrary interpretations

It seems reasonably obvious to suggest that one of the first places that transport instruments could be used is to specify standards for RPAS pilot training and competency requirements for RPAS pilots. Yet in large part this can already be done without resort to a transport instrument. For example, CAA has a policy that unshielded night operations can be conducted by Part 102 certificated operators, subject to the pilot of the unmanned aircraft having passed a competency assessment conducted at night. The content of the competency assessment is not specified by CAA but is instead determined by the Part 141 certificated aviation training organisation.

There is nothing stopping CAA specifying the syllabus of the training and assessments in an Advisory Circular issued under Part 102, just as Advisory Circulars are issued under Part 61 for manned pilot licence training and competency assessments. ASMS has, in fact, repeatedly asked CAA to issue such Advisory Circulars or otherwise to revise the existing Advisory Circulars. CAA staff are accepting of the idea, but it appears that one reason this has not progressed is lack of resourcing. If there is a lack of resourcing for the preparation of Advisory Circulars, which are advisory only, then can we have any confidence that there will be sufficient resourcing for the issuance and update of Transport Instruments, when the resource requirements for those instruments is presumably greater due to the legally binding nature of the instrument.

The exposure draft appears to achieve the intent of the stated policy decision, but it is not clear that CAA are adequately resourced to implement this additional tier of regulation.

7.2 Amalgamation of CA and AA Acts

No compelling reason has been offered to amalgamate these two Acts. An Airport Authority will also need to comply with the Health and Safety at Work Act 2015 and associated regulations, the Hazardous Substances and New Organisms Act 1996 and associated regulations (for example in relation to refuelling facilities and preventing hazardous substances spillages from reaching waterways). It is not clear why an Airport Authority is not also capable of dealing with a separate piece of legislation that is solely focussed on Airport Authorities.

7.3 Purpose Statement

The main purpose specified in s3 of the exposure draft is reasonable and appropriate.

There are elements of the additional purposes in s4 which are superfluous and not obviously achieved by provisions in the exposure draft. In particular:

- It is not obvious how the exposure draft contributes to achieving an accessible, sustainable, or productive transport system.
- It is not obvious how the exposure draft protects the interests of people and the environment that are affected by civil aviation. On the contrary, it is the Resource Management Act that 1991 that most protects such interests, and the long-standing prohibition against actions in nuisance that is contained in both the Civil Aviation Act and the exposure draft act against the interests of people and the environment that are affected by civil aviation.

The purpose statement is not suited to economic regulation.

Recommendations

It is recommended that:

1) All economic regulatory provisions in the exposure draft are moved to appropriate primary legislation such as the Commerce Act.
2) Section 4(a) and 4(e) of the exposure draft are deleted.
3) Sections 4(b),(c), and (d) of the exposure draft are incorporated into s3 to provide a single purpose statement as follows:

   The purpose of this Act is to facilitate the operation of a safe and secure civil aviation system, including by:

   facilitating the development of civil aviation;

   ensuring that New Zealand's obligations under international civil aviation conventions, agreements, and understandings are implemented; and

   preserving New Zealand's national security and national interests.

7.4 Structure of Part 8 of the Act (Part 6 of the Exposure Draft)

The structure of Part 6 of the exposure draft is reasonable.

7.5 Offence Provisions under the Civil Aviation (Safety) Levies Order

The wording proposed in s344 of the exposure draft appears to achieve the intent of the policy decision.

However, the proposed maximum fine of $5,000 for an individual that fails to make a required return seems potentially excessive. While the Ministry is concerned with the integrity of the levy collection system, failing to make a return (or filing a return late) is not an action that has an immediate impact on safety. When compared to the fines specified in the Civil Aviation (Offences) Regulations 2006, a fine of this magnitude is commensurate with the fine that may be imposed on conviction for an individual whose actions have an immediate impact on safety, and is 2.5 times higher than the maximum infringement fee that may be imposed for similar offences. This magnitude of the fine appears to be disproportionate to the seriousness of the offence.

Recommendation

It is recommended that the magnitude of the penalty specified in s344 for failing to make a return is reviewed to ensure that the penalty is commensurate with the seriousness of the offence when judged against civil aviation safety offences.

7.6 Minor changes relating to Levies

The wording of the exposure draft appears to achieve the policy objectives.

It is reasonable to allow levies to be calculated on a wide variety of bases: existing levies are not necessarily calculated on a basis which is efficient.

A very clever ruse, though, in hiding the intent to levy uncertified drone operators on the very last page of the commentary document (p. 61) rather than making it clear in the section "Amendments relating to unmanned aircraft (drones)" (pp. 26-29).

While the levy making power might in theory extend to all participants in the civil aviation system, the ability to collect levies is a different matter entirely. Registration of drones will be readily be able to be bypassed and consequently it will also be relatively easy to also bypass the payment of levies. The Ministry should also be careful about making value judgments about whether uncertified drone operators either benefit from or impose a cost on the civil aviation system. Like most of the general aviation community, most uncertified drone operators could operate quite happily without the vast majority of the civil aviation system. There is a strong argument that the civil aviation system exists for the benefit of the airlines, and that the airlines impose significant costs on other operators in the system. As such, there is also a very good economic argument that the airlines should pay for the vast majority of the costs of the civil aviation regulatory system, including the roll out of ADS-B below FL245.