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Submissions on Civil Aviation Bill – Exposure Draft, Issued 13 May 2019

References:

The Civil Aviation Authority: "CAA"

The Director of Civil Aviation: "The Director"

Civil Aviation Act 1990: "The Act"

Civil Aviation Bill Exposure draft: "The Bill"

Civil Aviation Rules references are referred to as "CAR" followed by the relevant Rule or Rule Part

Transport Accident Investigation Commission / Act 1990: "TAIC" or "TAIC Act"

Health and Safety at Work Act 2015: "HSWA"

Just Culture

1. Policy Intent and Legislative Drafting, and inter-relationship with other statutory regimes

1.1 The policy intent of incentivising and encouraging aviation participants to provide timely, accurate and full accident and incident reports to improve the quality and level of safety information, by providing for a Just Culture approach to protect participants from prosecution or administrative action except in limited circumstances, is one which has widespread support, and in principle, we also support it.

1.2 However, we can foresee some issues and difficulties arising from the legislative drafting of the provisions in the Bill, and in the way in which the policy regarding the exceptions where prosecution or administrative action may be taken has been framed, in successfully achieving these policy objectives.

1.3 We also consider that there is a need to reconcile these proposals with the current legislative regimes and differing levels of protection that currently exist, against prosecution action and use of safety information that exits for the investigation of aviation accidents and incidents as between the CA Act and TAIC Act, and against the CAA's statutory obligations and duties under the HSWA.

1.4 We can also foresee litigation being taken against the CAA in many cases where it decides to prosecute and/or take administrative action against a participant under these proposed new legislative provisions, on the basis that the participant will challenge whether the proposed statutory criteria have been met.

Incorporating statutory criteria as to when a statutory officer may prosecute directly into primary legislation, is quite unique and will inevitably reuqire the Courts to 'look behind' a statutory decision maker's reasons for prosecuting someone under the proposed new legislative provisions. This to our knowledge is without precedent in New Zealand and may be of some concern to parliament and/or the Courts.

1.5 We do also question from a safety perspective, whether the proposed limitations against when administrative action can be taken, should extend to all forms of administrative action, or be limited to only revocation of a participant's aviation documents or privileges.

1.6 We address these matters further by reference to each of the relevant clauses in the Bill.

2. Clause 264:

2.1 The prohibition against the admissibility of accident and incident notifications will only serve to encourage full reporting by participants, if participants believe the proposed additional legislative protections in Clauses 265-266 are effective in reducing the risk and incidence of prosecution or administrative action to considerably narrower circumstances than exist at present.

2.2 While the CAA claims that it applies Just Culture principles in making these decisions now, and that it has done so for several years, it is our observation that there remains a widespread perception in industry that the CAA remains very active in pursuing both prosecution and administrative actions, and that this has not changed in recent years. If Clauses 265-266 are seen to provide too broad a discretion to take law enforcement or prosecution action, industry participants will not feel confident that the situation will be markedly different from the status quo, and the desired increase in reporting may not eventuate. The legislative drafting and scope of these provisions is therefore critical to the success of this policy change.

2.3 While clause 264 provides that the initial notification of an accident or incident may be protected from admissibility in criminal proceedings, any additional information required by the CAA under clause 103(6) would not, under present drafting, be so protected. That may be defendable from a policy perspective, as if the circumstances suggest that one of the exceptions to take enforcement action exists under clause 265, the Director ought to be able to rely on all relevant information in the proceedings beyond the initial notification, including anything disclosed under clause 103(6).

2.4 However, we observe that this may defeat the purpose of clause 264, as it may act as a disincentive on participants to provide full and accurate details about an incident when requested to under clause103(6), or to notify an incident at all, due to a continuing concern that any additional information provided beyond the initial notification, could still be used to build a prosecution case against them.

2.5 As presently drafted, cl 264 also in our view does not offer the same protection that presently exists under CAR Part 12 from use of information obtained following notification of incidents and accidents pursuant to s26 of the Act. CAR Part 12 sets out the initial notification requirements (CAR 12.53 and 12.55), and also any further information required under CAR 12.57 and 12.59

This pertains to the "additional information" that is generally required by the CAA under s 26(4) of the Act, and appears to be the intended equivalent to clause 103(6) of the Bill.

2.6 CAR 12.63 presently prohibits **any information** submitted to it pursuant to CAR Part 12 to be **used or made available** for prosecution action unless one of the exceptions to that rule exist. Thus, it protects and includes not only the initial notification, but any other information such as that provided under CAR 12.57 and 12.59. Clause 264 of the Bill does not extend to any other information that might be required under clause 103(6), and accordingly does not provide the same protection as CAR 12.63 for any additional information supplied following an initial notification under Part 12.

2.7 In addition, CAR 12.63 not only prevents the information from being **used** in a prosecution, it also does not permit that information to be **made available** for that purpose, unless the threshold is met. This has generally been interpreted to mean that information gathered as part of a CAR Part 12 investigation, cannot even be disclosed to CAA law enforcement investigators to aid in a law enforcement investigation, unless CAR 12.63 has first been triggered.

2.8 Clauses 264-65 do not provide that same protection. There is no limitation on information that has been submitted under proposed clause 103(6) following an initial notification of an incident or accident, from being made available to and forming part of a law enforcement investigation from the outset. Once again, and even if there is a policy case for making such information available from the outset for law enforcement investigation purposes, we consider that this is not likely to foster an environment of open and full reporting, as intended.

2.9 That said, it is our observation that the CAA routinely avoids the effect of CAR 12.63 by initiating law enforcement or "ARC" investigations (Aviation Related Concerns) rather than, or in addition to, conducting an investigation under CAR Part 12, so that it can request and use information outside of the limitations in Rule Part 12, to support law enforcement investigations and prosecutions.

2.10 We acknowledge that the CAA is legally within its rights to initiate investigations outside of Part 12, notwithstanding any initial notifications being made under that Rule Part, as long as information is requested and obtained through a separate process. However, there are limitations to what information the CAA can mandatorily request from participants to support investigations under the Act, that are outside of the scope of Section 26 and Rule Part 12. Participants who are subject to a law enforcement investigation may presently refuse to provide information, unless it forms part of a limited set of documents required to be kept under the Act (such as pilot logbooks and daily flight records), and may exercise their rights to silence. There is therefore still some protection to participants outside of the Part 12 process, as to how much information they are required provide. For information that they are required to provide to safety investigators exercising their functions under CAR Part 12, the protection of CAR 12.63 presently exists and limits the circumstances when information may be used or made available to law enforcement investigators.

2.11 Clause 103(6) would put it beyond doubt, that the CAA may access and use any further information supplied following an initial notification of an incident under clause 103, including information that would be required under CAR 12.57 and 12.59, to support a law enforcement investigation from the outset, without any protections or safeguards against the use or admissibility of that information.

2.12 There may be a policy case to say that the CAA should be able to access this information for law enforcement investigation purposes from the outset, particularly if Clauses 265—266 are more effective in limiting the circumstances in which prosecution action can be initiated than the existing limitations in Part 12. However, we question whether that is the case. We also question whether participants will feel more encouraged to notify incidents than they do presently, when other information that they will be forced to provide under Clause 103(6), may be used to support a law enforcement investigation and thus potential prosecution action from the outset.

3. Clause 265

Legislative drafting and policy intent

3.1 As noted above, we are of the view that Clause 264 does not in principle provide the same protections as CAR Part 12 against use and availability of safety information for law enforcement purposes and this alone may not achieve the desired increase in reporting.

3.2 In addition, any protection afforded by clause 265 from prosecution will only incentivise increased and more accurate reporting if it is effective in restricting when prosecution action may be initiated. Clause 265(2) attempts to provide a confined set of circumstances in which this may occur. However, clause 265(1) expressly retains a general discretion for the Director to take prosecution action in other circumstances outside of the criteria in clause 265(2), where the "public interest" outweighs the benefits of full reporting of incidents. We consider that this alone is problematic.

3.3 There is no definition or guidance as to what constitutes the "public interest". The public interest test is also what is presently used in the Solicitor General's Guidelines for public agencies in determining whether or not to launch a prosecution. As such, as long as that test is met, then the Director could conceivably justify a decision to prosecute even where the participant has met their reporting obligations and there is otherwise no express basis to prosecute under clause 265(2). In our view, the current drafting is therefore too broad to achieve the intended policy objective. We can appreciate that the intention is to provide for a residual discretion beyond the prescribed specific instances where prosecution might be justified under clause 265(2), where prosecution might also be appropriate, and recognise that it is often impossible to provide an exhaustive list or set of limitations in legislation. However, we would suggest that the discretion in clause 265(1) should be prescribed in a much more confined way and in a way that is consistent with Just Culture principals. That is, that prosecution is not warranted where the reporting obligations have been met, and the behaviour is inadvertent and not wilful. This is quite a different test to the 'public interest' test.

3.4 Subclause 265 (2)(a) appears to be permitting prosecution of persons who have otherwise met the notification requirements under clause 103, for careless operation, where the conduct is a "major departure" from the standard of care.

This may impose a narrower and higher standard for prosecution of careless operation than would otherwise apply to a participant in other circumstances, but does leave open the question of what constitutes a "major" departure from the standard of care expected. It also permits prosecution against participants who have met their reporting obligations for acts of carelessness, whereas CAR 12.63 only permits safety information gathered under that rule part to be used for prosecution action where the higher threshold of endangerment is met.

3.5 Subclause (2)(b) also adopts a different language to the language of section 43 of the Act (clause 95 of the Bill), for offences constituting unnecessary endangerment. Unnecessary endangerment already encapsulates offending that caused actual harm or damage, or which posed a real risk of harm or damage. If this sub clause is attempting to confine prosecution for such offences to those where the person recklessly gave rise to conduct constituting unnecessary endangerment then it should reflect that language, rather than adopting different wording.

3.6 Again, subclause (c) should also adopt the same statutory language used in the offence section for unnecessary endangerment. Using different wording creates room for confusion or legal debate, where it appears unnecessary to do so.

3.7 It is also unclear whether due consideration has been given to whether the criteria in clause 265(2) in fact align with the Just Culture principles of not prosecuting incidents that have been fully self-reported, for breaches of the law which were genuinely inadvertent or not wilful in nature. That may need to be given further consideration to ensure the statutory criteria align as closely as possible to Just Culture principles.

Inter-relationship between CA Act and TAIC Act

3.8 The no blame focus of ICAO Annex 13 aircraft safety investigations, and the need to ensure safety lessons are learned and the free flow of information that might assist in preventing future accidents is not inhibited by fear of prosecution action, are already recognised in New Zealand Law. Serious aviation accidents and incidents that are investigated by the Transport Accident Investigation Commission under the TAIC Act are subject to blanket restrictions against use of any evidence or information provided to, or produced by the Commission, being used in prosecution proceedings. However, this is not subject to any element of discretion or legal interpretation as to when these protections should apply and when a person should or should not be prosecuted. It is very clear that once an investigation is opened by TAIC, nothing obtained or produced by the Commission about it can be used in prosecution proceedings.

3.9 The TAIC Act does not however cover all aviation accidents or incidents. TAIC has a discretion whether or not to investigate non air transport accidents or serious incidents. It has no jurisdiction over incidents that are not defined as serious incidents. That Act also does not prohibit the CAA from conducting its own investigation into accidents or incidents that are being investigated by TAIC, albeit that there may be limitations in what evidence it can independently obtain outside of the Commission investigation. This arguably already does create some degree of disparity between participants, in the sense that air transport accidents and serious incidents investigated by TAIC are far less likely to be subject to prosecution accident due the lack of available evidence outside of that investigation, than other incidents investigated by the CAA.

3.10 The effect of clause 265 is that any reportable incident or accident that is not investigated by and subject to the protections under the TAIC Act, and/or that is investigated separately by the CAA, should none the less be subject to some form of second tier test or criteria, before determining whether prosecution action is appropriate. Parliament would need to be very clear that this is what would be being achieved by the introduction of this clause of the Bill.

3.11 We consider that adoption of Just Culture principles in this way may well have merit, if it improves the safety data and outcomes that are underpinning these proposals.

3.12 We do however consider that clause 265 needs to be considered alongside the existing legislative regime that already exists under the TAIC Act, and how that inter-relates with the CAA's investigation functions and powers, and prosecutorial powers. As a starting point, we would suggest that it may need to be reviewed by parliament, whether the scope of TAIC's mandatory and discretionary powers of investigation remains appropriate or requires review first, before considering these Just Culture proposals.

Inter-relationship between CA Act and HSWA

3.13 Parliament will also need to consider how the proposed Clause 265 would operate alongside the provisions of the HSWA. The CAA is the designated agency responsible for investigating workplace accidents and incidents, and enforcing the provisions of the HSWA in the aviation sector.

3.14 Obligations exist on participants independent of the CA Act, to report serious incidents (as that is defined under the HSWA) to the CAA, although in practice one notification to the CAA is probably considered sufficient for both purposes.

3.15 The CAA acting under the HSWA has however independent obligations under that Act, to follow up on reported incidents that require investigation under that Act. The powers of investigation and powers to mandatorily require information to be provided, and even to require officers and workers to make statements to enforcement investigators, under the HSWA is also quite extensive and broader than what otherwise applies to investigations conducted under the CA Act.

3.16 It needs to be considered whether a notification under clause 103 will be deemed to be a notification for the purposes of the HSWA or whether they are separate, and whether each notification affords the same protected status against admissibility in criminal proceedings.

3.17 It also needs to be considered whether the limitations against initiating prosecution under Clause 265 would extend to, or be separate from, any consideration as to whether or not to prosecute offences under the HSWA. If entirely separate regimes and threshold tests are applied for offences under each Act, in our view this will further undermine the intended purpose of the enactment of the Just Culture provisions in the Bill. Conversely, if it is to apply across the board to any decision by the Director to prosecute for any offence that he has jurisdiction over, this may circumvent the policy intent behind the enactment of the HSWA and its offence provisions. This would in our view require careful policy consideration and scrutiny by parliament.

Role of the judiciary in interpreting and ruling on Just Culture decisions

3.18 Notwithstanding the widespread industry support for the incorporation of natural justice principles into the primary legislation, we can also foresee this clause causing policy and separation of powers concerns for the legislature and/or judiciary.

3.19 In considering these proposals Parliament would need to understand that it is creating a second tier statutory test that would have to be met before the Director could fulfil his statutory duties to enforce the law, including the prosecution of offences, under the Act. We do foresee that this could cause some concern. Parliament has seen fit to enact certain offence provisions, which the Director has a statutory duty to enforce, in order to maintain the safety of the civil aviation system. Placing rigid statutory requirements which overlay when the Director can execute those statutory duties in some or all instances, may be viewed as problematic, and shifting some of the decision making power in some ways, to the Courts.

3.20 Even if it is supported by the legislature in principle as a means of achieving better safety reporting and safety information, enacting a statutory framework of this nature is in our view quite unique. The Courts are ordinarily very clear, that their job is to interpret and apply the law and assess the evidence against a person who has been charged with an offence, against the statutory offence provision. The Courts generally view any underlying decision about whether or not to prosecute, as a matter for the statutory officer charged with that duty, and not a matter for the Courts to question.

3.21 Enactment of a statutory provision which overlays other existing offences, requiring the Director to assess against that criteria, whether he can and should initiate prosecution action, brings this decision making process within the express jurisdiction of the Courts. This in our view will inevitably lead to prosecutions initiated by the CAA, being delayed and challenged, by way of preliminary legal hearings on points of law, and or/ by injunctions and judicial review proceedings, while challenges are heard against whether the Director has correctly interpreted and applied Clause 265 in bringing prosecution action against a person who has otherwise met the requirements of Clause 103.

3.22 As we have acknowledged, there may well be a legitimate case for adopting such a regime, but we consider that this would likely generate careful scrutiny by parliament. It also highlights the need, in our view, for the legislative drafting of this Clause to be very robust, so as to be as clear as possible as to its intended operation and effect, and to minimise the extent to which the Director's underlying discretion and decision to prosecute is subject to judicial attack.

3.23 While some initial litigation in this area might be inevitable given its relative uniqueness in New Zealand law, and perhaps even helpful in providing judicial guidance to the Director on how to interpret and apply this discretion or any statutory criteria enacted, the Director does have a legitimate safety and public interest function in prosecuting the most serious of offences, and should not be unduly inhibited by legal challenges brought under this proposed new Clause, from doing so. As it presently stands, we can foresee a considerable risk that this will occur.

4. Clause 266

4.1 Once again, enactment of a Just Culture clause which overlays the exercise of the Director's administrative powers is likely in our view to also attract careful scrutiny from parliament.

4.2 Parliament has seen fit to give the Director certain powers to suspend or impose conditions, or in extreme cases, to revoke a participant's privileges, in the interests of the safety of the aviation system. We do question in this context, whether Clause 266 should be limited to decisions made under Clause 89-90 only, and not the initial suspension powers under Clause 88.

4.3 A similar analysis may also be required, as outlined above in relation to Clause 265, as to the appropriateness and effectiveness of Clauses 266(2) and (3), and their alignment to Just Culture principles. For completeness, we also note that subclause 3(a) and 3(c) also make incorrect reference to the taking of enforcement action, which should refer to the taking of administrative action.

4.4 Parliament is also once again likely to be mindful that challenges against administrative decisions will also if this provision is enacted, extend beyond the merits of the decision, to whether the Director acted in compliance with this Clause of the Bill in making the decision to take administrative action. However, we see this as less problematic than in a prosecution sense. Appeals to the District Court, or Judicial Reviews against administrative decisions can already take into account the process followed, and whether relevant or irrelevant matters were taken into account, and extending this to consideration of the matters under Clause 266 is in our view less complicated when assessing administrative decisions, than decisions on whether or not to prosecute a participant.

Unlimited time limits on suspension powers

5.1 On reviewing clause 88, we are also concerned that there is no proposed time limit on the Director's initial or subsequent powers of suspension.

5.2 While we support the need for the Director to take initial suspension action in the interests of safety, we do not consider that this suspension power should be unlimited, and should only continue where there are imminent risks to safety.

5.3 While the Director should not necessarily be limited in the time available to fully investigate an incident or decide what action to take against a participant, we consider that there should be mandatory time limits within which the Director must do so, if the Director proposes to continue to keep a participant from exercising their privileges. We have submitted in detail on the Director's investigation and suspension powers in our submission on the 2014 discussion document (under our prior company name of AMC Legal). We remain of the view that the Act does not adequately protect or balance the interests of participants and their right to continue to pursue their livelihood, against the safety functions and powers of the Director in this regard. The Bill in our view fails to address this.

Rights of appeal and review

6.1 In our submission on the 2014 discussion document, we also raised concerns at the limited effectiveness of the rights of appeal and review both in respect of decisions against aviation documents and document holders, and with respect to medical certification decisions.

6.2 We remain of the view that those are issues that require legislative reform, and these are not addressed in Part 11 Subpart 5 of the Bill. We reiterate the submissions previously made in our 2014 submission on those points. In summary, we consider that there ought to be a more robust convener review process, and that changes need to be made to make the rights of appeal to the Courts more efficient and cost effective.

6.3 We also have read the Submission filed by IQ Aviation on behalf of the Aviation Forum, and we endorse their further comments on this issue.

6.4 We also consider that the Director's ability to make a fresh decision that is contrary to the outcome of an appeal needs to be curtailed, and is too broad. This also acts as a disincentive to participants, in addition to the cost and lack of efficiency, to initiate appeals against administrative decisions.

Medical Certification

7.1 We are puzzled by the shifting of the medical certification section of the Act, out of Part 2A into a Schedule of the Bill. We question why this has been done and see no legislative reason for this.

7.2 As noted above, we consider that the medical convener function needs strengthening to make it a more effective and independent review option.

7.3 We also consider that there needs to be safeguards in the Bill, where information is provided, particularly anonymously, to CAA medical certification personnel or medical examiners, which has come from ex spouses or estranged family members, making adverse allegations against a participant's medical fitness to fly. It can be particularly difficult for a participant to defend allegations of mental illness or instability, or other behavioural issues, that have been made by estranged partners, relatives or other persons involved in personal disputes with the participant, and in our view, some legislative protection and safeguards need to be adopted to ensure that such information is received and assessed with particular care and objective scrutiny.

Fit and Proper Person Test

8.1 We reiterate our comments above under 7.3, in relation to the fit and proper person test. We are concerned that in this context also, while it is important for the Director to receive information from a wide variety of sources, the same need for caution exists when information is received from estranged third parties.

8.2 We consider that statutory protections and safeguards need to be applied when assessing a person's fit and proper person status also, and that the Bill needs to adopt legislative protections to achieve this both for fit and proper person and medical certification purposes.

8.3 With respect to the proposal to enable CAA to source information from other government agencies, while we do not in principal object, once again we see a need for legislative safeguards to ensure undue weight is not placed on certain information. In particular, we are concerned that information provided by other government agencies indicating that a participant has been charged with but not convicted or prosecuted for an offence, must be treated with considerable caution. Untested allegations that are in dispute must attract similar caution. Again, we see a need for statutory safeguards to be included in the Bill, to ensure the right balance is struck.

8.4 We are also concerned that from time to time, the CAA receives, often anonymously, copies of affidavits, decisions and other information that has arisen in the context of acrimonious family court proceedings. Such documents are protected under that Act from disclosure or use outside of the Family Court, and can only be released to other parties under the Family Courts Act, with the permission of that Court. When such information is passed on to the CAA, in our view it should not be able to be taken into account as it is a clear breach of the Act governing the Family Court jurisdiction, and there are clearly inherent dangers in the CAA relying on such information.

Other matters

9.1 We have not had an opportunity to consider the drug and alcohol (DAMP) provisions. However, we have read the submission by IQ Aviation on behalf of the Aviation Forum (the Aviation Forum), and we consider that they raise a number of valid issues that require further policy and legislative work.

9.2 We also support the Aviation Forum submissions regarding the Short Title and Purpose provisions of the Act; the respective roles of the Minister and Board under the Act; and the role of the Director as a safety and security regulator as distinct from other functions, and the need for further policy and legislative work in these areas.

9.3 We further support the Aviation Forum submission on the need to have greater consistency and alignment between the overlaying obligations on commercial operators under the CA Act and the HSWA and the need to avoid unnecessary duplication and red tape.

9.4 We note that the offences and penalties provisions are yet to undergo detailed review and that this work is ongoing. We would observe, that the Bill includes offences which are attached to specific legislative provisions, and others which are stand alone offence provisions, and that these are spread throughout the Bill. We would prefer to see all offence provisions included in a single Schedule to the Bill, and grouped by category or subject; or alternatively, a Schedule containing a full table cross refencing where the offence provisions may be found in the Act, against divided into categories or subjects, so that participants can easily identify what offences exist that may be applicable to them

9.5 We have not considered the economic legislative provisions in the Bill concerning airlines and airports authorities, or aviation security matters, as these are not matters that we routinely advise on or are consulted on. We remain of the view that economic matters should be separated from aviation safety and security matters. While we would have preferred separate legislation for each, in the absence of that option being supported, we endorse the comments of the Aviation Forum that the Bill should be structured in a way that clearly separates the economic parts of the Act from the safety regulatory parts of the Act.

General comment

As will be evident from our submission, we consider that there is significant policy and legal issues that arise from the Just Culture proposals. We consider that there is a need for more detailed policy work to ensure that there is sensible alignment between the legislative regimes applicable under the TAIC Act, CA Act and HSWA to ensure all operate cohesively alongside each other, in relation to these proposals in particular, as well as generally.

While we have not commented in great detail on other issues noted above, this has been due more to the limited time available to respond to the Exposure Draft and our inability to give those issues more detailed consideration in that time frame.

We would welcome the opportunity to engage in further consultation and to consider other aspects of the Exposure Draft or the Bill in more detail, as it progresses.

Thank you for the opportunity to comment on this Exposure Draft.

Yours faithfully,

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