

# Regulatory Impact Statement

## Amendments to the Civil Aviation Act 1990 and Airport Authorities Act 1966: Safety Regulation

### Agency Disclosure Statement

1. The Ministry of Transport has prepared this Regulatory Impact Statement (RIS). It analyses options to improve the legislative framework for civil aviation safety in New Zealand. This RIS accompanies the Cabinet paper entitled *Review of the Civil Aviation Act and Airport Authorities Act: Key Policy Decisions*.
2. The proposals contained in this RIS are the result of a review of the Civil Aviation Act 1990 (the Review), undertaken by the Ministry of Transport in 2014.
3. The Review canvassed a wide range of safety issues. In addition, industry raised additional matters during consultation. Further analysis post consultation determined that legislative changes were not necessary for many of these issues, as they were best remedied through other non-legislative mechanisms.
4. There are a number of additional minor amendments proposed to the Civil Aviation Act, that are considered to have minor impacts and have therefore not been included in this RIS.
5. The preferred options in this RIS aim to ensure New Zealand's aviation legislation can continue to support an effective, efficient, safe, secure and resilient aviation system, which supports the growth of the economy in order to deliver greater prosperity, security and opportunities for all New Zealanders.
6. Several issues arose following consultation, therefore we do not know stakeholders views. Consultation on these issues will take place through the Select Committee process.
7. A key assumption associated with the protection of safety information issue, is that the proposal will result in increased number of incidents reported to the Civil Aviation Authority, and that these reports will continue more detailed information surrounding the events of the incident.
8. The Ministry of Transport is satisfied that the cost estimates in the RIS are reasonable.

Withheld to protect privacy

  
Senior Adviser

Ministry of Transport

Date: July 2016

## The aviation environment

1. In the past 25 years since the enactment of the Civil Aviation Act (CA Act), significant change has occurred throughout the aviation industry and in government regulatory reform. Aviation safety and security, and New Zealand's international civil aviation obligations continue to be fundamental drivers. In addition, aviation is a key contributor to New Zealand's economic growth.
2. Since the introduction of the CA Act in 1990, New Zealand's aviation sector has flourished. Air passenger transport contributed approximately \$4.3 billion (14 percent) to New Zealand's \$29.8 billion tourism revenue in the year to March 2015.<sup>1</sup> 17 percent of New Zealand exports and imports by value are carried by air. The aviation industry annually exports \$3.8 billion of products and services and contributes 6.9 percent of New Zealand's GDP. We expect the aviation industry to continue to be a major contributor to economic growth.
3. Other factors that have influenced the aviation system over the past 25 years include:
  - 3.1. the Government's expectations of the transport sector as a contributor to economic growth
  - 3.2. the Government's priority to improve the quality of regulation
  - 3.3. the move by the CAA to a more proactive, risk-based approach to aviation regulation, and its change programme to improve regulatory quality, service delivery, efficiency and effectiveness
  - 3.4. ongoing and rapid change within the international aviation industry relating to an increased demand for services and improved technology.
4. Against this background, the Ministry of Transport undertook a review of the CA Act (the Review). The purpose of the Review was to ensure that New Zealand's aviation legislation could continue to support an effective, efficient, safe, secure and resilient aviation system, which supports the growth of the economy in order to deliver greater prosperity, security and opportunities for all New Zealanders.

### What does the CA Act cover?

5. The CA Act governs the civil aviation system in New Zealand, and:
  - 5.1. establishes the Civil Aviation Authority (CAA) and the Aviation Security Service (Avsec)
  - 5.2. establishes the framework for participating in the civil aviation system
  - 5.3. confers functions, duties and powers on those operating in the civil aviation system, including the CAA and Avsec
  - 5.4. empowers the Minister of Transport to make Civil Aviation Rules for a range of matters

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<sup>1</sup> Tourism Satellite Account: 2015

- 5.5. empowers the Director of Civil Aviation (the Director) to regulate entry into the civil aviation system, and monitor and enforce compliance with the CA Act and Civil Aviation Rules
- 5.6. empowers the Minister of Transport to establish, maintain and operate aerodromes
- 5.7. ensures New Zealand's obligations under international civil aviation agreements are implemented
- 5.8. provides for the economic regulation of licensing and international air services competition for foreign and New Zealand international airlines
- 5.9. prescribes airline liability and compensation for loss and delay.

### **Executive summary**

6. The aviation industry and the government regulatory environment have changed significantly in the past 25 years since the enactment of the CA Act. In this time, New Zealand's aviation sector has flourished. Air passenger transport contributed approximately \$4.3 billion (14 percent) to New Zealand's \$29.8 billion tourism revenue in the year to March 2015.<sup>2</sup>
7. Against this background, the Ministry of Transport undertook a review of the CA Act (the Review). The purpose of the Review was to ensure that New Zealand's aviation legislation could continue to support an effective, efficient, safe, secure and resilient aviation system, which supports the growth of the economy in order to deliver greater prosperity, security and opportunities for all New Zealanders.
8. The Review identified a number of legislative changes that will contribute to achieving this outcome. These changes will:
  - 8.1. improve the safety and security of the aviation system
  - 8.2. improve the efficiency and effectiveness of regulatory decision-making to facilitate a growing industry
  - 8.3. clarify expectations placed on participants in the aviation system
  - 8.4. improve the usability of the legislation.
9. The Ministry of Transport formally consulted with industry in late 2014. Industry provided comment on a wide range of issues, and was generally supportive of the proposed changes.
10. The changes proposed in this RIS are unlikely to be contentious.
11. *Table 1* below summarises the key changes and rationale for change.

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<sup>2</sup> Tourism Satellite Account: 2015

Table 1: Summary of key changes

<b>Safety</b>	
Protection of safety information	<p>Amend the CA Act to improve the level and quality of incident reporting to the Civil Aviation Authority (CAA) to support a pro-active and risk-based regulatory approach. This will be achieved by providing a framework in the CA Act which states that enforcement or administrative action should not be taken against people who fully and accurately self-report aviation incidents to the CAA, unless the person's behaviour was reckless or it is in the public interest to pursue such action.</p>
Offences and penalties	<p>The offences and penalties regime is operating essentially as intended. Significant changes are not necessary. Changes to two sections are proposed:</p> <ul style="list-style-type: none"> <li>• amending section 46B (which creates an offence to provide fraudulent, misleading or intentionally false statements to obtain a medical certificate) to provide that the offence may be committed 'recklessly'</li> <li>• amending section 65 (which sets out the time for filing charging documents) to change the limitation period for filing charging documents for certain offences, based not on when the offence was committed, but from when the offence is detected.</li> </ul>
Improving processes around fit and proper person tests	<p>The CA Act requires the Director to determine whether a person is 'fit and proper' to participate in the aviation system. To make that determination, the Director can 'seek and receive' information from third parties. Agencies are concerned that supplying such information may breach the Privacy Act 1993. This can lead to delays in relevant information being received, posing a potential risk to aviation safety.</p> <p>To address this, it is proposed that the CA Act explicitly state that when the Director seeks information from a third party, it is not a breach of the Privacy Act to supply that information.</p> <p>It is also recommended to make changes to the criteria that the Director considers when making a fit and proper person assessment. This includes adding criteria that the Director routinely takes into consideration, for example, any dependency on alcohol and drugs and a person's compliance history with transport security regulatory requirements in New Zealand or overseas.</p>

## Overall objectives of the Review

12. The overall objectives of the Review is to assess and design changes necessary to ensure that the Act is fit for purpose, including that it:
  - 12.1. provides capable and effective governance, operational and regulatory frameworks
  - 12.2. addresses identified safety, security and economic issues where appropriate
  - 12.3. provides clear, concise and accessible legislation.

## Issue 1: Protection of safety information

### Background

#### *Improving aviation safety—the move towards risk-based regulation*

13. New Zealand's aviation sector is growing rapidly. Predictions are that the quantity and diversity of aviation operations will expand over the short and long term, in line with global trends. This growth is likely to increase the number of incidents and accidents. We expect a risk-based approach to aviation safety management to deliver greater safety gains than the current regulatory approach.
14. Regulation of New Zealand's aviation sector is moving towards a risk-based approach.<sup>3</sup> This is in line with International Civil Aviation Organization (ICAO) expectations and the introduction of Safety Management Systems requirements.
15. Civil Aviation Part 100: Safety Management Systems came into force on 1 February 2016. The objective of this rule is to improve aviation safety performance in a way that embeds an effective safety culture in aviation operations; and to ensure New Zealand meets its international obligations as a signatory to the Convention on International Civil Aviation.

#### *Reporting—a key building-block in a risk-based system*

16. Information from accident and incident reports plays an important role to improve safety, especially in a risk-based system. Timely access to accurate safety information allows the CAA to identify high and emerging areas of risk throughout the aviation system—providing a more proactive and evidence-based approach to accident prevention.

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<sup>3</sup> Where attention is focussed on areas in the system that present the greatest risk.

## Status quo

17. The CA Act and Civil Aviation Rule Part 12 (Part 12) set out requirements for the mandatory reporting of accidents and incidents to the CAA. The CAA receives between 6,000 and 7,000 accident and incident reports each year. Reports have been steadily trending up over the past 10 years.
18. Part 12 provides some protection against prosecution. It states that the CAA shall not use information from accident and incident reports for the purpose of prosecution, unless:
  - 18.1. an act or omission caused unnecessary danger to any person or property or
  - 18.2. false information was submitted or
  - 18.3. where the CAA is obliged to release the information pursuant to a statutory requirement or by order of a Court.
19. Reporting requirements in Part 12 are supported by an Advisory Circular<sup>4</sup> (AC) which details the kinds of events that the CAA considers should be reported. The AC is comprehensive and includes events listed in ICAO Annex 13<sup>5</sup> and other types of incidents that the CAA has determined should be reported for safety improvement purposes.
20. CAA's Regulatory Operating Model (ROM) provides a high-level description of how the CAA works with the aviation community to sustain and improve safety performance. The ROM is not a regulatory requirement. The ROM notes that to promote a reporting culture, the CAA prefers not to take enforcement action against those who fully report details of accidents and incidents, but may well do so in circumstances where reporting is patently incomplete and/or reckless or repetitive at-risk behaviour is identified. CAA generally targets enforcement and administrative action<sup>6</sup> at participants who are wilfully not performing.

### *International drivers and best practice approaches prompting change*

21. New Zealand is a signatory to the Convention on International Civil Aviation 1944. This obliges New Zealand to secure, to the highest practicable degree, compliance with aviation global standards as established by ICAO.
22. ICAO has proposed changes to Standards and Recommended Practices (SARPs)<sup>7</sup> in Annex 19 to encourage people to report more accidents and incidents, to support the implementation of the Safety Management Systems approach.

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<sup>4</sup> ACs fulfil two roles. They illustrate specific ways to achieve compliance with the rule requirements—an Acceptable Means of Compliance AMC. An AMC is not the only means of compliance with a rule, and the Director will consider other methods of compliance. They also provide general guidance material on the rule requirements.

<sup>5</sup> Annex 13 to the Convention on International Civil Aviation covers requirements and best practice around aircraft accident and incident investigation.

<sup>6</sup> For example, imposing conditions on a licence, suspending a licence, or revoking a licence.

<sup>7</sup> ICAO adopts SARPs to achieve the highest practicable degree of uniformity in regulations where this will facilitate and improve international air navigation.

23. Key aspects of the ICAO proposal include the States should protect safety information captured in a voluntary reporting system. This means safety information provided in an incident report should not be used for disciplinary action or publically disclosed, unless an occurrence:
- 23.1 was caused by an act or omission that constitutes gross negligence, or
  - 23.2 constituted wilful misconduct, or
  - 23.3 was undertaken with criminal intent.
24. In the above cases, States can disclose safety information and use it as evidence in enforcement or administrative action. States can choose to extend the same protections to safety information in mandatory reporting systems.

#### *International comparison*

24. There is widespread support for the principles around the protection of safety information, including the USA, Europe, Singapore and Australia.
25. The recent Australian 'Aviation Safety Regulation Review' recommended that the Civil Aviation Safety Authority (CASA) publish and demonstrate the philosophy of 'just culture'.<sup>8</sup> To this end the CASA Director earlier this year issued a statement that he will be leading CASA in the implementation of a just culture approach to aviation safety regulation in Australia. We understand this will be done through non-legislative means.
26. The European Union is a strong proponent for protecting safety information for the purposes of improving aviation safety. An EU regulation was passed last year which embeds a just culture approach.
27. In the United States, operators can develop an Aviation Safety Action Programme (ASAP). The objective of the ASAP is to encourage employees to voluntarily report safety information. Under the ASAP, operators develop an MOU with the Federal Aviation Administration (FAA), that allows reports to be provided without fear that the FAA will use the reports to take enforcement action, or that companies will use information from such reports to take disciplinary action. Employees must submit a report in a timely manner, and protection is not available where the event involved criminal activity, substance abuse (including controlled substances), alcohol abuse, or intentional falsification by the reporting employee.

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<sup>8</sup> A just culture operates when people are not punished for making human errors. A key principle is that safety is more likely to improve from understanding and rectifying the cause of human error, rather than through punishing the individual. Punitive responses are reserved for non-reporting and reckless behaviour.

### *New Zealand civil aviation reporting culture*

28. We initially had concerns that the number of accident and incident reports submitted to the CAA was low. This prompted us to ask stakeholders what were the barriers to openly and fully reporting safety information. A number of submitters cited a lack of certainty about how the CAA uses safety information and the prospect of enforcement action, as deterrents to reporting. Industry was also concerned that the CAA did not always inform participants of the outcome of investigations, or how the CAA uses information to improve safety.
29. Further analysis showed that the industry's perception that the CAA routinely uses accident and incident reports for enforcement action does not hold true. The CAA takes very few prosecutions each year. Various CAA policies and procedures support not taking enforcement action against those who fully report. The CAA tends to take enforcement action only when accident or incident reports are patently incomplete or the behaviour is reckless or repetitively at-risk. The number of accident and incident reports has steadily increased in the past few years.
30. However, the Ministry still holds some concerns about:
  - 30.1. the industry's lack of trust of the CAA
  - 30.2. the accuracy and completeness of the reporting
  - 30.3. a lack of transparency of CAA processes, including a lack of industry awareness.

### **Problem/opportunity definition**

31. The threshold for protection from prosecution in Part 12 does not meet emerging international best practice, most recently expressed through proposed changes to ICAO SARPs. There is a risk that New Zealand will begin to lag behind international best practice. A robust incident reporting system is also a critical to the success of the safety system management approach, as embedded in Civil Aviation Rule Part 100.
32. In addition, there is an opportunity to make changes to:
  - 32.1. build trust levels between the industry and CAA
  - 32.2. improve the quantity and quality of reports
  - 32.3. increase the transparency of CAA processes around how it uses safety information.



### *Out of scope*

33. The proposal does not include protecting safety information contained in accident reports provided under Part 12.<sup>9</sup> The small size of New Zealand means that accidents generally come to the attention of the CAA. However, information about incidents and hazards often does not. Protecting safety information related an accident would be harder to justify if there was a high level of public interest.

### **Objectives**

34. The objective of this policy proposal is to improve aviation safety, in particular by ensuring an effective reporting culture exists, whereby participants understand the value of safety information and routinely provide full and accurate accident and incident reports to the CAA. This will allow the CAA to take an evidence-based and proactive approach to accident prevention. To achieve this objective any changes must:
  - 34.1. increase quantity and quality of incident reports
  - 34.2. be practical to implement
  - 34.3. minimise business compliance costs and government administration costs
  - 34.4. enhance relationships both domestically (CAA and industry) and internationally (New Zealand and ICAO)
  - 34.5. not unduly inhibit the CAA from undertaking its regulatory role.

### **Options and impact analysis**

35. The following options were considered:
  - 35.1. Status quo: rely on existing legislative and non-legislative measures.
  - 35.2. Option 1 (preferred): Develop a framework in the CA Act, which states that enforcement and administrative action should not be taken against people who fully and accurately report incidents to the CAA, unless the person's behaviour is reckless, or it is in the public interest to pursue such action.
  - 35.3. Option 2: Develop a framework based on the just culture principles in the Health Practitioners Competence Act 2003. Key features of this option include:

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<sup>9</sup> Accidents are defined in the CA Act and cover instances where a person is killed or seriously injured, the aircraft is badly damaged, or where an aircraft is missing. Incidents are defined as any occurrence, other than an accident, that is associated with the operation of an aircraft and affects, or could affect, the safety of the operation.

- As part of an organisation's Safety Management System, certain activities are performed to improve the safety of the operation e.g. incident reporting. Under the health system, such activities are called Quality Assurance Activities (QAA).
- The Minister can declare by Notice that a QAA is protected if he or she is satisfied that it is in the public interest.
- Organisations can apply to have their QAA protected i.e. a protected QAA protects the confidentiality of information that becomes known as part of the declared QAA and gives immunity from civil liability to people who carry out activities in good faith as part of the declared QAA.
- Separate inquiries (e.g. by Police) cannot access information that has become known solely through the QAA.
- Protection can be revoked.
- Operators would need to report certain information.

35.4. Option 3: Amend CA Act to require CAA to publish a ROM, outlining how it will treat safety information. Although CAA has a ROM, this is not currently a legal requirement.

36. Table 1 below sets out how each option rated against the criteria identified above.

Table 1: Summary of impacts for issue 1

Options	Increased reporting	CAA regulatory role	Cost	Practical to implement	Enhanced relationships
<b>Status quo</b>	We do not expect increased reports over and above the general trend.	There would be no change to the approach CAA currently takes.	CAA would face some costs around increased stakeholder engagement and redrafting policies and procedures. These are not expected to be significant.  No cost to aviation industry as a whole.	Relatively easily to implement through communications and stakeholder engagement plan.	NZ would be non-compliant with ICAO SARPs.
<b>Option 1 (preferred)</b>  Develop a framework in the CA Act based on the principle that if a person fully and accurately reports an incident, the Director will not take enforcement or administrative action, unless specific exemptions apply.	Based on experience and evidence from other countries, we believe that legislative protections should increase the levels of reporting more significantly than the other options. For example in Denmark air traffic control reports rose from 15 per year to more than 900 in the first year after laws were introduced making confidential and non-punitive reporting possible.	Limiting the protections provided for in legislation should mitigate the risk of CAA not being able to act in appropriate circumstances.	CAA would face some implementation costs around stakeholder engagement and updating various policies and procedures. We expect that the costs will not be significant.  No cost to aviation industry as a whole.	Relatively little implementation required following Act and Part 12 amendments. CAA would need to update various policies and procedures.	NZ would likely only partially meet ICAO requirements based on current wording of SARP changes. However, this option brings NZ closer to complying than the other options. For example because of the Official Information Act, NZ would not be able to meet the requirements around not disclosing safety information.  We expect to see an improved relationship with industry as there will be greater clarity around when CAA will take action.
<b>Option 2</b>  Develop legislative framework based on the	Large operators more likely to apply for protection, therefore their reports would likely increase.	The legislation would be clear about when the CAA can take enforcement/administrative action and when it cannot.	This is the most costly option, as an entirely new system would need to be developed.	Significant implementation required as an entirely new system would need to be developed.	This option only partially meets ICAO requirements based on current wording of SARP changes.

Health Practitioners Competence Act 2003.			Operators would face costs to apply for protection. Smaller operators may find the cost prohibitive due to the amount of time to get approval.	Small organisations may not have the capacity to apply for protections.	We do not expect small operators/individuals would participate, therefore, we would not see relationships between the CAA and industry improve across the board.
	We do not expect small operators to take up this option, minimising any increase in reporting.				Better relationships between CAA and large operators who have sought protection.
<b>Option 3</b> Amend Act to require CAA to publish a ROM, outlining how it will treat safety information.	Some increase in reporting expected but would not be to the same level where protections stated in the Act.	There would be no change to the approach CAA currently takes.  The content of the ROM would be dependent on the regulatory approach taken by the Director.	No cost impacts for the CAA or industry.	No implementation issues.	NZ would be non-compliant with ICAO SARPs.
					Status of ROM in Act would increase visibility of CAA approach but would not provide absolute legal assurance about how CAA will act.
					Greater promotion of CAA's policies and practices would go some way to improving relationships. However, we do not believe it would bring about a 'step change'.

Meets	Partially meets	Doesn't meet
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37. Option one best meets the objectives and criteria, and is therefore the preferred option.

#### *Features of the preferred option*

38. Under this option, amendment to the CA Act would provide a framework that states that enforcement or administrative action will not be taken against people who fully and accurately report aviation incidents to the CAA; unless the person's behaviour was reckless or it is in the public interest to pursue such action. The Appendix outlines a framework for inclusion in the CA Act.
39. In addition, consequential amendments to Part 12 would be necessary to align with the new provisions in the CA Act.

#### *Benefits*

##### *Safety is improved*

40. Providing a transparent process in primary legislation about how the Director will act when participants provide safety information to the CAA, should encourage more reporting.
41. The preferred option will improve the problem where operators/participants do not provide full information because they fear they will face prosecution, or face increased CAA oversight due to a perception of higher risk.
42. We expect to see improved safety outcomes with the preferred option compared to the status quo, although it is difficult to quantify by how much.
43. Internationally, the American Federal Aviation Administration (FAA) has indicated that it believes protections have contributed to improved safety, although it has not undertaken research to determine the direct impact protections have had. The FAA has seen a reduction in accident rates since the introduction of their legislation to protect safety information and can attest to safety improvements in the system because of greater collaboration and voluntary reporting.
44. There is anecdotal evidence of safety improvements from operators in New Zealand who take a just culture approach. Both the Health Quality and Safety Commission and the Health Practitioners Competence Assurance Act 2003 are based on 'just culture' principles. The Ministry of Health has indicated that it believes the protections associated with these regimes have improved the safety of the health system.

##### *Greater alignment with ICAO SARPs*

45. The ICAO proposal has not been finalised but we expect the proposal to change the CA Act will largely align with the proposed changes to SARPs. There are two areas where New Zealand may not fully align.

- 45.1. New Zealand cannot fully meet the requirements around not disclosing safety information, because to do so would be at odds with the Official Information Act 1982. While in most cases the CAA could use withholding provisions in the OIA, the case-by-case nature of the OIA makes it impossible to fully comply with the SARPs as currently drafted.
- 45.2. The terms 'gross negligence', 'wilful misconduct' and 'done with criminal intent' as proposed by ICAO, are terms rarely used in New Zealand statutes. ICAO's threshold for protecting safety information does not therefore neatly align with New Zealand's legislative framework, however we believe the proposal is in keeping with the underlying intent of the ICAO SARPs.
46. We have raised these concerns with ICAO. However if the ICAO proposal does not amend these two requirements, New Zealand may need to consider filing a partial difference to the SARPs.<sup>10</sup>

#### *Costs*

47. The preferred option has minimal cost impact for operators or individuals and minimal cost impact for the CAA. There are already mandatory reporting requirements, which participants should be fulfilling. This option does not alter these requirements. CAA processes would need little change, other than updating a number of policies and procedures. CAA advises that it can process any increase in incident reports within current resources.

#### *Impact on aviation industry*

48. All participants in the civil aviation system are required to comply with incident reporting requirements as set out in Civil Aviation Rule Part 12. This proposal does not impact on the requirements to report incidents. We anticipate that because of the protections, participants will be more willing to report incidents to the CAA.

#### **Consultation**

49. As part of the formal consultation on the Review in 2014, most submitters cited a lack of trust and timely feedback with what the CAA does with safety information and fear of prosecution as the main barriers to reporting. They also believe that the CA Act and CAA operating environment need to reflect the principles of just culture.
50. Stakeholder feedback, including from the CAA, has informed the development of the preferred option. The Ministry presented the preferred option to a representative group of the aviation industry who met in November 2015 to discuss this issue. The Ministry is confident that the preferred option largely addresses the concerns raised by stakeholders.

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<sup>10</sup> States must notify ICAO where they cannot fully comply with a Standard. This is known as 'filing a difference'. We expect a number of other States will also need to file a difference, therefore the impact for New Zealand is expected to be minimal.

## Issue 2: Offences and penalties

### Status quo

51. Parts 5 and 5A of the CA Act cover a wide range of offences and consequent penalties. They comprise five categories of offences (safety, general, security, infringement and unruly passenger). The offences range from low-level offending through to offences of a more serious nature that pose a danger to people or aircraft.
52. The CAA has undertaken approximately 85 prosecutions over the last five years. Overall, a very low number of prosecutions occur each year.
53. In general, the offences and penalties regime in the CA Act is operating as intended, and significant change is not proposed. However, two problems require change.

### Problem / opportunity definition

#### *Section 46B*

54. Pilots and air-traffic controllers are required to hold a medical certificate to participate in the aviation system. The medical certification process is critical to help ensure the safety of the civil aviation system. The Director must be able to rely on the veracity of the information he/she is provided through the medical certification process. As such there ought to be a suitable deterrent to people from providing inaccurate information.
55. Section 46B creates an offence for providing fraudulent, misleading or intentionally false statements to obtain a medical certificate. This is a *mens rea* offence where the prosecutor must establish the offender made fraudulent, misleading or intentionally false statements to obtain a medical certificate.<sup>11</sup>
56. The CAA is concerned that the *mens rea* requirement undermines the importance of the medical certificate regime. It is a high standard that is difficult to establish and does not provide an adequate incentive for an applicant to take the necessary care to provide accurate information.

#### *Section 65*

57. Section 65 provides a limitation period of 12 months after the date on which the offence was committed to file charging documentation.
58. There have been a number of cases where information has been disclosed to the CAA at a later date which shows that the original information provided by the subject was false or patently incomplete. We do not have reliable information on the frequency of this situation. Due to the 12 month statute of limitations falling due, no enforcement action could be taken in these cases.

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<sup>11</sup> A *mens rea* offence requires an action and a guilty mind before someone can be found guilty. A strict liability offence means that the prosecution is not required to prove the defendant had a guilty mind. All the prosecution must prove is the prohibited act occurred.

59. As an example, a review of a participant's medical file revealed prior convictions that were not disclosed when they should have been, when the participant previously applied for a medical certificate. The CAA was not able to take enforcement action because it did not become aware of the convictions within the 12-month timeframe.

## Objectives

60. The policy objective is to ensure that the offences and penalties regime in the CA Act can continue to perform its intended function—to deter and penalise inappropriate behaviour. In addition, to ensure that the Director can fulfil his or her statutory function to take action to enforce the provisions of the CA Act.<sup>12</sup>

## Options and impact analysis

*Section 46B - providing fraudulent, misleading or intentionally false statements to obtain a medical certificate*

61. The status quo does not meet the policy objectives. As currently drafted, the provision does not capture a situation where a person is not careful about how they complete the application form.
62. We assessed the viable options against the following criteria:
- 62.1. improving safety
  - 62.2. are a proportionate means to encourage compliance.
63. Option 1 would be to make the offence a strict liability offence. This conflicts with the presumption of innocence guarantee set out in section 25(c) of the New Zealand Bill of Rights Act 1990. Both the Courts and the Attorney General have made it clear that there needs to be strong case to justify strict liability/ reverse onus type proposals. That is, to show that the strict liability provision is a 'justified limitation' on the section 25(c) right. A strict liability offence could also create an avenue to prosecute minor, unintentional mistakes in the application process, which could undermine the medical certification process.
64. The preferred option (to insert a recklessness standard into the offence) is an improvement on the status quo. It provides a greater incentive for applicants to take the necessary care to provide accurate information in their medical certificate application—thereby contributing to improved safety outcomes. It better reflects the importance of participants providing accurate medical-related information as a key contributing factor to maintaining the safety of the aviation system. It is a more proportionate approach to ensure compliance than option 1.
65. Participants who comply with the law will face no regulatory impact. The regulatory impact of anyone found guilty of not complying with s46B does not change.<sup>13</sup>

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<sup>12</sup> Section 721(3)(b) of the CA Act.

<sup>13</sup> Every person who commits an offence is liable on conviction to imprisonment for a term not exceeding 12 months or a fine not exceeding \$10,000.



### *Section 65 – amending the limitation period for certain offences*

66. The status quo does not meet the policy objectives. The Director cannot effectively fulfil his or her statutory function, if it is difficult to address behaviour that demonstrates a disregard for aviation safety, in a timely manner.
67. Option one would be to remove the provision and let the timeframe for filing documents be governed by the default in section 25 of the Criminal Procedure Act 2011. This means there would be a range of different limitation periods under the CA Act, ranging from 6 months to 12 months. Under this option some limitation periods (especially relating to medical offences) would be reduced, and therefore does not meet the policy objectives.
68. The preferred option is to amend the limitation period for certain offences to 12 months from the time that the offence was detected by the CAA. We are continuing to work with the Ministry of Justice and the CAA to determine which offences this limitation period would apply to. It is likely to be applied to medical offences in sections 46A, 46B and 46C of the CA Act. This option is an improvement on the status quo.
  - 68.1. It provides a good balance between a limitation period that allows sufficient time for detection, investigation and enforcement steps, while being short enough to deliver certainty and provide a reasonable backstop on how far back investigations can go.
  - 68.2. It aligns with limitation periods expressed in the recent Health and Safety at Work Act 2015. Given the close relationship between the civil aviation and workplace health and safety regimes, such an alignment seems appropriate.
69. Participants who comply with the law will face no regulatory impact.

### **Consultation**

70. The CAA raised issues associated with sections 46B and 65 following the consultation period, so we are not aware of other stakeholder views on these issues.

## **Issue 3: Fit and proper person tests**

### **Status quo**

71. Before someone can enter the civil aviation system, he or she must undergo a fit and proper person test, as set out in section 10 of the CA Act. The test assesses an applicant's competency and honesty. It provides confidence to the public that a person has undergone an appropriate and robust check before they can operate. Participants must continue to be fit and proper to remain in the system.

72. The CA Act sets out the matters that the Director ‘shall have regard to’ and ‘give such weight as the Director considers appropriate’ when conducting a fit and proper person assessment. This covers such things as a person’s compliance history with transport safety requirements, any history of physical or mental health problems and transport convictions. The CA Act also states that the Director is not limited to the matters stipulated in the Act, and may take into account other matters and evidence that may be relevant.
73. The CAA has recently published the fit and proper person policy and handbook. This is to help participants understand the process and the steps carried out during an assessment, including the ‘seek and receive’ provisions from third parties.
74. Occasionally the Director obtains information that brings into question a person’s fit and proper person status. Section 10(3) of the CA Act allows the Director to ‘seek and receive’ information from third parties to investigate a person’s fit and proper status. The CA Act is silent on the obligations of the third party holding the information to disclose it when requested by the Director.
75. The Director does not exercise this power routinely—with around 20-30 requests a year. The Director most commonly requests information from the Ministry of Justice, Police, Department of Conservation, Ministry of Primary Industries (fisheries), local and regional councils and professional licensing bodies. The kind of information sought by the CAA can be broad, but often relates to when another agency intends to prosecute someone.

### **Problem definition**

76. We have identified two problems with the fit and proper person process.

*The fit and proper person test is not as clear and transparent to participants as it could be*

77. The matters the Director routinely considers have changed from what is currently expressed in the CA Act. The CA Act should be explicit about matters that the Director routinely considers or takes into account as part of a fit and proper person assessment. A presumption that such information will not be routinely considered, is created if these matters do not appear in the legislation.

*The Director does not always receive safety information from other parties in a timely manner, compromising aviation safety and security.*

78. As noted above, the Director occasionally uses section 10(3) of the CA Act to ‘seek and receive’ safety information about a participant from a third party. The CA Act does not place any obligations on third parties holding the information to disclose it when requested by the Director.
79. In most cases, the third party releases the information but can be a protracted process. Third parties are often concerned that they will be in breach of the Privacy Act if they provide information to the Director.

80. While a safety risk has not been realised to date, the concern is that in the future, a safety risk could be realised with significant safety consequence (e.g. an accident involving injury or death) in the absence of accurate and timely information from third party agencies.

### **Objectives**

81. The policy objective is to ensure that the fit and proper person regime:
- 81.1. appropriately assesses an applicant's competency, character and attitude, to mitigate the risk that aviation activities are carried out incompetently or recklessly
  - 81.2. provides appropriate levels of transparency and clarity about the process, for industry participants, other government departments and the public.

### **Options, impact analysis and consultation**

*The fit and proper person test is not as clear and transparent to participants as it could be*

82. The following options were considered to address this problem:
- 82.1. Status quo
  - 82.2. Preferred option: amend the CA Act to include matters that the Director routinely considers or takes into account as part of a fit and proper person assessment. Some of the matters that the Director routinely considers which are not explicit in the CA Act include whether the person has a dependency on alcohol and drugs, and a person's compliance history with transport security regulatory requirements in New Zealand or in another country. Currently the CA Act only refers to safety regulatory requirements.
83. The status quo does not meet the policy objectives. Not including the matters the Director routinely considers as part of a fit and proper person test, creates a presumption that such information will not routinely be considered. This provides a lack of transparency for applicants about the process.
84. The benefits of amending the CA Act include:
- 84.1. providing a higher degree of transparency for participants, which makes the fit and proper person test clearer and fairer for participants
  - 84.2. providing greater confidence to the public that certain risks are addressed before a person or organisation is permitted to undertake aviation activities.
85. There are no financial impacts on the sector of the CAA as this issue is simply clarifying the process in legislation.

86. The majority of stakeholders who submitted on this issue, supported the Ministry's preferred option to rectify the status quo. Stakeholders supported the concept that the CA Act be explicit about the Director's powers and matters that the Director must take into account, for ease of implementation and use.

*The CAA does not always receive safety information from other parties in a timely manner, which may compromise aviation safety and security*

87. The following options were considered to address this problem:
- 87.1. Status quo
  - 87.2. Option one: non-legislative initiatives e.g. amending the application form so that the Director has ongoing consent from applicants to access personal information, develop information sharing agreements or memoranda of understanding between the Director and agencies that the Director is more likely to make requests to e.g. Ministry of Justice and New Zealand Police.
  - 87.3. Option two: amend the CA Act to clarify that third parties can provide information to the Director to enable him or her to determine a person's ongoing fit and proper person status, without breaching the Privacy Act.
88. The status quo does not meet the policy objectives. The lack of clarity around what information can be provided to the CAA under a section 10(3) request remains. Therefore safety risks are potentially not able to be dealt with in a timely manner.
89. We support the CAA making non-legislative improvements as identified in option one. Such initiatives (in parallel with legislative amendments) will better ensure the policy objectives are met.
90. In addition, we support amending the CA Act as outlined in paragraph 87.3. While there is still some discretion about whether a third party provides the Director with the requested information in a timely manner, it is an improvement on the status quo by providing assurance that the third party is not in breach of the Privacy Act.
91. Providing the Director with safety information more quickly mitigates the risk that someone can continue to operate in the system when he/she may not be 'fit and proper'.
92. There are no financial impacts on the sector or government as this issue is simply clarifying the process in legislation.
93. The preferred option was developed following further analysis on the issue after consultation. It was not, therefore, consulted and we are not aware of stakeholder views.

*Other option ruled out post consultation*

94. We consulted on an option to amend the CA Act to compel a third party to provide information. Many stakeholders including Qantas and the CAA Board

supported this option. Some stakeholders noted caution that this option be utilised in a transparent manner under reasonable grounds.

95. On further investigation, we ruled this option out. The power to compel is not common in other regulatory regimes, and lacks sufficient precedence. The option would shift the power balance too far in favour of the Director, and unreasonably affect the autonomy of other agencies. We believe it would be a disproportional response to the problem.

## Conclusions and recommendations

96. Maintaining a safe aviation environment will continue to be a fundamental driver within New Zealand's civil aviation regulatory regime. The social cost and reputational impacts of air accidents are significant, particularly for public air transport.
97. As well as the intrinsic safety benefits for passengers and other users, safe flight leads to public confidence in New Zealand's civil aviation system. A loss of confidence in the system could have significant economic and social impacts.
98. The proposed changes to the CA Act relating to safety will improve the workability of the aviation system—allowing the Director to better perform his statutory role to contribute to a safe system. The proposals that provide better clarity and transparency around CAA processes will contribute to greater confidence in the system.

## Consultation

99. On 1 August 2014, the Ministry of Transport began a period of formal consultation that ran until 31 October 2014. This included formal stakeholders meetings in around the country and two specific issue-based focus group sessions. The Ministry received 31 written submissions on a wide range of issues in response to the consultation. Submitters were largely supportive of the proposed changes.
100. As noted, some issues were raised following this consultation period, therefore we do not know stakeholder views.

## Implementation plan

Withheld to maintain the constitutional conventions which protect the confidentiality of advice tendered by Ministers of the Crown and officials.

101. [REDACTED]
102. A programme will be developed to effectively implement Act changes that impact operational arrangements. The CAA and Ministry of Transport will be responsible for developing any changes to processes and procedures associated with the safety amendments.
103. The Ministry of Transport will develop a communications and stakeholder engagement plan to ensure that the aviation industry understands what changes have been made to the CA Act.
104. Not all proposed Act amendments have an implementation aspect.

## **Monitoring evaluation and review**

105. The Ministry of Transport and CAA will monitor the effectiveness of the legislative changes through on-going data about the performance of the system and through review processes. The CAA will monitor case law to determine whether the Court perceives the changes clarify the regime.

### Summary of impacts for preferred options associated with issues 2 and 3

Issue	Aviation safety	Aviation participants	Public
Issue 2: Offences and penalties	<p>The amendments enhance the importance of the aviation certification regime. It better protects the public from the risk of individuals being medically unfit to operate an aircraft and/or not disclosing important information that may impact aviation safety. It emphasises the importance of honest disclosure to ensure aviation safety is not compromised.</p>	<p>Participants who comply with the law will face no regulatory impact.</p> <p>There are no cost implications.</p>	No impact.
Issue 3: Fit and proper person tests	<p>We expect that the proposal will support improved aviation safety if the Director is able to act more quickly where there may be doubts about a person's fit and proper person status.</p> <p>We expect the proposal to provide greater confidence to the public that certain risks are addressed before a person can undertake activities.</p>	<p>The preferred option provides greater transparency to participants about the fit and proper person test process.</p> <p>There are no cost implications.</p>	No impact.