

# Questions for your submission

This submission form is intended to be used alongside the consultation document to guide your feedback. Please give reasons for your answers or in support of your position so that your viewpoint is clearly understood, and also to provide more evidence to support decisions.

You can send us a written submission focusing on the questions in this document that are relevant to you by completing all or part of this submission template.

Please email your written submission to [ca.act@transport.govt.nz](mailto:ca.act@transport.govt.nz) with the word "Submission" in the subject line, or post it to:

Civil Aviation Act Review  
Ministry of Transport  
PO Box 3175  
Wellington 6140

The deadline for all forms of submission is 31 October 2014.

## Your role

**Your name** Angela Beazer

**Your email address** [angela@amclegal.co.nz](mailto:angela@amclegal.co.nz)

*Why is your email needed?*

*Your email address is needed in case we need to contact you with any questions about your submission.*

### 1. What is your interest in Civil Aviation Act and Airport Authorities Act Review?

Are you:

- ☐ A private individual?
- ☐ Part of the transport industry?
- ☐ AMC Legal is a boutique law firm specialising in civil aviation law and public law issues within the aviation industry

### 2. If you are part of the sector, please describe your role:

Angela Beazer, Principal and Director of AMC Legal Services Limited, practiced as an in-house lawyer with the NZ Civil Aviation Authority between 2006 – 2010. Since October 2010 Angela has practiced as a private lawyer offering her services and expertise in civil aviation law to the New Zealand aviation industry. This background means that Angela has a current and working knowledge of the letter and practical application of the law from both the regulator and industry participant's perspective.

Angela has written extensively for the NZ Aviation News magazine on topical legal issues affecting the industry, and this has often included comment on areas for possible legislative reform of the Civil Aviation Act 1990. Some of those articles are accordingly attached to this submission where relevant to issues raised below.

### Part A: Statutory framework

#### Item A1: Legislative structure

**Question A1a:** Which option do you support?

- ☐ **Option 1:** Amalgamate the Civil Aviation Act and the Airport Authorities Act
- ☐ **Option 2:** Separate the provisions in the Civil Aviation Act into three separate Acts:
  - (i) an Act dealing with safety and security regulation
  - (ii) an Act dealing with airline and air navigation services regulation
  - (iii) an Act dealing with airport regulation
- ☐ **Option 3:** Status Quo – Civil Aviation Act and Airport Authorities Act maintained.
- ☒ **Some other option** (please describe):

I favour removing the airport regulation and airline and air navigation parts of the Civil Aviation Act and incorporating those with the Airport Authorities Act; and retaining the Civil Aviation Act solely for civil aviation safety and security regulation.

This would separate out the safety and security focused legislation from other economic, airport and international air carrier related functions.

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Please state your reasons:

I do not support merging the Airport Authorities Act with the Civil Aviation Act, and consider those provisions would sit more naturally with other airport regulation provisions. Air carrier legislation in my view has a distinct economic flavour and should either sit with the Airport regulation provisions, or in another Act (eg the Commerce Act). They do not naturally sit within the ambit of the security and safety focused provisions of the Civil Aviation Act.

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### Item A2: Purpose statement and objectives

**Question A2a:** Do you support the concepts listed in Part A, paragraph 29 for inclusion in a purpose statement?

Subject area of the Act or Acts	Purpose	Do you support?
Safety and security related	To contribute to a safe and secure civil aviation system	<input type="checkbox"/> Yes <input type="checkbox"/> No
Economic - airport related	To facilitate the operation of airports, while having due regard to airport users	<input type="checkbox"/> Yes <input type="checkbox"/> No
Economic – airline related	To provide for the regulation of international New Zealand and foreign airlines with due regard to New Zealand’s civil aviation safety and security regime and bilateral air services	<input type="checkbox"/> Yes <input type="checkbox"/> No
	To enable airlines to engage in collaborative activity that enhances competition, while minimising the risk resulting from anti-competitive behaviour <sup>1</sup>	<input type="checkbox"/> Yes <input type="checkbox"/> No
	To provide a framework for international and domestic airline liability that balances the rights of airlines and passengers	<input type="checkbox"/> Yes <input type="checkbox"/> No

Please state your reasons:

Safety and Security – should state “to facilitate and promote a safe and secure civil aviation system”

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<sup>1</sup> Depending on the outcome of the review, international air carriage competition provisions may be moved out of transport legislation and into the Commerce Act 1986.

**Question A2b:** What other concepts do you think should be included in the purpose statement of the Act or Acts? (Please specify)

I favour retaining a purpose statement that the Act aims to establish rules of operation and divisions of responsibility within the system – this is an important principle underpinning the Act and Rules and the statutory provisions should continue to align with this or be improved to ensure better alignment with this purpose

**Question A2c:** Should the revision of statutory objectives align with the purpose of the Act or Acts?

Yes – see above

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**Question A2d:** Do you support the revision of statutory objectives to include a requirement that decision-makers (for example, the Minister, the CAA, and the Secretary of Transport) be required to carry-out their functions in an effective and efficient manner?

Yes

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### Item A3.4: Independent statutory powers

**Question A3.4:** Should independent statutory powers continue to reside with the Director of Civil Aviation?

**X Yes – but with some changes – in particular to make the safety investigation functions of the CAA the statutory responsibility of the Board of the Authority, to be exercised by the CAA safety investigation unit under delegation from the Board and not the Director of Civil Aviation.**

☐ No

Please state your reasons here.

The industry has long been unsettled about the Director “wearing too many hats”. This is particularly of concern in relation to the co-existence of accident and incident reporting and investigation functions and duties, and law enforcement functions and duties, imposed under the Act on the Director. At present both functions are exercised under delegation by CAA staff and all report to the Director.

Accidents and incidents are acknowledged in the Consultation Document to be under-reported and of ongoing concern. I am strongly of the view that until there is some statutory separation between the safety investigation and law enforcement (and possibly other CAA operational) functions in the act, this will always continue to be the case as participants are fearful of prosecution or law enforcement action if they voluntarily disclose incidents to the CAA. This has been further exacerbated by the combining of the “section 15A investigation function” into the same unit responsible for Law Enforcement Investigations (now referred to as the Regulatory Investigations Unit). This acts as a barrier against voluntary reporting.

One option to address this would be to create a separate agency to investigate for law enforcement purposes, or remove safety investigation functions solely to the Transport Accident Investigation Commission. However, both options have cost and other practical implications and drawbacks. There would, among other things, be questions as to where the section 15A and other regulatory investigation functions should sit.

An alternative means of achieving greater separation of these functions can in my view be achieved by giving statutory responsibility for safety incident and accident reporting and investigation functions to the Board of the Civil Aviation Authority. Those functions would continue to be delegated to the CAA safety investigation unit as they are presently, but with the reporting lines directly between that team and the Board. This would separate that function from any other investigation function and would not therefore require any internal restructure of where those functions sit. There may also be merit in consider including statutory guidelines on when information can be passed from the Safety and Investigation Unit to the Regulatory Investigations Unit (and possibly other operating units) within the CAA. I comment on this last aspect further under B11 Accident and Incident Reporting.

### Entry into the system

#### Item B1: Provisions relating to fit and proper person assessment

**Question B1a:** Which option do you support?

- ☐ **Option 1:** Status quo – no change to the matters which the Director should consider when undertaking a fit and proper person test

☒ **Option 2:** Align the fit and proper person test in the act with other transport legislation (Ministry of Transport preferred option) – appropriately tailored to the civil aviation context for relevance; information of a personal nature should only be sought to the extent necessary and relevant

- ☐ **Some other option** (please describe):

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Please state your reasons here.

In broad terms I would support more clarity and specificity about what types of offending should be considered by the Director as potentially relevant.

In my view however, particular care needs to be applied when compelling someone to disclose that they have been **charged** with an offence that is yet to proceed through due process. Natural justice and privacy issues can arise if a person is forced to disclose not only the fact of the charge, but also the nature of the allegations behind the charge – especially when the charge is denied or key facts are in dispute.

In my experience the mere fact that someone is facing charges can be enough to taint the view or impression formed about a person by officials. Forcing disclosure of the details of the alleged offending can have even more of a prejudicial effect. For these reasons, I would want to see a careful and critical analysis what types of charges should be required to be disclosed, and the extent of disclosure of the nature of the alleged offending required. I would also want to see the same statutory guidance or limitations included in any similar medical related powers to require disclosure about offences and/or alleged charges. I would hope to see this issue receive careful scrutiny throughout the law making process, with due deference to protecting as much as is practicable, personal privacy rights.

**Question B1b:** Are there any issues with the provisions in Part 1 or 1A of the Civil Aviation Act 1990 that you think should be addressed? If so, what options do you propose to address the issue(s)?

### **Section 11 proposed adverse decisions process requires major policy and legislative drafting work (in conjunction with Part 2 powers)**

In my view the s 11 process could be significantly improved, both to ensure more timeliness in decision making and better protection for participants subject to the process. Given that s11 is intertwined with the Director's powers under ss 15 – 19 of the Act, my comments on s 11 should also be read in conjunction with my comments under Part 2 below.

#### 1) General Drafting issues

This section is currently titled “rights of persons affected by proposed adverse decisions” but in my view it blends two important legal concepts that should be separated out :

- (i) the legal “proposed adverse decision” process itself; and
- (ii) the “rights of persons affected by proposed adverse decisions”.

Separating out the two concepts more clearly would make the s11 adverse decision process, and the statutory protections afforded to participants during that process, clearer.

This section should also be moved into the same part of the Act that contains the powers (currently Part 2) relating to suspension and revocation of aviation documents, as it clearly interrelates and is connected with the exercise of those powers of the Director. This would also enable the second concept noted above, relating to the “rights of persons affected by proposed adverse decisions” to potentially be extended to cover “the rights of persons affected by **adverse or proposed adverse** decisions”. In that respect, the rights as defined could be extended, for example, to include rights of persons subject to suspension action.

#### 2) Time frames for participants to respond, and right to receive further information

With respect to the s11 general process and timeframes, I support the need for the Director to be able to initiate the process without delay and by providing information sufficient to meet the current requirements in s 11. Compliance with s11(2)(b) for example, can be met by providing a letter containing a summary of reasons for a proposed adverse decision. The same can be said for the Director's powers to take initial suspension action under Part 2 of the Act.

However, this often will not provide enough information to properly respond to the full nature of the allegations or concerns held, and any person subject to potentially serious or permanent adverse decisions must be afforded all the necessary information before being compelled to respond, and in a timely manner. In my view, statutory protection needs to be afforded to affected persons to ensure minimum natural justice rights are preserved throughout the process.

There should be an express provision within the Act to allow a person who receives a s11 notice to obtain further information without delay, and outside of normal Official Information Act procedures.

The statutory timeframe for responding to proposed adverse decisions should also be automatically extended where a participant is waiting on such information.

### 3) Timeframe for Director to move to proposed adverse decision following s15A investigation

I consider that a major flaw under the current legislation, is that there is no specific timeframe for completing an investigation under s15A (from personal experience both within and outside the CAA, “as soon as practicable” has been subject to very liberal interpretation over the years. Further, there is no time frame at all to issue a proposed adverse decision under s 11 of the Act. In my view, there should be a statutory requirement for the Director to complete a s 15 A investigation within six months, and if applicable, to issue a proposed adverse decision within 28 days of that investigation being completed, unless the Director has first obtained permission of the Courts to extend those time frames.

I discuss my proposals as to new High Court actions that should be introduced into the Act under Part 2 below.

### 4) Ability to opt out of the proposed adverse decision process at initiation of participant

In my view the s11 process (and the s18 powers in Part 2 of the Act) should expressly be able to be circumvented or abandoned where **a participant proposes** action be taken that is acceptable and agreeable to the Director, but would otherwise require the Director to follow the proposed adverse decision process, if initiated by the Director.

This could occur, for example, where a participant has been subject to a s15A investigation and, at the conclusion of the investigation, is already well appraised of the Director’s concerns. In some cases, the participant may be willing to voluntarily submit a plan, for example to agree to surrender an aviation document, or have conditions or restrictions imposed on the document for a period of time, and this may be an acceptable outcome and resolution to the Director. In such cases, there should be some ability, if both parties agree, to avoid the s11 proposed adverse decision process by permitting the participant to put forward their proposals for acceptance by the Director.

This can provide both the Participant and the Director with the ability to avoid going through a full legal process if there is clearly agreement on how a participant’s conduct can be addressed.

To ensure that a participant cannot later “back out” or back-track on such agreed action, the legislation should be clear that a participant initiated agreement of this nature is binding and non-revocable. Further, that it would not prevent the Director from initiating a new investigation or s 11 process if new events arise that are cause for concern.



### Participant obligations

**Question B2:** Are there any issues in relation to participant obligations and Director's powers in Part 2 of the Civil Aviation Act 1990 that you think should be addressed? If so, what options do you propose to address the issue(s)?

#### **Section 17 suspension powers (and concurrent s15A investigation powers) need major overhaul**

##### 1) Lack of effective right of review or appeal

I am strongly of the view that there are no effective rights to seek judicial review or intervention in a decision of the Director to take suspension action against an aviation document holder, even where an initial ten day suspension is extended, sometimes for very lengthy periods. In my view, this is particularly problematic when commercial interests are at stake, as suspension beyond a few days can cause irreversible commercial damage and ultimate failure of a commercial operation. While the Director must be able to take initial unimpeded action where safety is at stake, there needs to be much stricter controls on the continuing right of suspension, and the timeframes within which further steps are taken after suspension action is initiated, particularly for commercial participants. These simply do not exist in the Act as it presently stands.

The right of appeal to the District Court is too slow and time consuming, and the right of appeal in s 66 of the Act is expressly subject to the proviso that it does not prevent the decision taking effect in the interim period pending a judgment. The Court of Appeal has ruled (in the 2011 *Air National* case) that this means that High Court interim injunction action is unlikely to succeed, and cannot be used as a mechanism to circumvent the intent of the Act in allowing the Director's decision to continue to take effect pending a full appeal hearing. That is well and good if the appeal mechanism provided for a swift hearing and ability to resolve any disputed adverse action, but in practice it does not, and cannot do so.

As noted above in relation to my comments about s 11, the s 15A investigation powers are not subject to any meaningful time restrictions, and this can mean that participants can be subject to lengthy suspension and investigation action, ensuring almost certain failure, before an investigation has even established whether there is any safety breach or risk to future aviation safety that would warrant such a punitive result.

There is therefore a need, in relation to the Director's suspension powers, and in relation to the s15A investigation powers, for the Courts to have specific powers to intervene in appropriate cases or at least to ensure that any subsequent investigation process followed proceeds expeditiously to a conclusion.

##### 2) Adoption of Australian based approach

In my submission, New Zealand should follow suit and adapt and adopt a similar statutory to Australia, which requires that further suspension action beyond an initial period must be effectively reviewed and endorsed by the Courts.

I would suggest that a similar, but appropriately adapted, scheme should be adopted in New Zealand, with recourse being to the High Court.

I attach as Appendix I, a copy of an article I wrote which was published in the October 2012 edition of NZ Aviation News, titled “Australia vs New Zealand approach to suspending an AOC – Part 3: Need for Legislative Reform”. I endorse my comments in that article regarding the specific nature of reforms needed. In summary, I propose that:

1. The initial s 17 suspension power of up to ten days to remain, but the right to appeal that suspension to the Courts being removed (this would not limit a participant or Court reviewing the appropriateness of that decision as part of any wider court action, for example an appeal against a final adverse decision or judicial review, but would remove any immediate ability to prevent that suspension taking effect)
2. The Director to apply to the High Court to extend the suspension beyond 10 days, **unless** there is prior agreement between the Director and affected person to extend the suspension for a period of no more than 40 days
3. Further court ordered suspension to be limited to no more than 40 days
4. If court ordered (or privately agreed) suspension continues, s15A investigation must be completed within maximum time frame for suspension
5. Draft investigation report must be sent to participant for comment within 5 working days of completion of investigation
6. Investigation report must be made final within 5 working days and any report and recommendations submitted to Director. Suspension continues by operation of law
7. Director must determine what, if any further action, to be taken within ten working days of receiving final investigation report and recommendations.
8. Provided timeframes within steps 4 to 7 are met, suspension continues by operation of law. If proposed adverse decision is issued, suspension continues by operation of law until proposed adverse decision process reaches final conclusion
9. In all cases where a participant is not suspended, or there is no further suspension beyond the initial ten days, s15A investigation should be completed within six months, unless the Director has obtained a High Court order granting more time to complete the investigation

By way of further background, I attach as Appendix II and II, my articles in the August and September edition of NZ Aviation News, titled “Australia vs New Zealand approach to suspending an AOC”, Part 1 and 2. These discuss in more detail the differences in the legislative regime in each country and how they were applied in recent cases involving the suspension of Air Operator Certificates of a regional airline in each country.

### 3) Other drafting issues

Section 17 covers other actions that can be taken including imposing conditions or revoking aviation documents. These powers are better addressed under s18, and s17 could be limited to suspension action only.

### Medical certification

#### Item B3: Certification pathways and stable conditions

**Question B3a:** Which option do you support?

☐ **Option 1:** Status quo – two pathways for medical certification

☒ **Option 2:** Develop a third pathway for medical certification for individuals affected by stable, long-term or fixed conditions.

☐ **Some other option** (please describe):

**I have read and endorse the Aircraft Owners and Pilots Association [AOPA (NZ)] submission on Option 2**

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#### Item B4: Provision for the recognition of overseas and other Medical Certificates

**Question B4a:** Should the Act allow the Director to recognise medical certificates issued by an ICAO contracting State?

☐ **Yes**

☐ **Yes, but only those without any operational endorsements issued by States with a robust aviation medical certification regime**

☐ **No**

**I have read and endorse the AOPA (NZ) submission on recognition of overseas medical certificates**

### Item B5: Medical Convener

**Question B5a:** Which is your preferred option?

- ☐ **Option 1:** Status quo continue: Medical Convenor retained (Ministry of Transport preferred option)
- ☐ **Option 2:** Status quo continues and a separate fee for the Medical Convener is charged to applicants
- ☐ **Option 3:** Disestablish Medical Convener role

☒ **Other option:** please describe

**I have read and endorse AOPA NZ's submission on the medical convener functions.**

Medical convener function should be retained but with ability to co-opt specialists onto a panel review, and panel should be given explicit power to overturn medical assessments.

I strongly disagree with the Consultation Document's assumptions that the low level of appeals or convener reviews is evidence the process is working and the system is robust. My experience in reading convener reports for clients, is that they often read like an expanded dissertation of the often very brief medical opinion given by the CAA medical unit, without any real critique of that position, even when there is clear expert opinion to the contrary.

District Court appeals are costly and slow, and there is little ability for the Court to intervene and overturn a CAA medical decision. The CAA does not need to establish that its medical opinion is correct, only that it was a view that could reasonably be held. That is not a high standard in a medical context, and renders the appeal right virtually worthless.

Are there any other issues with the provisions in Part 2A of the Civil Aviation Act that you think should be addressed? If so, what options do you propose to address the issue(s)?

**Section 27C:** The requirement to disclose relevant information that may result in a change in medical condition – the CAA currently relies on this section to require participants to disclose if they have had a drink driving or drugs related convictions, on the basis that this may signify an underlying alcohol dependency problem that requires consideration in the context of medical certification. However, this is not obvious to lay participants. In my view, obligations to disclose alcohol related offending should be made explicit in the legislation.

There may also be merit in requiring other information to be explicitly required to be disclosed, and this should also be considered. If information about other offending or charges is to be required, I refer to my comments above under B1, fit and proper persons issues.

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### Offences and penalties

#### Item B6: Penalty levels

**Question B6a:** Which is your preferred option?

- ☐ **Option 1:** Status quo – penalty levels remain unchanged
- ☐ **Option 2:** Increase penalty levels
- ☐ **Other option:** Please describe

**Penalty levels should be consistent with Maritime Transport levels.**

**Question B6b:** If you consider that increases to penalty levels are necessary, which penalties, and by how much?

**Similar to MTA levels.**

### Item B7: Acting without the necessary aviation document

**Question B7:** Which is your preferred option?

- ☐ **Option 1:** Status quo
- ☐ **Option 2:** Amend the provision to separate out the offences (Ministry of Transport preferred option)
- ☐ **Other option:** Please describe

#### Option 2, MTA drafting is preferable

Please state your reasons

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### Appeals

#### Item B8: Appeals process

**Question B8a:** Should a specialist aviation panel or tribunal be established in addition to the current District Court process?

Refer to my comments under Part 2 above as to the introduction of new Court review powers concerning s17 suspension and s15A investigation functions.

I support retaining a further right of appeal against any final adverse decision of the Director.

As an alternative, I would endorse the proposals of AOPA (NZ) to provide for a non-Court based industry panel review. This could co-exist with any right to appeal to the Court. I would suggest that the outcome of an industry panel review would not be binding but would be admissible in Court by either party in any subsequent appeal action.

### Rules and regulatory frameworks

#### Item B9: Rule making

**Question B9a:** What enhancements could be made to the rule-making process?

I have read and endorsed AOPA NZ's comments on this.

### Information management

#### Item B11: Accident and incident reporting

**Question B11a:** What are the barriers to fully reporting accidents and incidents to CAA?

- 1) I consider the Accident and Incident reporting and investigation functions should come under the authority of the Board of the Authority and not the Director. Refer to my answer above under A3.4, statutory powers.
- 2) In addition, I believe there would be merit in having more defined statutory criteria as to when, if at all, it is permissible for safety investigation information to be passed on to other CAA units including:
  1. For Law Enforcement purposes
  2. For safety regulatory action purposes (ie, s15A investigations, or general operational unit oversight)
- 3) I believe that Part 12 of the Civil Aviation Rules should be reviewed with a view to incorporating some or all of Part 12 directly in to the Act so that it is more accessible to the wider public, and understood by all participants precisely what the reporting and investigation obligations are



### **Item B12: Accessing personal information for fit and proper person assessments**

**Question B12a:** What information does the Director need to undertake a fit and proper person assessment?

**Refer to my comments above under B1 fit and proper person information.**

**I believe that caution should be applied to any power to compel personal information to be given. Any such power should be clearly and demonstrably needed, and limited to breach a person's privacy rights as much as possible.**

### Item F6: Fees and charges for medical costs

**Question F6:** Which is your preferred option?

- ☐ **Option 1:** Status quo – section 38(1)(b) of the Civil Aviation Act allows the Governor-General to make regulations prescribing the fees and charges for the purpose of reimbursing the CAA for “costs directly associated with” the Director and Convener’s functions under Part 2A of the Act.
- ☐ **Option 2:** Clarify section 38(1)(b) that this section is intended to cover a broad range of services and corporate overheads associated with the Director and Convener’s functions under Part 2A of the Act
- ☐ **Some other option** (please describe):

**I have read and endorse AOPA NZ’s submission on this aspect. Fees and charges should be limited only to actual direct costs involved in administering the medical and convener functions respectively. The legislation should be amended to reimburse “the direct costs of” each function respectively.**