

**Civil Aviation Bill -  
exposure draft  
commentary document**



Ministry of **Transport**  
TE MANATŪ WAKA

New Zealand Government

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## REQUEST FOR SUBMISSIONS

1. The Ministry of Transport is seeking submissions on the exposure draft of the Civil Aviation Bill before 6 July 2019.
2. We are undertaking consultation on the exposure draft for a number of reasons.

### *To clarify decisions made by government*

3. This document, and the exposure draft, contain decisions made by government regarding changes to the Airport Authorities Act 1966 (AA Act) and the Civil Aviation Act 1990 (CA Act). These decisions followed the Civil Aviation Act Review in 2014, the Domestic Aviation Security Review 2014/15, and policy work regarding drug and alcohol regulation in 2014.

### *To seek feedback on policy*

4. This commentary document contains new policy proposals that have arisen during drafting, which the public has not been consulted on. We are seeking feedback from stakeholders on these new policy proposals.
5. We are also seeking feedback on areas which require further engagement on policy details, such as those that relate to Just Culture, drug and alcohol management in aviation and amendments relating to drones.

### *To seek feedback on drafting*

6. An exposure draft is a useful way to identify and resolve practical problems with the legislation before it is made or introduced to Parliament. It can be particularly helpful for complex or technical regulatory requirements, such as those in civil aviation regulation.
7. We are seeking feedback on whether the drafting of the Bill accurately reflects policy decisions made by government.
8. Please include your contact details in the cover letter or email accompanying your submission. You can make your submission by:

- emailing your submission as a Microsoft Word document to: [ca.bill@transport.govt.nz](mailto:ca.bill@transport.govt.nz), or mailing your submission to:

Ministry of Transport  
PO Box 3175  
WELLINGTON 6140

9. Please direct any questions you have in relation to the submissions process to: [ca.bill@transport.govt.nz](mailto:ca.bill@transport.govt.nz). During the consultation period we will be available to meet with stakeholders. If you would like to discuss the contents of this document, please email us.

## DISCLAIMER

10. The exposure draft attached to this commentary document reflects policy decisions taken by the government to date.
11. It is not the final version of the Civil Aviation Bill. We expect further amendments will be made as a result of this consultation process.
12. On completion of the exposure draft consultation process, an updated version of the Civil Aviation Bill will be submitted to Cabinet, for approval for the Bill to be introduced to Parliament, and considered by the appropriate Select Committee.
13. Stakeholders, interested parties and the public will have further opportunities to comment on the Civil Aviation Bill throughout the legislative process.
14. The opinions and options contained in this document and the exposure draft of the Civil Aviation Bill are for consultation purposes only and do not reflect final government policy.
15. Please seek specific legal advice from a qualified professional person before undertaking any action based on the contents of this publication.
16. The contents of this document and the Bill must not be construed as legal advice. The government does not accept any responsibility or liability whatsoever for an action taken as a result of reading, or reliance placed because of having read any part, or all, of the information in this document, or the Bill, or for any error, inadequacy, deficiency, flaw in or omission from this document, or the Bill.

### **Official information Act and Privacy Act**

17. This work is undertaken by the Ministry of Transport (the Ministry) in conjunction with the Parliamentary Counsel Office.
18. The Ministry may publish all submissions received online, including the names of submitters, other than submissions that may be defamatory. We will not publish the content of your submission if you state that you object to its publication when you provide it. However, your submission will be subject to the Official Information Act 1982 and may be released in part or full on request. When making your submission, please state if you have any objections to the release of any information contained in your submission. If so, please identify which parts of your submission you request to be withheld and the grounds under the Official Information Act 1982 for doing so.
19. The Privacy Act 1993 also applies to your submission. This means that any personal information you supply to the Ministry in the course of making your submission will be used by the Ministry only in conjunction with matters covered by the exposure draft of the Bill. The information provided in submissions will be used to inform the development of the Civil Aviation Bill, decisions in relation to the outstanding policy matters, and advice to Ministers. We may contact submitters directly if we require clarification of any matters in submissions.

## GLOSSARY

**AA Act** - Airport Authorities Act 1966

**AIC** – Airport Identity Card

**Airside** – the area of a security designated aerodrome where access is controlled. Passengers are screened before entering this area.

**ASA** – air services agreement

**ASO** – aviation security officer

**CAA** – the Civil Aviation Authority of New Zealand

**CA Act** – Civil Aviation Act 1990

**The Convention** – the Convention on International Civil Aviation

**DAMP** – drug and alcohol management plan

**DASR** – Domestic Aviation Security Review 2014/15

**Drones** – see definition unmanned aircraft

**The Director** – the Director of Civil Aviation

**EDD** – explosives detector dogs

**Exposure draft** – the draft Civil Aviation Bill released for consultation

**ICAO** – the International Civil Aviation Organization

**IFSO** – in-flight security officer

**Landside** – the public area of a security designated aerodrome. Passengers are not normally screened before entering this area.

**MBIE** – Ministry of Business Innovation and Employment

**MTAB** - Maritime Transport Amendment Bill

**OSHAA Act** – Outer Space and High Altitude Activities Act 2017

**PIC** – pilot in command

**The Review** – the Review of the Civil Aviation Act initiated in 2014

**TAIC** – Transport Accident Investigation Authority

**Unmanned aircraft** – aircraft without a pilot on board. Includes small hobby “drones” through to larger aircraft used for the transport of people and goods.

## BACKGROUND AND PURPOSE

### Executive summary

20. The CA Act governs the civil aviation system in New Zealand and sets the overall framework for aviation safety, security and economic regulation in New Zealand. The AA Act provides for local authorities and other persons (e.g. airport companies) to be authorised as airport authorities, and confers certain powers and responsibilities on these airports.
21. The CA and AA Acts have been amended several times since their enactment, but have never been substantively revised. The aviation industry and the government regulatory environment have changed markedly over that same period, during which, New Zealand's aviation sector has been a major contributor to economic growth, as it will continue to be.
22. The Civil Aviation Bill (the Bill) reflects recommendations from a 2014 review (the Review) of the CA Act and the AA Act, the Domestic Aviation Security Review 2014/15 (the DASR 2014/15) and the policy investigation into reducing the risks of alcohol and drug impairment in aviation, maritime and rail in 2014.
23. The Ministry formally consulted with interested stakeholders in late 2014 on the Review and in 2015 on the policy investigation into drug and alcohol impairment. Thank you to those that submitted on these pieces of work.
24. The exposure draft of the Bill has been developed to replace the CA Act and the AA Act with a single statute. The exposure draft represents an intention to:
  - improve the safety and security of New Zealand's aviation system
  - update legislation in response to a growing and evolving industry
  - improve the usability of the legislation.
25. The exposure draft attached to this commentary document reflects policy decisions taken by the government to date. Further amendments may be made as a result of this consultation process.
26. On completion of the exposure draft consultation process, an updated version of the Bill will be submitted to Cabinet, for approval for the Bill to be introduced to Parliament, and considered by the appropriate Select Committee.

### Guide to this commentary document and the exposure draft

27. This commentary document includes the following sections:
  - Section A provides a summary of the structure of the exposure draft.
  - Section B provides an overall summary of the key policy issues and decisions considered, and indicates where in the commentary document further information about each issue can be found.
  - Section C provides further analysis for certain key issues, and indicates the relevant provisions to each issue in the exposure draft.

## **The CA Act and AA Act**

28. The [Civil Aviation Act 1990](#) currently governs the civil aviation system in New Zealand, and does a number of things, including:
- establishing the Civil Aviation Authority of New Zealand (the CAA)
  - confers functions, duties and powers on those operating in the civil aviation system, including the CAA and the Aviation Security Service (Avsec)
  - empowers the Minister of Transport to make Civil Aviation Rules for a range of matters
  - empowers the Director to regulate entry into the civil aviation system, and monitor and enforce compliance with the CA Act and Rules
  - empowers the Minister of Transport to establish, maintain and operate aerodromes
  - ensures New Zealand's obligations under international civil aviation agreements are implemented
  - provides for the economic regulation of licensing and international air services competition for foreign and New Zealand international airlines
  - provides a framework for authorising commercial cooperation between airlines
29. The [Airport Authorities Act 1966](#) provides for the authorisation of a local authority or any other person/association to exercise the powers of an airport authority to establish and operate airport. It also provides airport authorities with a range of functions, powers and responsibilities to establish and operate airports.

## **New Zealand and the International Civil Aviation Organization (ICAO)**

30. ICAO serves as the forum for cooperation in all fields of civil aviation among its 192 member States. It sets regulations and standards necessary for aviation safety, security, and efficiency, as well as for aviation environmental considerations. The strength and effectiveness of the international system relies on setting and adhering to these global standards, although the ability to adopt different practices is permitted.
31. New Zealand's safety and security framework is heavily influenced by international requirements. New Zealand is obliged to secure, to the highest degree practicable, compliance with aviation global standards as established by ICAO. A few minor changes to the legislative framework will be made to ensure consistency with international standards.
32. Based on ICAO's Universal Safety Oversight Audit Programme results, New Zealand is above the global average level in effectively implementing ICAO's Standards and Recommended Practices.

## **Work which has contributed to the development of the exposure draft**

33. A number of pieces of work have contributed to the development of the exposure draft.

### *2014 Review of the CA Act and AA Act*

34. In 2014 the Ministry of Transport undertook a review of the CA Act and the AA Act.
35. It was noted that the CA Act and the AA Act have had a number of amendments over their respective 28 and 52 years — significant material has been both inserted into, and repealed from, each Act.
36. Amendments to the CA Act have included the addition of aviation security provisions; changes to give effect to various international conventions; changes to civil aviation rule-making provisions and medical certification requirements; and implementing mutual recognition of airline safety certification with Australia.
37. Conversely, changes to other legislation have removed provisions in the CA Act. For example, the Crown Entities Act 2004 removed a raft of provisions associated with the governance and operation of the CAA. A list can be found at:
- [The CA Act Amendments](#)
  - [The AA Act amendments](#)
38. In August 2014, the Ministry began a period of formal consultation on the Review that ran until October 2014. The Ministry received submissions on a wide range of issues in response to the consultation. Submitters were largely supportive of the changes proposed in the Review.
39. We would like to re-engage with interested parties on the issues consulted on in 2014, along with a number of new policy proposals that have subsequently arisen.

### *Domestic Aviation Security Review 2014/15 (the DASR 2014/15)*

40. Following the DASR 2014/15, government agreed to a package of new security measures, including the introduction of a tiered airport security designation which needs to be formally reflected in legislation through the Bill (see page 46).

### *Drug and alcohol regulation*

41. In late 2016, the previous government decided to amend the CA Act and the Maritime Transport Act 1994 to strengthen the management of the risk of drug and alcohol impairment in the commercial aviation and maritime sectors. This was in response to the Carterton ballooning incident and recommendations from the Transport Accident Investigation Commission (TAIC).
42. Legislation to enable the Director of Maritime Transport to carry out drug and alcohol testing within the maritime system has already been enacted in 2017. The drug and alcohol measures proposed for the aviation system are included in the exposure draft for comment (see page 21).

### **Transitional arrangements**

43. The transitional provisions have yet to be finalised and will be available upon introduction of the final Bill. We welcome submissions on any of the transitional arrangements which may apply to the new policy contained in the Bill.

### **Offences**

44. A number of the offences and penalties in the Bill have not been formally reviewed by the Ministry of Transport. Prior to the Bill being introduced to Parliament, the Ministry will review penalties and offences in the Bill, to ensure consistency with other similar regulatory systems and current best regulatory practice. The Bill will also undergo a formal offence and penalty vetting process by the Ministry of Justice.

## SECTION A – STRUCTURE OF THE CIVIL AVIATION BILL EXPOSURE DRAFT

The table below summarises the main Parts of the exposure draft.

|  |
|--|
| <p><b><i>Part 1- Preliminary provisions</i></b></p> <p>Part 1 of the exposure draft sets out preliminary provisions. This Part outlines the purpose of the legislation and provides context-specific definitions of language used.</p>   |
| <p><b><i>Part 2 – Civil Aviation System</i></b></p> <p>Part 2 sets out the general duties of participants in the civil aviation system including the regulatory roles of the CAA and the Director.</p>   |
| <p><b><i>Part 3 – Rules</i></b></p> <p>Part 3 contains key provisions relating to the making of Civil Aviation Rules by the Minister. Much of the detail of the working of the civil aviation system is provided in rules.</p>   |
| <p><b><i>Part 4 – Aviation documents and medical certification</i></b></p> <p>Part 4 contains provisions relating to the application for and granting of aviation documents. It also contains provisions relating to the Director's powers to investigate document holders, and suspend, revoke and impose conditions on an aviation document.</p> <p>It contains offences relating to medical certification – the main provisions for which can be found in Schedule 2.</p> |
| <p><b><i>Part 5 – Requirements for particular aviation participants</i></b></p> <p>Part 5 contains provisions relating to drug and alcohol regulation, and the duty to report accidents and incidents.</p>   |
| <p><b><i>Part 6 – Aviation security</i></b></p> <p>Part 6 relates to the provision of aviation security services, such as security checks of persons, designations throughout aerodromes, and screening and searching powers at security designated aerodromes/navigation installations.</p> <p>It also outlines the methods for dealing with an item or substance suspected of presenting a risk to aviation safety and security detected when screening or searching.</p>  |
| <p><b><i>Part 7 – International air services</i></b></p> <p>Part 7 contains provisions relating to the air services licensing of international airlines.</p> <p>It also contains provisions relating to the authorisation of airline cooperative arrangements (alliances).</p>   |

**Part 8 – Aerodromes**

Part 8 contains provisions relating airport authorities and joint venture airports.

**Part 9 – International and domestic carriage of passengers and goods by air**

This part contains provisions relating to airline liability for international carriage of persons, baggage and goods, consistent with the international conventions which New Zealand is party to.

It also contains provisions relating to domestic airline liability for delay.

**Part 10 – Investigation, intervention and compliance, and enforcement**

Part 10 contains the inspection, monitoring and enforcement powers of the Director, and powers of the Minister to take action the grounds of national security.

It contains protections in relation to the reporting of safety information (Just Culture).

It also contains unruly passenger offences, and provisions relating to other general offences.

**Part 11 – Regulations and miscellaneous provisions**

Part 11 contains provisions relating to regulation making powers, including the power to make regulations concerning fees, charges and levies. It also contains the Director's powers to make airworthiness directives and transport instruments.

Part 11 also contains provisions relating to the Minister's power to authorise airline cooperative arrangements.

A number of miscellaneous provisions are also contained in this part, including rights of appeal and powers of delegation.

## SECTION B – SUMMARY OF POLICY DECISIONS REFLECTED IN EXPOSURE DRAFT

The table below summarises the key policy decisions taken to date by government in the following areas:

- Aviation safety
- Aviation economic regulation
- Aviation security
- The legislative Framework.

Further details regarding some these issues can be found in section C of this document.

| <b>Aviation Safety</b>  |  |
|---|--|
| <b>Issue</b>  | <b>Commentary</b>  |
| <p><b>Protection of safety information (a ‘Just Culture’ approach)</b></p> <p>See page 19 of this commentary document for more information.</p> | <p>To achieve an effective risk-based regulatory system, there needs to be a maturing safety culture across the aviation sector, where incidents are openly and fully reported, and a growing sector-wide commitment to continuous safety improvement.</p> <p>The exposure draft provides that enforcement or administrative action should not be taken in respect of infringements of civil aviation law, which come to the CAA’s attention through an incident report filed under the CAA’s incident reporting system.</p> <p>This protection is aimed at increasing incident reporting to the CAA.</p> <p>These protections will not apply when there is a public interest in taking enforcement action, or an aviation safety interest in taking administrative action. However, these interests must outweigh the aviation safety benefits of full, accurate and timely incident reporting.</p>   |
| <p><b>Drug and alcohol management</b></p> <p>See page 21 of this commentary document for more information.</p>                                  | <p>These proposals strengthen the management of the risk of drug and alcohol impairment in the commercial aviation sector, by including the following statutory obligations on aviation operators, specifically:</p> <ul style="list-style-type: none"> <li>• aviation operators must have a drug and alcohol management plan (DAMP) to manage the risk of drug or alcohol use by workers that carry out safety sensitive activity</li> <li>• the DAMP must provide for random testing of safety sensitive workers by the operator</li> <li>• the proposed changes also grant the Director of Civil Aviation (the Director) the power to conduct non-notified testing of safety sensitive workers.</li> </ul>  |
| <p><b>Offences and penalties</b></p> <p>See page 23 of this commentary document for more information.</p>                                       | <p><u>Recklessly providing false information in obtaining a medical certificate</u></p> <p>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. The corresponding offence provision contains a <i>mens rea</i> provision where the prosecution must establish that the offender made fraudulent, misleading or intentionally false statements to obtain a medical certificate. This is difficult to establish and does not provide an adequate incentive for an applicant to take the necessary care to provide accurate information.</p> <p>This proposal will make it an offence to provide false or incorrect information recklessly, which is a lower standard of <i>mens rea</i>.</p> <p><u>Limitation period to apply from the time offence is detected</u></p> <p>Under the CA Act, a charging document must be filed no later than 12 months after the date on which the offence was committed. At times, the CAA has been unable to pursue enforcement action because offences are not disclosed in time for the work to be undertaken to file a charge within 12 months. This proposal makes changes requiring filing of the charging document within 12 months of detection for certain offences under the CA Act.</p> <p><u>More work is required on offences and penalties</u></p> <p>A number of the offences and penalties in the Bill have not been formally reviewed by the Ministry of Transport. Prior to the Bill being introduced to Parliament, the Ministry will review penalties and offences in the Bill, to ensure consistency with other similar regulatory systems and current best regulatory practice. The Bill will also undergo a formal offence and penalty vetting process by the Ministry of Justice.</p> |

|  |  |
|--|--|
| <p><b>Improving the process to determine if someone is ‘fit and proper’ to participate in the aviation system</b></p> <p>See page 24 of this commentary document for more information.</p> | <p><u>Clarifying the matters the Director routinely considers as part of the fit and proper process</u></p> <p>Before someone can enter the aviation system, he or she must undergo a fit and proper person test.</p> <p>The Bill will be explicit about matters that the Director now routinely considers or takes into account as part of a fit and proper person assessment, such as the person’s use of drugs or alcohol.</p> <p><u>Clarifying that third parties can provide information to the CAA to enable the Director to determine a person’s ongoing fit and proper person status, in alignment with the Privacy Act</u></p> <p>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.</p> <p>This proposal will make changes to provide certainty that providing the CAA with information in response to a ‘seek and receive’ request does not breach the Privacy Act.</p>   |
| <p><b>Amendments relating to unmanned aircraft (drones)</b></p> <p>See page 26 of this commentary document for more information.</p>   | <p><u>Pilot in command – unmanned and autonomous aircraft</u></p> <p>The CA Act is designed with the assumption that there is a ‘pilot in command’ (PIC) who has ultimate responsibility for the safety and control of the flight. The CA Act specifies the duties of a PIC, and specifies certain powers and responsibilities in relation to those duties. The current definition of PIC is not well suited for new and developing aviation technology where a traditional pilot may not be present on the aircraft.</p> <p>This proposal makes changes to ensure that in the absence of a pilot on board the aircraft, the duties, powers and obligations of the PIC fall to the operator of the aircraft.</p> <p><u>Definition of accident to include unmanned aircraft</u></p> <p>The CA Act requires parties to notify the CAA if there is an accident involving manned aircraft. There is no equivalent requirement if the accident involves unmanned aircraft. This limits the CAA’s ability to investigate these accidents, understand the safety risks from these aircraft, and thereby regulate them effectively.</p> <p>This proposal will make changes to require notification of accidents involving unmanned aircraft.</p> <p><u>Powers to detain, seize and destroy drones</u></p> <p>We have proposed a number of options that will better allow persons, or certain classes of persons, to take action against a drone being operated in contravention of civil aviation law, or being operated in a fashion that may endanger people or property.</p> <p>Page 27 of this document has more information on these proposals.</p> |
| <p><b>Directors powers in relation to aerodromes</b></p> <p>See clause 255 and 256 of the Bill.</p>  | <p>The CA Act permits the Director to detain aircraft, seize aeronautical products, and impose prohibitions and conditions, if the Director believes on reasonable grounds that action is necessary to prevent danger to persons or property. For non-urgent situations a warrant is required (section 21(1)). A warrant is not needed if the Director needs to take prompt action (section 21(2)).</p> <p>This proposal adds ‘aerodrome’ to these provisions, to provide the Director with the necessary powers to impose prohibitions and conditions on aerodromes where the Director believes on reasonable grounds, action is necessary to prevent danger to persons or property.</p>  |
| <b>Aviation economic regulation</b>  |  |
| <b>Issue</b>   | <b>Commentary</b>  |
| <p><b>Improving the regime for authorisation of airline cooperative arrangements</b></p> <p>See page 30 of this commentary document for more information.</p>                              | <p>The CA Act provides that the Minister may authorise arrangements (alliances) between airlines offering international services. The effect of authorisation is an exemption from the Commerce Act 1986, so that sections 27 to 30 of the Commerce Act do not apply.</p> <p>The Bill improves transparency of the process of considering applications for authorisation and provides that the Minister must take the main and additional purposes of the Act into account when determining if an airline cooperative arrangement is in the public interest.</p> <p>The Bill provides for authorisation of tariffs where required by the relevant international air services arrangements.</p> <p>The Bill deletes the obsolete provisions for the Minister to issue a Commission Regime.</p>  |
| <p><b>Airport Authorities powers</b></p> <p>See page 35 of this commentary document for more information.</p>  | <p>Some of the provisions in the AA Act have become obsolete over the years since the Act was first passed (and indeed some provisions date back to the 1920s). In particular, the Local Government Act 2002 means that local authorities that are airport authorities do not require sector specific empowerment to be able to carry out many functions.</p> <p>The Bill proposes that these redundant provisions be deleted.</p>   |

| <p><b>Airport price setting</b></p> <p>See page 31 of this commentary document for more information.</p>                                | <p>The AA Act allows airport companies, following consultation, to ‘set charges as they think fit’. This provision was included at a time when the airport company model was new and untested, to make it clear that airport companies could exercise the powers necessary to operate and manage their airports as commercial undertakings independent of Crown intervention.</p> <p>On its own the provision has not proven effective in countering the difficulties faced by small airports which often have to negotiate with one major airline customer when seeking to change prices. At the other end of the airport size spectrum, airlines consider that this provision hinders commercial negotiations between airlines and large airports, and allows airports to ignore the views of their customers.</p> <p>Additionally, the Companies Act 1993 provides an adequate basis for airport companies to operate or manage their airports as commercial undertakings in accordance with the AA Act — making this provision redundant. This proposal will remove this provision.</p>   |  |                            |             |               |                             |                |             |                |
|---|---|--|----------------------------|-------------|---------------|-----------------------------|----------------|-------------|----------------|
| <p><b>Improving the international airline licensing regime</b></p> <p>See page 33 of this commentary document for more information.</p> | <p>International airlines serving New Zealand on a scheduled basis are required to hold an International Air Service Licence or an Open Aviation Market Licence. Among other things, these licences specify the routes and capacity (number of flights or seats) that the airline may operate. Licensing provides the mechanism to authorise and monitor the exercise of traffic rights exchanged between governments, in New Zealand’s bilateral air services arrangements.</p> <p><u>Improvements to allocation decisions</u></p> <p>The Minister of Transport is required to make allocation decisions for New Zealand international airlines even where there are no limits on routes and/or capacity. Given the decision does not have any significant impact, it is not necessary for the decision making powers to be at ministerial level.</p> <p>This proposal will designate the Secretary for Transport as the licensing authority for the allocation of routes and/or capacity rights where these are unlimited for New Zealand international airlines. The Minister of Transport would retain decisions involving the allocation of limited rights.</p> <p><u>Simplification of licensing provisions</u></p> <p>With the improvements to allocation decisions outlined above, the distinction in processes for airlines seeking full or open aviation market licenses is effectively removed. The Bill eliminates the separate category of open aviation market license and amalgamates provisions relating to licensing of New Zealand and foreign airlines.</p> <p><u>Commercial non-scheduled international flights</u></p> <p>The power to authorise non-scheduled flights rests with the Secretary for Transport. One-off charter flights that clearly meet the requirements for approval, currently require case by case authorisation.</p> <p>This proposal will amend the CA Act to include two categories of commercial non-scheduled flights. This would remove the need for the Secretary for Transport to authorise non-systematic charter flights. In that circumstance, operators would only need to notify the Ministry of Transport when they intend to operate flights and confirm that they have met safety and security requirements. This will make it easier for charter operators to meet ad-hoc demand, without the added burden of seeking authorisation for their services.</p> |  |                            |             |               |                             |                |             |                |
| <p><b>Airport consultation on certain capital expenditures</b></p> <p>See clause 205 of the Bill</p>                                    | <p>Only specific airport companies are required to consult before approving certain capital expenditures.</p> <p>This proposal amends the AA Act to require all airport companies to consult on certain capital expenditures. To mitigate the risk that airport companies undertake capital expenditure to increase profit, without providing additional services or facilities that are wanted or sufficiently valued by airport users.</p>  |  |                            |             |               |                             |                |             |                |
| <p><b>Threshold for consultation on airport expenditure</b></p> <p>See clause 205 of the Bill</p>                                       | <p>The current threshold for consultation is where capital expenditure will, or is likely to, exceed 20 percent of the value of particular assets within a 5-year period. The underlying value of airports has increased substantially since 1998. The 20 percent threshold for consultation is now too high for the three main international airports (Auckland, Christchurch and Wellington).</p> <p>The Bill provides for the following thresholds:</p> <table border="1" data-bbox="774 1530 1700 1814"> <thead> <tr> <th>Annual passenger and/or aircraft movements</th> <th>Threshold for consultation</th> </tr> </thead> <tbody> <tr> <td>&lt; 1 million</td> <td>&gt; \$5 million</td> </tr> <tr> <td>&gt; 1 million but &lt; 3 million</td> <td>&gt; \$10 million</td> </tr> <tr> <td>&gt; 3 million</td> <td>&gt; \$30 million</td> </tr> </tbody> </table>  | Annual passenger and/or aircraft movements | Threshold for consultation | < 1 million | > \$5 million | > 1 million but < 3 million | > \$10 million | > 3 million | > \$30 million |
| Annual passenger and/or aircraft movements  | Threshold for consultation  |  |                            |             |               |                             |                |             |                |
| < 1 million   | > \$5 million   |  |                            |             |               |                             |                |             |                |
| > 1 million but < 3 million   | > \$10 million  |  |                            |             |               |                             |                |             |                |
| > 3 million   | > \$30 million  |  |                            |             |               |                             |                |             |                |

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| <p><b>Airline liability - delay and damaged, lost and delayed baggage</b></p> <p>See page 35 of this commentary document for further information.</p>                          | <p>The CA Act currently contains provisions relating to airline liability for delay, and lost, delayed and damaged baggage. We seek views on a proposal to make clear that the Disputes Tribunal has jurisdiction to hear claims brought for compensation under these provisions.</p> <p>We also propose new regulation making powers to prescribe requirements for the disclosure of information about passenger rights regarding delay, and lost, damaged and delayed baggage</p>   |
| <p><b>Deleting obsolete or outdated provisions relating to airport authorities</b></p> <p>See page 35 of this commentary document for further information.</p>                 | <p>In the course of the drafting process we have identified that many of the provisions in the Airport Authorities Act 1966 are obsolete.</p> <p>We propose modernising the airport authority regime by omitting these provisions.</p>  |
| <p><b>Aviation Security</b></p>  |   |
| <p><b>Issue</b></p>  | <p><b>Commentary</b></p>  |
| <p><b>Clarifying the Avsec search powers in the landside part of security designated aerodromes</b></p> <p>See page 40 of this commentary document for more information.</p>   | <p>This proposal will make changes that clarify the use of the existing powers that Avsec officers have for landside searches, and ensure that these align with those for airside searches. In particular, these amendments will clarify Avsec's authority to search vehicles and unattended items, conduct landside searches and use explosives detector dogs.</p> <p>This proposal will not increase the powers that an Avsec officer has for airside or landside searches.</p>   |
| <p><b>Clarifying that Avsec can search suspicious items of hold baggage without passenger consent</b></p> <p>See page 42 of this commentary document for more information.</p> | <p>Avsec routinely deals with items that present a safety and security concern, and therefore need closer inspection.</p> <p>Avsec generally tries to locate the relevant passenger, or seek authorisation from the airline operator before searching the bag. However, it may not be appropriate to contact the passenger if significant security concerns exist. In addition, if a passenger or airline representative cannot be located quickly the security risk cannot be resolved, which in turn risks delays to flights or bags not travelling on the passenger's flight.</p> <p>From a safety and security perspective, it is important for Avsec to quickly resolve any concerns by clearing the item/bag or sectioning off the item/bag promptly to protect people and property.</p> <p>This proposal will make it explicit that Avsec can conduct hold stow baggage searches without the consent of the passenger for both domestic and international travel, where there is a risk to aviation safety or security that requires immediate response.</p> |
| <p><b>Clarifying Avsec's powers to deal with dangerous goods</b></p> <p>See page 42 of this commentary document for more information.</p>                                      | <p>Avsec officers have duties and powers to screen, seize and detain dangerous goods pre-flight. However, the CA Act does not allow Avsec officers to retain dangerous goods for the purposes of evidence.</p> <p>Further, Avsec's primary role is to ensure that dangerous goods are not carried on board an aircraft. However, Avsec's mandate to seize and retain dangerous goods found on arrival, for prosecutorial purposes, is unclear. If dangerous goods are discovered after the fact (for example by Customs), it does not alter whether an offence was committed and Avsec should be able to act in this scenario.</p> <p>This proposal makes changes to address these two issues by enabling Avsec to hold onto the dangerous goods for prosecutorial purposes and making it explicit that this mandate exists regardless of whether the item(s) were found prior to, or after, the flight occurred.</p>   |
| <p><b>Avsec's institutional arrangements</b></p> <p>See page 43 of this commentary document for more information.</p>  | <p>Avsec is an operational division within the CAA, which means the Chief Executive/Director of Civil Aviation is regulating and auditing part of their own organisation. While this conflict of interest is being managed by the CAA's Board, it is preferable to remove any perception that a conflict of interest may exist at Chief Executive and Board level.</p> <p>The proposal will amend the CA Act and associated Civil Aviation Rules to remove the requirement for Avsec to hold an aviation document. This will remove the Director's independent statutory role as the regulator of Avsec, thereby removing the inherent conflict of interest.</p> <p>The proposal will specify that Avsec, in the absence of an aviation document, is required to meet the requirements and standards commensurate with those provided in Civil Aviation Rules. This will ensure Avsec continues to operate to current high standards.</p>   |

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| <p><b>New security designation framework for aerodromes</b></p> <p>See page 46 of this commentary document for more information.</p>   | <p>There are two kinds of aerodrome in New Zealand – security designated and non-security designated. The Minister designates an aerodrome as being security designated under section 82. The Minister is responsible for ensuring that aviation security services are provided at all security designated aerodromes under section 77.</p> <p>As a result of the DASR 2014/15, Cabinet decided to implement a regime that splits aerodromes into three designations (Tier 1 and Tier 2 security designated, and non-security designated). The Minister is required to provide aviation security services at Tier 1 security designated aerodromes. The exposure draft includes an amended definition of security designated aerodrome to incorporate the tiered model.</p>  |
| <p><b>Providing for alternative airport terminal configurations and implications for security screening</b></p> <p>See page 45 of this commentary document for more information.</p>   | <p>The security requirements in the CA Act have a significant impact on the layout of airport terminals. For example, the terminal must have space for security screening and it must segregate screened passengers from non-screened passengers and non-passengers. These requirements limit flexibility in terminal configuration, potentially constraining the aerodrome’s ability to introduce more efficient or effective layouts.</p> <p>The CA Act requires that no one other than a member of the Police or an Avsec officer may enter or remain in a security area unless that person is wearing an airport identify card. Passengers are exempt from this requirement if they are embarking or disembarking directly through a gateway or thoroughfare. These provisions prove problematic if any airport wished to adopt an alternative terminal design to permit non-passengers (such as someone wishing to greet or farewell a passenger) to enter security areas.</p> <p>To future-proof the legislation for the possibility of alternative terminal configurations, the proposal will make changes to give the Director, on application by an aerodrome operator for any proposed aerodrome layout within a security designated aerodrome, the power to allow any specified group of persons or member of the public to enter or remain in any security area.</p> |
| <p><b>Enabling New Zealand Defence Force personnel to act as ASOs</b></p> <p>See page 47 of this commentary document for more information.</p>   | <p>There may be times when Avsec needs additional resource, for example, if there is a significant security incident and additional screening is necessary at very short notice.</p> <p>The proposal makes changes to allow, subject to the Defence Act 1990, defence force personnel to act as aviation security officers (ASOs) for specified or limited purposes.</p>   |
| <p><b>Notices made under section 77A</b></p> <p>See page 47 of this commentary document for more information.</p>  | <p>Under section 77A of the CA Act, the Minister may direct an aviation security provider, through a Notice of Direction published in the <i>Gazette</i>, to screen and search people, items, substances or vehicles.</p> <p>During the DASR 2014/15, it was identified that the existing section does not allow for the Minister’s authority to be delegated to any other person. At times it may be necessary for the Director to excuse particular flights from screening where it is unnecessary.<sup>1</sup> This discretion is necessary if it is a day-to-day operational and technical matter that is better determined by the Director.</p> <p>The proposal will make changes to allow the Minister to delegate to the Director the power to excuse any flight from any screening requirements in a section 77A Notice.</p>   |
| <p><b>Addition of ‘airlines’ to the list of organisations permitted to provide aviation security services</b></p> <p>See page 48 of this commentary document for more information.</p> | <p>The CA Act only allows regulated aviation security services to be provided by either Avsec or the operator of the aerodrome or navigation facility. Avsec currently holds, and will continue to hold, a statutory monopoly enacted via a 1997 <i>Gazette</i> notice on the provision of regulated aviation security services.</p> <p>However, this proposal will include ‘airlines’ as a third potential provider of regulated aviation security services. This will enable future flexibility in the delivery of regulated aviation security services, should a change be necessary.</p>   |
| <p><b>Replacing ‘consent’ in section 79A with ‘consult’</b></p> <p>See page 49 of this commentary document for more information.</p>   | <p>Section 79A(1) of the CA Act allows the Minister, by Gazette notice, to specify that only Avsec hold an aviation document to provide aviation security services at any security designated aerodrome or security designated navigation installation.</p> <p>However, if an aviation document already exists allowing a person to provide aviation security services at that aerodrome or installation, the holder’s consent is required before the Minister can issue the Gazette notice under section 79A(1) in respect to that aerodrome or installation.</p> <p>This proposal will replace the requirement to obtain consent, with a requirement to consult both the aviation document holder and the Director.</p>  |
| <p><b>Assaulting an ASO and killing, injuring or obstructing an Avsec dog</b></p> <p>See page 50 of this commentary document for more information.</p>                                 | <p>It is important there are appropriate offences in place to protect ASOs. There should also be consistency with equivalent offences against Customs, Police and Corrections officers. In particular, currently:</p> <ul style="list-style-type: none"> <li>• it is an offence to obstruct an ASO, but there is no offence for assaulting them</li> <li>• there is no offence for killing, injuring or obstructing a dog used by an ASO.</li> </ul> <p>Three new offences are proposed to address these gaps.</p>   |

<sup>1</sup> For example, a last minute airline schedule change, where an airline (at an airport where Avsec is currently not present) substitutes an aircraft of 90 or fewer passenger seats with an aircraft of over 90 seats for safety reasons.

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| <p><b>Airport identify cards (AIC)</b><br/>See page 51 of this commentary document for more information.</p>  | <p>The CA Act prohibits people from entering or being in a security/security enhanced area unless they wear an AIC or other identification approved by the Director, and are authorised. Some issues exist with the way the AIC system is set out in the CA Act and Civil Aviation Rules.</p> <p>This proposal will fix these issues by:</p> <ul style="list-style-type: none"> <li>• requiring people in security and security enhanced areas to produce, on request by authorised employees of the CAA (including Avsec) AIC or other identity documents</li> <li>• giving Avsec the authority to seize an AIC or other identity documents when they are being used in breach of the CA Act or Civil Aviation Rules, or, are being used in circumstances where authorisation has been withdrawn, or where the AIC has expired</li> <li>• addressing minor inconsistencies in terminology between the CA Act and Civil Aviation Rules.</li> </ul>   |
| <p><b>In-flight Security officers</b><br/>See page 52 of this commentary document for more information.</p>   | <p>In Flight Security Officers (IFSOs) are covert law enforcement or counter-terrorist agents on board commercial aircraft to counter aircraft hijackings. IFSOs may be provided by airlines or by government agencies.</p> <p>Under current legislation, two steps would be needed to allow IFSOs to operate in New Zealand:</p> <ul style="list-style-type: none"> <li>• by Order in Council, bring into force latent provisions in the Civil Aviation Amendment Act 2007 and the Aviation Crimes Amendment Act 2007; then</li> <li>• having an IFSO agreement between another State and New Zealand.</li> </ul> <p>The Bill will continue the status quo at this time, by reflecting provisions from the Civil Aviation Amendment Act 2007 relating to IFSOs. The commencement clause of the Bill will provide for these provisions to only come into force by a subsequent Order in Council, as is currently the case.</p>   |
| <p><b>Offence for being found in a security area without being screened, or without authorisation</b><br/>See page 53 of this commentary document for more information.</p> | <p>Section 84 of the CA Act allows the Director to create security and security enhanced areas at security designated aerodromes. It also establishes strict controls as to who may and may not enter those areas. This section is central to aerodrome security.</p> <p>While the CA Act imposes clear legal controls over entry to the security and security enhanced areas, it lacks corresponding offence provisions.</p> <p>The Bill creates an infringement offence for being found in a security area without having been screened, or without authorisation under the Act or Civil Aviation Rules.</p>   |
| <p><b>National security</b><br/>See page 55 of this commentary document for more information.</p>   | <p>The CA Act and Civil Aviation Rules can regulate aviation safety and security including (but not limited to) personal security. Security in this context is read as aviation security. This is relatively narrow in scope—only covering risks to safety from the carriage of dangerous goods and the risk to aviation security by unlawful interference with an aircraft.</p> <p>The CA Act has no powers to control activities or operations that may pose a threat to national security. The proposal will make changes that incorporate national security considerations.</p>  |
| <b>Legislative framework</b>  |  |
| <b>Issue</b>  | <b>Commentary</b>  |
| <p><b>Transport instruments</b><br/>See page 56 of this commentary document for more information.</p>   | <p>One area of the CA Act identified for improvement is the ability for the Minister, through Civil Aviation Rules, to leave matters to the Director to determine. For example, issues that require relatively frequent adjustment or that are truly technical in nature.</p> <p>Section 28(5) of the CA Act currently provides for the Director to be given flexibility in Rules to set requirements or conditions. Some Rules use this flexibility to leave matters to be set out in a CAA Notice, which could be either administrative or legislative (i.e. law-making) in nature – noting that the boundary between administrative and legislative action is inherently uncertain.</p> <p>As a companion to section 28(5), this proposal will create an additional power for the Director to make “transport instruments” for the purposes of the Rules. These instruments would be expressly legislative in nature and modelled on similar provisions in other legislation. Section 28(5) would be retained, so as to continue to provide for the Director and other persons to carry out administrative functions under the Rules.</p> |
| <p><b>Amalgamation of the CA and AA Acts</b><br/>See page 57 of this commentary document for more information.</p>  | <p>Amalgamating the CA Act and the AA Act removes the risk of inconsistency between two critical pieces of aviation legislation and makes it easier for stakeholders to engage with the regulatory regime.</p> <p>This proposal is to amalgamate the CA Act and the AA Act.</p>  |

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| <p><b>Purpose statement</b></p> <p>See page 57 of this commentary document for more information.</p>   | <p>The proposal includes a purpose statement to provide guidance and clarity to the reader around what the Act is intended to achieve. The objectives of the CAA have also been amended to appropriately align with the purpose statement.</p>   |
| <p><b>Structure of Part 8 of the CA Act</b></p> <p>See page 58 of this commentary document for more information.</p>   | <p>The proposal will amend the Part 8 of CA Act (security provisions) in order to make improvements to the structure to aid interpretation and improve the usability of the section.</p>   |
| <p><b>Offence provisions relating to the Civil Aviation (Safety) Levies Order 2002 (Levies Order)</b></p> <p>See page 58 of this commentary document for more information.</p> | <p>Aviation operators' levies under the Levies Order are calculated from activity returns that operators must provide to the CAA. The returns provide information, according to the type of operation, on the amount of passengers or freight carried and the number of hours flown or flights made, or the amount of agricultural products applied.</p> <p>The CA Act provides no explicit sanctions for a failure to provide an activity return or for providing a misleading or false return. Without the ability to address non-compliance with the Levies Order, the CAA may not be in a position to ensure that it receives prompt and accurate payment of levies. This proposal creates three offences to support enforcement of Levies Order requirements.</p>   |
| <p><b>Minor issues relating to levies</b></p> <p>See page 60 of this commentary document for more information.</p>   | <p>The Bill contains a few minor proposals relating to levies including:</p> <ul style="list-style-type: none"> <li>• providing greater flexibility as to how levies can be prescribed in regulations</li> <li>• removing the need for levy orders to be confirmed by the House of Representatives</li> <li>• removing section 42A(3)(b) of the CA Act which states that the Minister must be satisfied that the CAA's income from other sources is not or will not be sufficient to enable it to perform its functions under this Act without the imposition of a levy at the rate recommended</li> <li>• reducing the timeframe that the Director can suspend an aviation document if there is an overdue fee from six to four months, to encourage timely payment of fees and charges and assist in the CAA's process of debt collection [sections 41(1) and 41(2) of the CA Act]</li> <li>• clarifying that the CAA may decline to process an application or provide a service until an outstanding debt has been paid to remove uncertainty and prevent disputes [section 41(4) of the CA Act]</li> <li>• allowing the CAA to require a limited audit of levy payers at the CAA's own cost, to ensure that the information it receives is accurate [section 42B of the CA Act]</li> <li>• clarifying that fees and charges can be prescribed for reimbursing the CAA for a broad range of costs associated with the Director and Medical Convenor's functions, relating to medical certification, to make it clear that the provision is intended to cover a broad range of services and corporate overheads associated with the Director and Convenor's functions under Part 2A of the CA Act [section 38(1)(ba)]</li> <li>• repealing section 72F(3) which states that no provision specifying any liabilities the CAA intends to incur may be included in a statement of intent without the concurrence of the Minister of Finance, as this provision is outdated</li> <li>• repealing section 72CA which states that Avsec may pay to the Crown any surplus funds, as this provision is not consistent with the Crown Entities Act 2004 or a 2014 Cabinet decision that allows Avsec to carry a reserve within a range of \$6–12million (which then acts as a trigger to amend the passenger security charge).</li> <li>• expanding the levy making power to allow the collection of levies from all aviation participants who benefit from or impose a cost on the system (rather than just aviation document holders).</li> </ul> |
| <p><b>Repeal of latent legislation relating to Airways Corporation</b></p>   | <p>Section 99 of the CA Act provides that the Airways Corporation is the sole provider of certain services, namely area control, approach control, and flight information. A 1992 amendment to the CA Act, if brought into force, would allow the repeal (through an Order in Council) of section 99, ending the Corporation's statutory monopoly. This amendment will be repealed as it has been unused for well over 20 years, and there is no ongoing reason to retain it.</p>  |

## SECTION C – DETAILED ISSUES ANALYSIS

45. This section provides further analysis about each of the issues summarised in Section B, and indicates the relevant clauses in the exposure draft for each issue.

### **Aviation safety**

#### ***Protection of safety information (a ‘Just Culture’ approach)***

| Act           | Exposure draft |   |
|---------------|----------------|---|
| New insertion | 263            | Interpretation in this subpart                                      |
|               | 264            | Restriction on admissibility of accident and incident notifications |
|               | 265            | When Director may take law enforcement action                       |
|               | 266            | When Director may take administrative action                        |
|               | 373            | Confidentiality of information                                      |

47. Civil Aviation Rules and the CA Act require aviation participants to report aviation accidents and incidents to the CAA. Timely access to accurate safety information contained in these reports allows the CAA to identify high and emerging areas of risk throughout the aviation system. This provides a more proactive, evidence-based approach to accident prevention.
48. ‘Just Culture’<sup>2</sup> principles seek to improve the quality and level of safety information provided, by ensuring people who self-report incidents are provided certain protections from enforcement action. Just Culture is a concept widely promoted by international regulators and organisations such as ICAO.
49. Just Culture is routinely practiced by the CAA when deciding whether or not to take enforcement or administrative action based on safety information. Providing for Just Culture principles within primary legislation provides transparency and certainty for aviation participants about how the CAA will use reported safety information.
50. We recognise a careful balance must be struck when reflecting these principles within legislation. The protections need to be at a level which promote the reporting of safety information, while still allowing the CAA to take enforcement or administrative action necessary in order to ensure the safety of the aviation system.
51. To improve the safety culture across the sector and promote reporting, the exposure draft includes ‘Just Culture’ principles in provisions dealing with incident reports.

<sup>2</sup> The term ‘Just Culture’ refers to a values-supportive system of shared accountability where organisations are accountable for the systems they have designed and for responding to the behaviours of their employees in a fair and just manner. Employees, in turn, are accountable for the quality of their choices and for reporting both their errors and system vulnerabilities. The application of Just Culture principles is now becoming widespread by aviation operators and safety regulators around the world.

52. It is not proposed that the full suite of Just Culture protections apply to accidents. Given the size of New Zealand, accidents generally come to the attention of the CAA, whereas information about incidents and hazards is often not reported to the CAA. Providing protection to events surrounding an accident would be harder to justify if there was a high level of public interest.

*Policy decision*

The exposure draft provides that enforcement or administrative action should not be taken in respect of infringements of civil aviation law, which come to the CAA’s attention through an incident report filed in accordance with the CA Act, and rules made under it.

This protection is not absolute, as the Director does have discretion to take action in certain circumstances. This discretion takes the form of a balancing test, where the Director must be satisfied that the public interest in taking enforcement action in the particular circumstance outweighs the benefit of receiving timely and accurate incident reports. A similar test applies for administrative action.

The exposure draft also contains protections which prevent accident and incident reports from being used as evidence in criminal proceedings against the person who provided the report.

The confidentiality of information clause in 373 of the exposure draft also applies to safety information provided to the CAA.

*We are seeking feedback on the following questions*

- Does the current drafting in the exposure draft achieve this policy decision?
- Should the full suite of protections apply to accident reports, or are the non-statutory Just Culture principles which the CAA currently practice sufficient?
- Are the protections adequate to incentivise safety reporting to the CAA?
- Are there any unintended consequences as a result of the drafting?

***Drug and alcohol regulation***

| Act           | Exposure draft |                                 |
|---------------|----------------|---------------------------------|
| New insertion | 106            | Interpretation                  |
|               | 107            | DAMP operator must develop DAMP |
|               | 108            | Random testing by DAMP operator |
|               | 109            | Director testing                |

|  |            |   |
|--|------------|---|
|  | 110        | What happens if worker refuses consent or test result is not negative |
|  | 111        | Tampering   |
|  | 112        | Test results only to be used in certain prosecutions                  |
|  | Schedule 1 | Transitional, savings and related provisions                          |

66. New Zealand generally has a good safety record in the aviation, maritime and rail sectors. However, accidents in these sectors, while rare, can have catastrophic consequences.
67. Over the last decade, Transport Accident Investigation Commission (TAIC) reports have identified gaps in New Zealand's management of alcohol and drug use in the maritime, aviation and rail sectors. Following the 2012 hot-air balloon crash near Carterton that resulted in 11 deaths, TAIC recommended changes to alcohol and drug management in these sectors.
68. In 2016, Cabinet considered a paper setting out drug and alcohol management matters and recommendations and decided that:
- all commercial operators in the aviation and maritime sectors were to have drug and alcohol management plans (DAMPs) to reduce the risk of drug and alcohol impairment
  - the DAMPs were to require random testing of staff in safety sensitive activities for the presence of alcohol or drugs or both
  - the Directors of Maritime New Zealand and the CAA were to be provided with the power to undertake non-notified testing at any time for any reason in accordance with the random testing requirements in operator DAMPs.
69. In 2017, during Select Committee consideration for the Maritime Transport Amendment Bill (MTAB), a number of submitters raised concerns that mandatory random testing was a disproportionate response to the level of risk in the maritime sector, and argued that mechanisms already existed to appropriately manage drug and alcohol risk. Concerns were also raised over the cost and practicality of testing for sole operators, particularly in remote areas. Based on that view, the government agreed in December 2017 to amend the MTAB, removing the DAMP and random drug and alcohol testing requirements. The MTAB retained provisions empowering the Director of Maritime New Zealand to undertake drug and alcohol testing and was subsequently enacted.
70. While the suitability of the Clear Heads scheme in the maritime sector has been tested, there are arguments for treating aviation differently. In particular, the potential consequences from drug and alcohol impairment in the aviation sector can be greater, and events posing flight safety risk can unfold very quickly with catastrophic consequences – both for those in an aircraft and for people on the ground. Public tolerance for aviation safety risks is understandably much lower than in maritime transport, given that civil aviation is heavily oriented to passenger transport.

71. Risks to passengers and the general public did not feature in submissions on the MTAB, which were primarily concerned with the utility, practicality and cost of mandatory random testing from a maritime industry perspective.
72. Other differences between the maritime and aviation sectors include:
- some 85 percent of the approximately 1,800 commercial operators operate only one vessel in the maritime sector, and many are in remote locations. In contrast, less than 200 aviation operators operate between one and five aircraft, some in remote locations.
  - The nature of the maritime working environment means that performance-based health and safety at work measures and operational maritime safety measures have much in common. Health and safety measures to manage impairment (from any cause) are already capable of addressing drug and alcohol risks, especially in a sector where fishing, as opposed to the carriage of passengers is the dominant industry sector. Health and safety measures and operational safety systems do not, in the view of the CAA, provide the certainty and precision needed to manage the higher flight safety risks from drug or alcohol impairment consistently.

#### *Policy decision*

The exposure draft reflects the full suite of proposed Clear Heads statutory obligations on aviation operators, specifically:

- a mandatory drug and alcohol testing regime by commercial operators (DAMPs)
- mandatory random testing by commercial operators
- system oversight by granting the Director of Civil Aviation the power to conduct non-notified testing of safety sensitive workers.

#### *We are seeking feedback on the following questions*

- Does the current drafting in the exposure draft achieve this policy decision?
- Transitional provisions relating to Clear Heads are included in Schedule 1 of the exposure draft. Do these provisions raise any practical issues in terms of implementation?
- Do these provisions appropriately manage the risk of drug and alcohol impairment in aviation?
- Are there any unintended consequences as a result of the drafting?

## Offences and penalties

| Act |   | Exposure draft |   |
|-----|---|----------------|---|
| 46B | Fraudulent, misleading, or intentionally false statements to obtain medical certificate | 102            | Fraudulent, misleading, or false statements to obtain medical certificate |
| 65  | Time for filing charging document   | 300            | Time for filing charging document   |

### Recklessly providing false information in obtaining a medical certificate

73. 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 dissuade people from providing inaccurate information.
74. Section 46B of the CA Act creates an offence for providing fraudulent, misleading or intentionally false statements to obtain a medical certificate.
75. The CAA is concerned that the requirement to prove intent 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.
76. A recent Court of Appeal case looked at this test in detail, and noted that if a lower standard of mens rea (i.e. recklessness) were to be applied to the offence, this was a matter for the legislature and not the courts.
77. Including recklessness as an element of the offence would lower the mens rea threshold and would be consistent with a similar offence in the CA Act (section 56) which relates to the supply of false information affecting safety.

### *Policy decision*

The exposure draft includes recklessness as an element of the offence.

### Limitation period to apply from the time offence is detected

78. Section 65 of the CA Act provides a limitation period of 12 months after the date on which the offence was committed to file charging documentation. At times, the CAA has been unable to pursue enforcement action because offences are not disclosed in time for the work to be undertaken to file a charge within 12 months.
79. Amending the CA Act so that the limitation period is 12 months from when the offence was detected will ensure that delayed disclosure of relevant information does not prevent the CAA from pursuing enforcement action.

### *Policy decision*

The exposure draft states that the limitation period for the following offences (relating to disclosure of information) will begin 12 months from when the offence was detected:

- acting without necessary aviation document
- acting without required medical certificate
- fraudulent, misleading or intentionally false statements to obtain a medical certificate
- failure to disclose information required by Director
- carrying on scheduled international air service without licence or contrary to licence
- failure to notify accident or incident.

### *We are seeking feedback on the following questions*

- The policy regarding limitation period was first developed in 2015. More recently, the Ministry has considered whether it would be useful for the Bill to reflect the approach taken to this subject in similar recent legislation. For example, sections 146 and 147 of the Health and Safety at Work Act 2015 provide more flexibility to reflect different situations from which a prosecution may arise and provides for the District Court to extend the period for filing a charging document in certain circumstances. We are seeking feedback on whether similar provisions should be incorporated in the Bill.
- Does the current drafting in the exposure draft achieve this policy decision?
- Are there any unintended consequences as a result of the drafting?

### Further work is planned offences and penalties

80. A number of the offences and penalties in the Bill have not been formally reviewed by the Ministry of Transport. Prior to the Bill being introduced to Parliament, the Ministry will review penalties and offences in the Bill, to ensure consistency with other similar regulatory systems and current best regulatory practice. The Bill will also undergo a formal offence and penalty vetting process by the Ministry of Justice.

### ***Improving the process to determine if someone is 'fit and proper' to participate in the aviation system***

| Act |   | Exposure draft |                            |
|-----|---|----------------|----------------------------|
| 10  | Criteria for fit and proper person test | 73             | Fit and proper person test |

81. Before someone can enter the aviation system, he or she must undergo a fit and proper person test. Section 10 of the CA Act sets out the process. Participants must continue to be fit and proper to remain in the system.

### Clarifying the matters the Director routinely considers as part of the fit and proper process

82. The CA Act sets out the matters that the Director must consider when conducting a fit and proper person assessment. The CA Act also states that the Director is not limited to the matters stipulated in the CA Act, and may take into account other matters and evidence that may be relevant.
83. Given the age of the CA Act, there are matters that the Director routinely considers which are not explicit in the CA Act. Not including these in the legislation creates a presumption that such information will not be routinely considered.

#### *Policy decision*

The exposure draft is more explicit about matters that the Director routinely considers or takes into account as part of a fit and proper person assessment. In particular:

- the person's use of alcohol and drugs
- the person's compliance history with transport security regulatory requirements in New Zealand or in another country.

### Clarifying that third parties can provide information to the CAA to enable the Director to determine a person's ongoing fit and proper person status, in alignment with the Privacy Act

84. Occasionally the CAA 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.
85. The Director does not exercise this power routinely, and only makes around 20–30 requests a year. The CAA most commonly requires information from the Ministry of Justice, Police, Department of Conservation, the Ministry for Primary Industries (fisheries), local and regional councils and professional licensing bodies. The kind of information sought by the CAA can be fairly broad, but often relates to when another agency intends to prosecute someone.
86. Third parties are often concerned that they will be in breach of the Privacy Act 1993 if they provide information to the CAA. In most cases, the third party releases the information but it is generally a protracted process. In the meantime, potential safety risks persist and the Director is potentially inhibited from fulfilling their statutory functions as outlined in the CA Act.

#### *Policy decision*

The exposure draft provides certainty that providing the CAA with information in response to a 'seek and receive' request does not breach the Privacy Act 1993.

*We are seeking feedback on the following questions*

- Does the current drafting in the exposure draft achieve this policy decision?
- Are there any unintended consequences as a result of the drafting?

***Amendments relating to unmanned aircraft (drones)***

87. When the CA Act first came into force, unmanned aircraft (drones) were not as prevalent as they are now, and might be in the future. We have identified some policy proposals which aim to ensure our primary legislation takes account of this new technology. These are described below.
88. In addition to these proposals, the Ministry, together with other government agencies, is also undertaking a broader programme of work regarding unmanned aircraft. This work includes reviewing Civil Aviation Rules Part 101 and 102, which are the main pieces of aviation regulation governing the use of drones. The aim of this work is to ensure our regulation continues to support the safe and effective use of this technology.

**Definition of accident to include unmanned aircraft (drones)**

| Act |  | Exposure draft |  |
|-----|--|----------------|--|
| 2   | Interpretation – definition of accident          | 6              | Meaning of accident                      |
| 26  | Obligation to notify all accidents and incidents | 103            | Duties to notify accidents and incidents |

89. The CA Act requires parties to notify the CAA if there is an accident involving manned aircraft.
90. There is no equivalent requirement if an accident involves an unmanned aircraft. This limits the CAA's ability to be aware of, and thereby investigate, drone accidents, understand the safety risks from these aircraft, and thereby regulate them effectively.

***Policy decision***

The definition of “accident” in the exposure draft is consistent with the definition under Annex 13 to the Convention on International Civil Aviation, which includes drones.

The exposure draft also requires notification of an accident involving drones, where required to do so by rules made under the CA Act.

Rules that identify which drone accidents must be reported can be nuanced to exclude accidents where notification to the CAA would be impractical and unnecessary.

### Amendments to pilot in command provisions to allow for drones

| Act |  | Exposure draft |                |
|-----|--|----------------|----------------|
| 2   | Interpretation –Definition of pilot-in-command | 5              | Interpretation |

91. Where possible, it is important that the CA Act adequately anticipates and caters for the introduction of new technology.
92. The CA Act is designed with the assumption that there is a ‘pilot-in-command’ (PIC) on-board the aircraft who has ultimate responsibility for the safety and control of the flight. The CA Act specifies the duties of a PIC, and specifies certain powers and responsibilities in relation to those duties.
93. The current definition of PIC is not well suited for new and developing aviation technology, such as drones (including autonomous aircraft), where a traditional pilot might not be present on the aircraft.

#### *Policy decision*

The exposure draft states that in the absence of a pilot, the duties, powers and obligations of the PIC fall to the operator of the aircraft.

### Detention, seizure and destruction of drones

| Act                            | Exposure draft   |
|--------------------------------|--|
| This would be a new insertion. | Not included in draft, but see clause 255 regarding the Director’s power to detain and seize aircraft. |

#### *Background*

94. The Bill carries over existing powers to detain aircraft, seize aeronautical products, and impose prohibitions and conditions in relation to aerodromes, aircraft, and aeronautical products. These powers, set out in clause 255 and 256 of the Bill, empower the Director, or any person to whom the Director delegates the power, to take immediate action in the event the decision maker has reasonable grounds to believe that the use may endanger persons or property.
95. If prompt action is necessary, the Director or the delegate may take action without warrant. Detentions and seizures may be maintained for only such time as considered necessary in the interests of safety and security, but may be retained as evidence.

96. The current provisions authorise the detention of aircraft, but do not expressly authorise the seizure of an aircraft that is operating in contravention of the Act or the Rules. Law enforcement agencies who take action against manned or unmanned aircraft that threaten persons or property are instead exercising their law enforcement functions (including preventing crime, keeping the peace and maintaining public safety) and rely on the availability of defences and prosecutorial discretion. This is the same framework that applies when law enforcement action is taken to protect the public in other circumstances, including, for example, when using road spikes to stop motor vehicles that are being operated dangerously.
97. The current framework is clearly appropriate in relation to aircraft that have people on board. In principle, no-one should interfere with the operation of such an aircraft except where there are significant safety or security concerns and intervention is clearly justifiable on public policy grounds.
98. Non-passenger carrying drones present a clearly distinguishable circumstance. Protection is not required to prevent death or injury on board the aircraft, and in many cases the drone itself has low property value. Therefore, in the case of drones, a different balance between the protection afforded to the aircraft and the regulator's powers to ensure compliance with the civil aviation legislation is appropriate.
99. Under clause 39 of the Bill, drones or other aircraft that operate other than in accordance with the rules are not afforded protection from actions in trespass or nuisance. However, seizure of a trespassing drone is unlikely to be authorised under the common law except in narrow circumstances.

#### *Problem*

100. There have been frequent recent instances of drones operating in contravention of civil aviation law, where this has caused significant risk and disruption to other aircraft, aviation operations and people on the ground. The scale of this problem is significant – the Gatwick incursions in late 2018 alone caused an estimated £50 million loss to the United Kingdom economy and affected thousands of passengers.
101. A range of techniques exist or are under development to respond to these incursions, including nets, radiofrequency jamming or interception, or more extreme action such as destroying the drone. However, it is likely that the use of these technologies is currently only justified where there is a significant urgent risk to people or property.

#### *Option 1 – status quo*

102. As noted above, the status quo does not provide for an appropriate balance for the ability to take action against a drone that is operating in breach of the rules, but does not pose an immediate danger to people or property. While an action in trespass or nuisance may be available, private law enforcement would not provide for effective enforcement.

#### *Option 2 – expand power to the Director or delegates to take action*

103. Under this option, the power to seize or detain non-passenger carrying drones would be expanded, as follows:
  - 103.1. The power would be exercisable by the Director or delegates of the Director (which could include CAA employees, Police, or other agencies)

- 103.2. The person exercising the power would have to have reasonable grounds to believe that the aircraft had no people on board, and was operating in contravention of civil aviation law or might endanger people or property
- 103.3. The power to seize includes the power to use reasonable force to bring a drone in operation under the control of the person, such as by using nets, radiofrequency jamming or interception, or more extreme action such as destroying the drone
- 103.4. In choosing what action to take to seize the drone, the person exercising the power must give such consideration as is reasonable in the circumstances to any risks to people or other property from taking the action
- 103.5. The seizure would be only maintained for such time as was necessary to ensure compliance with the civil aviation law, provided that the aircraft could be retained for the purposes of evidence for any prosecution.
104. This option places the power in the regulator or delegate within the CA Act framework. This would ensure that the power is focussed on compliance with civil aviation legislation and is exercised proportionately. The power relies on the Director or a delegated agency allocating resources to support its use, and the establishment of operational procedures for exercising power.

*Option 3 – general defence to take action*

105. Under this option, persons or classes of person would have a statutory justification or a defence against prosecution in respect of various offences (including civil aviation law, the Aviation Crimes Act and the Crimes Act) where the person used reasonable force against a drone. The justification might, for example, apply to any person who reasonably believed that the aircraft had no people on board, and was operating in contravention of civil aviation law or might endanger people or property.
106. Under this option, the protection generally applies to a class of people, so there is less reliance on the Director or the delegated agency. As a consequence, however, the circumstances in which action was justified, and the person who is protected, would require careful design. A defence that was too broad might encourage reckless or disproportionate behaviour, while a too-narrowly defined defence would offer little improvement on the status quo, as it may not provide sufficient certainty.

*We are seeking feedback on the following questions*

- What are the potential costs and benefits of the proposed options for the detention, seizure and destruction of drones? Are there other, better, options?
- Are any other changes required to primary legislation to take account of unmanned aircraft technology? If so, what?
- Does the proposal relating to PIC present any significant issues to aviation operations now and those expected in future?
- Does the current drafting in the exposure draft achieve the policy objectives?
- Are there any unintended consequences as a result of the drafting?

## **Economic Regulation**

### ***Improving the regime for authorisation of airline cooperative arrangements***

| Act    |  | Exposure draft      |  |
|--------|--|---------------------|--|
| Part 9 | International air carriage competition | Subpart 2 of Part 7 | International air carriage competition |

### **Alliances are a way for airlines to offer a global service in a constrained regulatory environment**

107. If an airline is to provide international air services this must be done pursuant to an inter-governmental air services agreement (ASA). Traditionally ASAs would specify the routes that airlines may operate, the frequency, capacity or aircraft types that may be operated, how prices should be set and require airlines of either side to be substantially owned and effectively controlled by nationals of the 'designating' (home) country.
108. These restrictions meant that airlines are not able to enter markets in all cases where they identify commercial opportunities. In any case, no airline, regardless of its size, or the depth and breadth in their air services arrangements, can provide a service to its customers to every city in the world. Cross border mergers and acquisitions are less common than in many other industries.
109. Alliances are a way that airlines can overcome some of these issues. Alliances can result in more convenient access to a larger range of destinations, efficiencies that can be passed on to consumers in the form of lower prices, and a better overall product for travellers. However, because they involve competitors or potential competitors agreeing on services and fares they also have the potential to lessen competition, with a risk of higher prices, reduced capacity and increased barriers to entry for other airlines.
110. From the 1980s, regulators across the world increasingly recognised that the benefits of cooperation to consumers from airline cooperative arrangements needed to be balanced against the detriments of any potential anti-competitive behaviour.
111. Section 88 of the CA Act therefore provides that the Minister may authorise arrangements between airlines. The effect of authorisation is an exemption from the Commerce Act so that sections 27 to 30 of the Commerce Act do not apply. Competition issues are considered as part of the authorisation process.
112. The legislative regime for considering these arrangements has not changed in response to the new developments in the sector or regulatory practice. The specific statutory criteria do not explicitly allow for a full consideration of the impacts of the arrangements, the legislation does not allow for a transparent process or consultation with interested parties and it is unclear whether conditions (including time limitations on authorisations) can be imposed.
113. Air Services Agreements are instruments of treaty status between New Zealand and other governments. Given the role these play in the regulation of provision of international services, the government considers that a sector specific regime remains appropriate.

114. The Bill updates the regime to formalise a consultation process and to specify that in determining if an airline cooperation agreement is in the public interest the Minister must take into account the main and additional purposes of the Act.

*Policy decision*

The exposure draft updates the regime for considering airline cooperative arrangements to put in place a more transparent process and specify the matters the Minister must take into account in determining whether the arrangement is in the public interest.

Provisions for Commission Regimes have been deleted.

Provision has been retained for authorisation of single airline tariffs where this is required by the relevant air services arrangement.

*We are seeking feedback on the following questions*

- Does the proposal in the Bill rectify the process issues that had been identified with the existing regime?
- Do the main and additional purposes of the Act sufficiently cover the matters that the Minister should take into account when considering whether to authorise airline cooperative arrangements?
- Are there any unintended consequences as a result of the drafting?

**Airport price setting**

| Act         |         | Exposure draft |
|-------------|---------|----------------|
| AA Act – 4A | Charges | N/A            |

115. Section 4A of the AA Act allows airport companies, following consultation, to ‘set charges as they think fit’. Section 4A was included in the CA Act at a time when the airport company model was new and untested, to make it clear that airport companies could exercise the powers necessary to operate and manage their airports as commercial undertakings independent of Crown intervention.
116. On its own, the provision has not proven effective in countering the difficulties faced by small airports which often have to negotiate with one major airline customer when seeking to change prices.
117. With regard to the larger airports in particular, airports and airport customers hold strongly opposing views.
118. Airport customers (airlines) argue that an airport’s ability to set charges as they think fit creates an environment where monopoly pricing by airports can occur, that consultations between them do not mirror commercial negotiations and that unnecessary investments and excessive pricing can occur.

119. Airports argue that section 4A is necessary because:
- the provision now serves a broader purpose and is a material part of the statutory economic regulation framework for airports
  - it is a 'circuit breaker' when agreement cannot be reached
  - without it, there would need to be a fundamental change in the basis for pricing decisions, creating uncertainty for airports
  - repeal would lead to litigation
  - repeal could have significant impacts on airport investment.
120. A specific provision in the AA Act is not required to enable airport companies to set charges. The risk of retaining section 4A is that it may be interpreted as giving airport companies greater discretion when setting charges than they would otherwise have. This is not the intent of the provision.

#### *Relationship with Commerce Act*

121. The three major airports (Auckland, Wellington and Christchurch) are regulated by the 'information disclosure' regime under Part 4 of the Commerce Act.
122. In 2014 and 2016, the Ministry of Business, Innovation and Employment (MBIE) undertook a consultation process seeking feedback on the effectiveness of the regime and how it could be improved.
123. The Commerce Amendment Act 2018 has recently made changes to the Commerce Act which:
- clarify that the Commission's 'summary and analysis' reports on information provided by Airports, can comment on whether information disclosure is being effective
  - introduce a truncated inquiry process to investigate the need for further regulation of already-regulated airports; and
  - clarify that changes to the type of regulation for an already-regulated airport can be made through Order in Council.
124. This, combined with the Commerce Act, puts in place a regime that more effectively addresses the issues and section 4A would create unnecessary overlap if retained.

#### *Policy decision*

Section 4A of the AA Act, which allows airport companies to set charges as they see fit, is proposed to be repealed.

#### *We are seeking feedback on the following questions*

- Does the proposed policy change, along with recent changes to the Commerce Act 1986, support a robust regulatory regime for major international airports?

- It is proposed that provisions in the AA Act requiring airport companies to consult regarding charges and certain capital expenditure be retained. Would these provisions still be appropriate if, in future, major airports were subject to a different regulatory regime under the Commerce Act?
- Are there any unintended consequences as a result of the drafting?

### ***Improving the international airline licensing regime***

| Act     |                                      | Exposure draft      |                                      |
|---------|--------------------------------------|---------------------|--------------------------------------|
| Part 8A | International air services licensing | Subpart 1 of Part 7 | International air services licensing |

125. International airlines serving New Zealand on a scheduled basis are required to hold an International Air Service Licence or an Open Aviation Market Licence. Among other things, these licences specify the routes and capacity that the airline may operate. Licensing provides the mechanism to authorise and monitor the exercise of traffic rights exchanged between governments, in New Zealand's bilateral negotiations.
126. Part 8A of the CA Act prohibits anyone from operating a scheduled international air service or a non-scheduled international flight to/from New Zealand without appropriate authorisation. It specifies who may make authorisation decisions, specifies the criteria to consider when doing so and allows conditions to be imposed.
127. The Minister of Transport is the licensing authority for New Zealand airlines operating under a scheduled air service licence.
128. The Secretary for Transport is the licensing authority for New Zealand airlines operating under an open aviation market licence.

### **Improvements to allocation decisions**

129. The Minister of Transport is required to make licensing decisions for New Zealand international airlines even where there are no limits on routes and/or capacity. Given that these decisions do not reflect any significant allocation which excludes other airlines, it is not necessary that the decision-maker should be at ministerial level.
130. The proposal designates the Secretary for Transport as the licensing authority for the allocation of routes and/or capacity rights where these are unlimited for New Zealand international airlines.
131. This will reduce the administrative burden for decisions when there is no significant choice or discretion involved. It ensures legislation reflects the more liberal framework of air services arrangements. The Minister of Transport would retain decisions involving the allocation of limited rights.
132. Given the above decision, the distinction in process between an Open Aviation Market Licence and a Scheduled International Air Services Licence is narrowed. Consequently, the Bill eliminates the category of Open Aviation Market Licence and amalgamates provisions relating to New Zealand and foreign licences.

Commercial non-scheduled international flights

133. The CA Act only distinguishes between two classes of international air services: non-scheduled flights and scheduled international air services. The power to authorise non-scheduled flights rests with the Secretary for Transport.
134. In practice, three broad categories exist and the boundaries between them are not always clear. The three categories are described in the table below.

| Commercial non-scheduled international flights   |  | Scheduled international air service  |
|--|--|--|
| <b>'Pure' charters</b><br>Not systematic, usually one-off, not open to the public generally, not in accordance with a published timetable. | <b>Series of flights</b><br>May have some characteristics of being systematic, open to the public, or being operated in accordance with a published timetable. | Systematic, open to the public generally and in accordance with a published timetable. |

135. The CA Act defines 'scheduled international air service' but it does not define 'commercial non-scheduled international flight'. In particular, it does not provide a definition or guidance for when flights are so regular or frequent as to constitute a systematic/scheduled service.
136. Purely one-off charter flights do not circumvent New Zealand's international air services agreements and should not warrant a complete assessment for authorisation by the Secretary for Transport. Authorisation should only be required where services do not meet the criteria for pure charter services, or appear to circumvent our bilateral agreements.

*Policy decision*

The exposure draft includes two categories of commercial non-scheduled flights. This removes the need for the Secretary for Transport to authorise non-systematic charter flights.

In that circumstance, operators would only need to notify the Ministry of Transport when they intend to operate flights and confirm that they have met safety and security requirements.

This will make it easier for charter service operators to meet ad-hoc demand, without the added burden of seeking authorisation for their services.

*We are seeking feedback on the following questions*

- Does the current drafting in the exposure draft achieve this policy decision?
- Are there any unintended consequences as a result of the drafting?

### **Modernising provisions relating to Airport Authorities**

137. In the course of the drafting process, we have identified that many of the provisions in the Airport Authorities Act 1966 are obsolete.
138. In particular, local authorities which own a majority of airports in New Zealand, have significantly enhanced powers pursuant to the Local Government Act 2002 than they had in 1966 when the Airport Authorities Act was first passed (indeed some provisions in that Act date back to the 1920s).
139. As a consequence, many of the provisions of the Airport Authorities Act specifically empower local authorities to do things that they are now enabled to do in any case.

#### *Policy decision*

The exposure draft deletes obsolete provisions.

The provisions we propose deleting are included in schedule 8 of the exposure draft.

#### *We are seeking feedback on the following questions*

- Does the current drafting in the exposure draft achieve this policy decision?
- Do you agree that the provisions in schedule 8 of the exposure draft are out of date?
- Are there any unintended consequences as a result of the drafting/deletions?

### **Amendments to airline liability provisions**

| Act           |  | Exposure draft |  |
|---------------|--|----------------|--|
| New insertion |  | 328            | Jurisdiction of Disputes Tribunal              |
| 99A           | Regulations relating to information disclosure | 330            | Regulations relating to information disclosure |

#### Disputes Tribunal jurisdiction to hear claims regarding airline liability

141. New Zealand is a signatory to international agreements which dictate the amounts and circumstances for which airlines offering international services are liable for lost, delayed and damaged baggage; and delayed flights. The CA Act gives effect to these agreements in New Zealand law.
142. Liability with respect to domestic services is also covered, but is limited to damages as a result of airline delay (lost, damaged and delayed baggage are covered by the Contract and Commercial Law Act 2017).

143. It is not clear how a passenger might reasonably exercise their rights for compensation under the CA Act, particularly if an airline were to dispute a claim made by an affected passenger. Claims under these provisions are likely to be for small amounts, which would not justify the expense of taking the dispute to a court.
144. The Disputes Tribunal is a relatively quick and inexpensive way to settle cases involving small claims. However, it is not clear that the Tribunal has jurisdiction to hear claims relating to airline liability under the CA Act. Its jurisdiction only extends to claims based on contract, quasi-contract, and enactments specified in the schedule of the Disputes Tribunal Act 1988 (of which the CA Act is not). A small number of claims relating to delay and lost baggage appear to have been heard at the Tribunal, but these seem to have been based on the contract of carriage between the passenger and the airline.
145. We propose that the Bill make it clear that the Disputes Tribunal has jurisdiction over claims made under civil aviation legislation, for lost, delayed and damaged baggage; and delayed flights.
146. The CA Act also gives effect to provisions relating to international airline liability for passenger injury and death. We do not consider that the Disputes Tribunal should have jurisdiction over such claim, which are different in kind to the typically small financial disputes over which the Tribunal has jurisdiction.

#### Clarify the right to bring proceedings under these provisions

147. The CA Act is currently opaque as to how proceedings are able to be commenced in relation to the airline liability provisions. We propose to clarify this by using provisions similar to those in the Fair Trading Act 1986, which provide very similar rights of action in a court or the Disputes Tribunal.

#### Disclosure of information regarding passenger rights

148. Although we are aware of a few examples, the Ministry has no data to confirm how often passengers rely on these provisions when making claims for compensation from airlines. Anecdotal evidence suggests that this may be because passengers are not well informed of their rights.
149. Other jurisdictions have addressed this issue through regulations which require airlines to inform passengers of their right to seek compensation. For example, with respect to flight delay and cancellation, the European aviation regulator EASA requires all airlines operating to/from Europe to:
  - 149.1. provide all passengers affected by a cancellation or delay of longer than two hours with a written notice setting out the rules for compensation under European regulations.
  - 149.2. display a sign at the check in counter, informing passengers to ask at check-in for text describing passenger rights with regard to compensation and assistance.
150. The regulation making powers under the CA Act do not currently allow for similar regulations to be made in New Zealand. This may be an issue, should further policy investigation uncover a need for airlines to take a more active role in disclosing this type of information to passengers. We propose that the Bill contain new regulation making powers to require information to be disclosed.

We are seeking feedback on the following questions

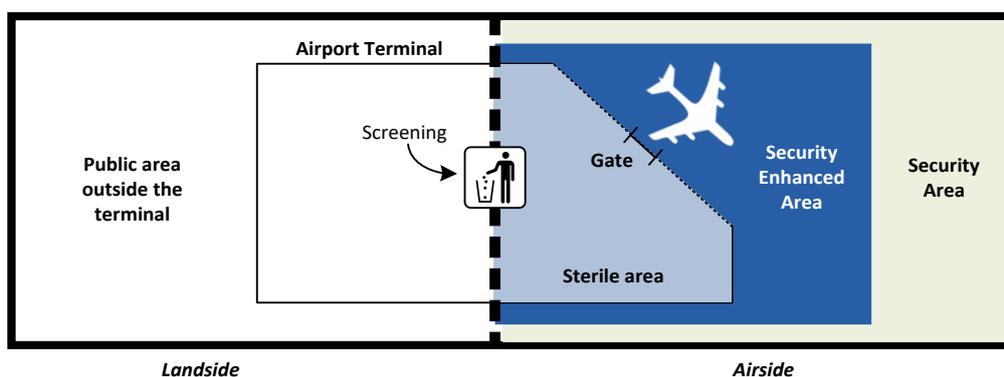
- Do the provisions as drafted adequately address issues relating to the ability of passengers to exercise their rights?
- Are there any other options for ensuring passengers are well informed of their rights. If so, what?
- Are there any unintended consequences as a result of the drafting?

## **Aviation Security**

*Aviation security in context*

151. The proposed changes to Part 8 of the CA Act not only reflect the recommendations from the Review of the CA and AA Act, but also separate work undertaken as part of the DASR 2014/15.
152. To help explain Part 6 of the Bill and how Avsec operates, the following diagram and table show the ‘geography’ of a security designated aerodrome and define some common terms used.

**Figure 1; Security Designated Aerodrome**



**Table 2; Common terms used**

|                               |   |
|-------------------------------|---|
| Airside                       | The movement area of an airport, adjacent terrain and buildings or portions thereof, access to which is controlled — comprising the security area, security enhanced area and sterile area. |
| Landside                      | The area of an airport, adjacent terrain and buildings or a portion thereof, which is not part of the airside. Also described as the public area of an airport.                             |
| Security designated aerodrome | A security designated aerodrome refers to the total area, usually referred to as ‘the airport’. It is comprised of the secure areas (airside) and the public areas (landside).              |

|                        |   |
|------------------------|---|
| Security Area          | The area known as the airside part of an airport where aircraft and supporting vehicles normally move about, together with the adjacent terrain and buildings or portions thereof, for which access is controlled.  |
| Security enhanced area | Those areas of the airside of an airport that are identified as priority risk areas where, in addition to access control, other security controls are applied.  |
| Sterile area           | The sterile area comprises the area after people, items and baggage have passed through screening and includes the departure lounges through to the gate to the aircraft.<br><br>Access to this area is limited to authorised personnel, passengers and crew. |

### *Security provisions in the CA Act*

153. Part 8 of the CA Act (sections 76 – 87) sets out how aviation security services are to be delivered in New Zealand. In particular, it sets out the powers and duties of the authorised provider of those services, and the respective roles of the Minister of Transport and the Director of Civil Aviation.
154. Part 8 also needs to be read in conjunction with the Aviation Crimes Act 1972, which gives effect to a number of international conventions relating to the prevention of crimes against international air services. It includes specific guidance on the exercise of certain powers set out in the CA Act.
155. Avsec (along with the New Zealand Police) has a duty under the CA Act to prevent crimes against the Aviation Crimes Act 1972 (the Aviation Crimes Act) and to protect persons and property from dangers arising from crimes or potential crimes identified in the Aviation Crimes Act.
156. The CA Act (supported by Civil Aviation Rules and Directions) confers functions, duties and powers on Avsec to enable it to provide services at security designated aerodromes. These services include:
- screening international air passenger services
  - screening domestic air passenger services using aircraft with more than 90 passenger seats<sup>3</sup>, and reasonable searches if necessary
  - screening persons, items, substances, or vehicles entering or within ‘security enhanced areas’
  - carrying out aerodrome security patrols.

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<sup>3</sup> This is done by a *Notice of Direction to Require Screening* which was issued by the Director under section 77B of the CA Act.

157. The focus of Avsec's work is within the airside area of security designated aerodromes. Avsec fulfils its patrol function by undertaking foot and mobile patrols both in the airside and landside parts of the aerodrome. Avsec routinely use Explosives Detection Dogs (EDD) to assist with this function, as this is the most effective and efficient way to identify risks related to explosives.

**Clarifying the Avsec search powers in the landside part of security designated aerodromes**

| Act |   | Exposure draft |   |
|-----|---|----------------|---|
| 80  | Powers, functions and duties of Aviation Security Service | 123            | Interpretation  |
|     |   | 131            | Screening powers of aviation security officers  |
|     |   | 132            | Searching powers of aviation security officers  |
|     |   | 133            | Requirements relating to consent to screening   |
|     |   | 136            | Requirements and incidental powers relating to the manner of searching persons  |
|     |   | 137            | Power to require drivers to stop vehicles in security enhanced areas for screening and searching  |
|     |   | 138            | Powers of aviation security officer in relation to person who is not screened or refuses consent to screening or searching before entry into, or in, sterile area or security enhanced area |
|     |   | 139            | Powers of constable in relation to person who is not screened or refuses consent to screening or searching before entry into, or in, sterile area or security enhanced area                 |

|  |  |     |  |
|--|--|-----|--|
|  |  | 140 | Item or substance suspected entering into, or in, sterile area           |
|  |  | 141 | Item or substance suspected entering into, or in, security enhanced area |

158. The CA Act provides Avsec with a general power to search in the landside part of security designated aerodromes [section 80(ab)] and to carry out airport security patrols [section 80(b)]. Searches conducted under section 80(ab) must be 'reasonable' and 'necessary'.
159. The CA Act is silent on what Avsec must do, or is permitted to do, in relation to the person or any item/substance discovered in the course of that landside search. This contrasts with the requirements for Avsec's authority in the airside part aerodrome, which are very prescriptive.
160. The general nature of section 80 of the CA Act creates a potential lack of clarity about the extent and nature of Avsec's landside search and seizure powers. The issue is most noticeable in relation to:
- unattended items
  - vehicles
  - the use of EDD.
161. The CA Act needs to reflect the balance between security imperatives, personal rights (as expressed in the New Zealand Bill of Rights Act) and the efficient flow of goods and people through the airport. From a Bill of Rights perspective, legislation should be clear about what Avsec officers can or cannot do when exercising any search or seizure powers. This also needs to be balanced against the fact that security designated airports are busy places.
162. In a security environment, officers must be able to act quickly and decisively to resolve potential security threats. It is also important from a facilitation perspective, to help manage the smooth running of airports.
163. The changes proposed will not increase the powers that an Aviation Security Officer (ASO) has for airside or landside searches. The proposed amendments will instead clarify the use of the existing powers that ASOs have for landside searches, and ensure that these align with those for airside searches. These amendments will clarify Avsec's authority to:
- search vehicles and unattended items;
  - conduct landside searches (including requirements on when searches are permitted, how searches are conducted and what happens to anything that is found).
  - use EDD.
164. In particular, the proposed amendments will confirm that before conducting a search landside, an aviation security officer must either have:

- reasonable grounds to suspect there is an imminent risk to safety and security and the risk requires an immediate response; or
  - the consent of the person to be searched; or
  - the consent of the person in possession of the item, substance or vehicle to be searched.
165. To avoid doubt, the exposure draft specifies that an item, substance, or vehicle may be searched without consent if it is unattended.
166. The exposure draft also specifies that a search may be conducted either:
- at the request of the aerodrome operator; or
  - at the request of Police; or
  - on the initiative of the ASO in the course of their duties under the CA Act.

Clarifying the use of EDD

167. The proposed amendments regarding the use of EDD landside will clarify that they can be used to support Avsec undertaking its functions, duties and powers under the legislation. This includes use on patrols, and for the search of persons and property when necessary.
168. The proposed amendments will also clarify that consent needs to be sought prior to a search by an EDD, if the search is directed by the EDD’s handler. Consent will not be required if it is not practicable (for example the EDD is being used to clear an area with large numbers of people); the EDD conducts a search without being directed by an aviation security officer to do so; or the item, substance or vehicle being searched is unattended.

*Policy decision*

The exposure draft clarifies any potential uncertainty relating to Avsec’s landside search and seizure powers.

*We are seeking feedback on the following questions*

- Does the current drafting of the Bill achieve this policy decision?
- Are there any unintended consequences as a result of the drafting?

***Clarifying that Avsec can search suspicious items of hold baggage without passenger consent***

| Act           | Exposure draft |   |
|---------------|----------------|---|
| New insertion | 134            | Requirements relating to consent to searching |

169. When screening hold baggage for items that may present a risk to aviation safety and security, Avsec routinely deals with items that present a safety and security concern, and therefore need closer inspection.
170. It is proposed that the CA Act be clarified to confirm that Avsec has the power to search hold baggage that trigger a safety or security concern, without the consent of the passenger.
171. From a safety and security perspective, it is important for Avsec to quickly resolve any concerns by clearing the item/bag or sectioning off the item/bag promptly to protect people and property.

*Policy decision*

The exposure draft is explicit that Avsec can conduct hold baggage searches without the consent of the passenger for both domestic and international travel, where there is a risk to aviation safety or security.<sup>4</sup>

*We are seeking feedback on the following questions*

- Does the current drafting in the exposure draft achieve this policy decision?
- Are there any unintended consequences as a result of the drafting?

**Clarifying Avsec’s powers to deal with dangerous goods**

| Act |  | Exposure draft |   |
|-----|--|----------------|---|
| 80A | Powers and duties of aviation security officer relating to dangerous goods | 152            | Power of aviation security officer to seize and detain dangerous goods detected by government agency or carrier |

172. It is an offence against the CA Act and Civil Aviation Rules to carry, or cause to be carried, any dangerous goods on an aircraft. Avsec officers have duties and powers to screen, seize and detain dangerous goods pre-flight.
173. The Review identified two potential issues with Avsec’s powers to deal with dangerous goods:
  - the CA Act does not allow Avsec officers to retain dangerous goods for the purposes of evidence

<sup>4</sup> This is consistent with the approach in a number of other jurisdictions including the United States, Canada, Japan, Austria, Belgium, Finland, Israel, The Netherlands, South Korea, and Switzerland. Australia does not currently permit bag inspection without the passenger present.

- Avsec's role in this context is to ensure that dangerous goods are not carried on board an aircraft. If dangerous goods are discovered after the fact (for example, by Customs), Avsec's mandate to seize and retain dangerous goods found on arrival, for prosecutorial purposes, is unclear.

*Policy decision*

The exposure draft:

- enables Avsec to take possession of the dangerous goods for prosecutorial purposes
- makes it explicit this mandate exists regardless of whether an item(s) is found prior to, or after, the flight occurred.

*We are seeking feedback on the following questions*

- Does the current drafting in the exposure draft achieve this policy decision?
- Are there any unintended consequences as a result of the drafting?

**Avsec's institutional arrangements**

| Act              |   | Exposure draft |   |
|------------------|---|----------------|---|
| 46               | Acting without necessary aviation document  | 95             | Acting without necessary aviation document  |
| 79(2), (3) 81(1) | Authorised aviation security service providers<br>Functions and duties of other aviation security service providers | 126            | Requirements for aviation document in relation to provision of aviation security services |
| 72B              | Functions of Authority  | 23             | Functions of the CAA  |
| 72L              | General Manager of Aviation Security Services   | Removed        |   |
| 72M              | Acting General Manager of Aviation Security Services  | Removed        |   |
| 72O              | References to Director to be read as General Manager of Aviation Security Service in certain circumstances          | Removed        |   |

|     |   |     |   |
|-----|---|-----|---|
| 79  | Authorised aviation security service providers            | 124 | Authorised aviation security service providers                                      |
| 79A | Further provisions relating to Aviation Security Service  | 127 | Minister may specify only Avsec to provide security at an aerodrome or installation |
| 80  | Powers, functions and duties of Aviation Security Service | 128 | Functions and duties of Avsec   |

174. Avsec has existed as an operational division within the CAA since 1997. It is the only organisation permitted to provide aviation security services in New Zealand. Avsec's statutory monopoly was enacted by a *Gazette* notice issued in 1997 pursuant to section 79A of the CA Act. Avsec, like all organisations operating in New Zealand's aviation system, is required to hold an aviation document.
175. Avsec's institutional arrangement means that the CAA is regulating and auditing part of its own organisation. This may create a perceived conflict of interest.
176. This proposal removes the requirement for Avsec to hold an aviation document. It will also remove the Director's independent statutory role as the regulator of Avsec, thereby removing the inherent conflict of interest.
177. In the absence of an aviation document, the CAA's Board will be responsible for ensuring Avsec continues to meet the requirements and standards commensurate with those provided in Civil Aviation Rules. This will ensure Avsec continues to operate to current high standards.
178. As a result of the proposal, some provisions in the CA Act relating to Avsec may be redundant. For example, the legislated requirement to appoint a General Manager of Avsec.
179. Effectively, the CAA would no longer treat Avsec as a regulated service provider. Rather, it would simply be treated as a government agency providing a service in order to meet New Zealand's international obligations, just as the New Zealand Customs Service does, for example.
180. The CAA's Board strongly support the proposal. There are potentially a number of other benefits, including efficiencies from consolidating some corporate service provision and giving the CAA greater flexibility about how it structures its corporate functions.
181. A risk associated with this option is that ICAO may express concern over the fact that there would no longer be a clear separation between the service provider and those responsible for quality assurance. The risk is perceived to be low. It could be addressed by the CAA obtaining periodic external audits of Avsec.

*Policy decision*

- The exposure draft removes the requirement for Avsec to hold an aviation document.
- In the absence of an aviation document, Avsec will be required to meet the requirements and standards commensurate with those provided in Civil Aviation Rules.
- Consequential changes required as a result of this decision will be made, e.g. removal of legislative requirements to appoint a General Manager of Avsec.

*We are seeking feedback on the following questions*

- Does the current drafting in the exposure draft achieve this policy decision?
- Are there any unintended consequences as a result of the drafting?

***Providing for alternative airport terminal configurations and implications for security screening***

| Act           | Exposure draft |   |
|---------------|----------------|---|
| New insertion | 115            | Entry into security or security enhanced area |

182. The security requirements in the CA Act have a significant impact on the layout of airport terminals. For example, the terminal must have space for security screening and it must segregate screened passengers from non-screened passengers and non-passengers. These requirements limit flexibility in terminal configuration, potentially constraining the aerodrome’s ability to introduce more efficient or effective layouts.
183. In the past, airport operators have approached the Ministry of Transport to discuss whether it is possible to configure the terminal in a way that allows people segregated under existing requirements to mix in common areas.
184. The CA Act requires that no one other than a member of the Police or an Avsec officer may enter or remain in a security area unless that person is wearing an airport identify card. Passengers are exempt from this requirement if they are embarking or disembarking directly through a gateway or thoroughfare. These provisions prove problematic if any airport wished to adopt an alternative terminal design to permit non-passengers (such as someone wishing to greet or farewell a passenger) to enter security areas.

*Policy decision*

To future-proof legislation for the possibility of alternative terminal configurations, the exposure draft gives the Director, on application by an aerodrome operator for any proposed aerodrome layout within a security designated aerodrome, the power to allow any specified group of persons or member of the public to enter or remain in any security area.

The Director would still need to be assured that an alternative design meets all the security outcomes as required under the legislation and Civil Aviation Rules.

In addition, Cabinet approval would be required for the amendment of the passenger security charges regulations to support an alternative design, to accommodate an increased number of persons through a security screening point.

*We are seeking feedback on the following questions*

- Does the current drafting in the exposure draft achieve this policy decision?
- Are there any unintended consequences as a result of the drafting?

***New security designation framework for aerodromes***

| Act |   | Exposure draft |   |
|-----|---|----------------|---|
| 82  | Security designated aerodromes and navigation installations | 113            | Security designated aerodromes and navigation installations |

185. There are two kinds of aerodrome in New Zealand – security designated and non-security designated. The Minister designates an aerodrome as being security designated under section 82. The Minister is responsible for ensuring that aviation security services are provided at all security designated aerodromes under section 77.
186. As a result of the DASR 2014/15, Cabinet decided to implement a regime that splits aerodromes into three designations (Tier 1 and Tier 2 security designated, and non-security designated). The Minister is required to provide aviation security services at Tier 1 security designated aerodromes.
187. Due to the *Gazette* notice issued in 1997, only Avsec can hold an aviation document enabling them to provide aviation security services.

*Policy decision*

The exposure draft includes an amended definition of security designated aerodrome to incorporate the tiered model (See clause 113).

The exposure draft also clarifies that the Minister is required to provide aviation security services Tier 1 security designated aerodromes.

*We are seeking feedback on the following questions*

- Does the current drafting in the exposure draft achieve this policy decision?
- Are there any unintended consequences as a result of the drafting?

### **Enabling New Zealand Defence Force personnel to act as ASOs**

| Act |                | Exposure draft |   |
|-----|----------------|----------------|---|
| 2   | Interpretation | 5              | Interpretation  |
|     | New insertion  | 157            | Powers of members of Armed Forces when providing aviation security services |

188. There may be times when Avsec needs additional resource, for example, if there is a significant security incident and additional screening is necessary at very short notice.

#### *Policy decision*

The exposure draft enables defence force personnel to act as ASOs.

This is subject to section 9 of the Defence Act 1990, which places limitations on when and how armed forces may be used to provide public services.

#### *We are seeking feedback on the following questions*

- Does the current drafting in the exposure draft achieve this policy decision?
- Are there any unintended consequences as a result of the drafting?

### **Notices of Direction made under section 77A**

| Act |   | Exposure draft |   |
|-----|---|----------------|---|
| 77A | Powers and duties of Minister to require screening, searching and seizing | 144            | Power of Minister to require screening, searching and seizing |

189. Under section 77A of the CA Act, the Minister may direct an aviation security provider through a notice of Direction published in the Gazette, to screen and search people, items, substances or vehicles.
190. During recent work undertaken in aviation security it was identified that the existing section does not allow for the Minister's authority to be delegated to any other person, for example, the Director.
191. At times it may be necessary for the Director to excuse a particular flight from screening required under a section 77A Direction. For example, a last minute airline schedule change, where an airline (at an airport where Avsec is currently not present) substitutes an aircraft of 90 or fewer passenger seats with an aircraft of over 90 seats.

192. Under the current section 77A, only the Minister could make this decision, which is likely to be time-consuming and impracticable. This discretion is necessary if it is a day-to-day operational and technical matter that is better determined by the Director.

*Policy decision*

The exposure draft enables the Minister to delegate to the Director the power to excuse any flight from any screening requirements.

*We are seeking feedback on the following questions*

- Does the current drafting in the exposure draft achieve this policy decision?
- Are there any unintended consequences as a result of the drafting?

***Addition of ‘airlines’ to the list of organisations permitted to provide aviation security services***

| Act   |  | Exposure draft |  |
|-------|--|----------------|--|
| 79(1) | Authorised aviation security service providers | 124            | Authorised aviation security service providers |

193. Section 79 of the CA Act provides that regulated aviation security services under the CA Act may be provided by either Avsec or the operator of the aerodrome or navigation facility.
194. However, section 79A of the CA Act also allows the Minister of Transport, by *Gazette* notice, to specify that only Avsec can provide regulated aviation security services. The then Minister of Transport issued such a notice in 1997,<sup>5</sup> which is still in place.
195. To enable future flexibility in the delivery of regulated aviation security services, the exposure draft includes ‘airlines’ as a third potential authorised provider of regulated aviation security services.
196. At this time, there are no proposed changes to the monopoly afforded to Avsec to provide aviation security services. If consideration were to be given to removing Avsec’s monopoly on the provision of regulated aviation security services, a full impact analysis would need to be undertaken before any decision was made.
197. However, this addition will provide a further option as to who can provide regulated aviation security services in the future, if this was required.
198. This amendment has no impact on the standards of service required of a regulated aviation security provider as set out in Civil Aviation Rules.

<sup>5</sup> <https://gazette.govt.nz/notice/id/1997-go3702>

### *Policy decision*

The exposure draft includes 'airlines' as an authorised provider of regulated aviation security services.

### *We are seeking feedback on the following questions*

- Under clause 130, an authorised aviation security service provider, which would include airlines in the exposure draft, must designate aviation security officers. Those designated aviation security officers have all the powers of an Avsec Officer, except the power to arrest and detain. We are interested in stakeholder feedback on whether this is a reasonable limitation or whether it is likely to result in undesired outcomes?
- Does the current drafting in the exposure draft achieve this policy decision?
- Are there any unintended consequences as a result of the drafting?

### **Replacing consent requirements in section 79A of the CA Act with consult**

| Act |  | Exposure draft |   |
|-----|--|----------------|---|
| 79A | Authorised aviation security service providers | 127            | Minister may specify only Avsec to provide security at an aerodrome or installation |

199. Pursuant to section 79 of the CA Act, the provision of aviation security services at a security designated aerodrome or navigation installation can only be provided by Avsec or the operator of the aerodrome/installation.
200. The CA Act allows the Minister, by *Gazette* notice, to specify that only Avsec can provide regulated aviation security services at a specific security designated aerodrome or installation. The effect of such a decision by the Minister is to prevent other existing and potential providers from providing aviation security services at that security designated aerodrome/installation.
201. The CA Act provides some protection for any provider already permitted to provide regulated aviation security services in the event that a Minister decides to issue a Notice under section 79A. That is, the Minister must obtain the consent of that provider before issuing the Notice. This provision is potentially problematic in that consent could be refused, which may unreasonably restrict the Minister's decision-making authority.
202. At present, this is a hypothetical problem due to a decision by the then Minister of Transport in 1997 to issue a Notice under section 79A, specifying that only Avsec can provide regulated aviation security services. However, the issue could arise in future if:
  - the Minister decides to revoke the Notice
  - a new provider is permitted to provide regulated aviation security services

- the Minister then decides to issue another Notice under section 79A
- the new provider refuses consent.

*Policy decision*

The exposure draft replaces the requirement for “consent” with a requirement to “consult”. The Minister of Transport must consult with both the relevant provider and the Director. This will mean the Minister must consider both the interests of the provider, and through the Director, any interests of civil aviation safety and security.

*We are seeking feedback on the following questions*

- Does the current drafting in the exposure draft achieve this policy decision?
- Are there any unintended consequences as a result of the drafting?

***Assaulting an Aviation Security Officer (ASO) and killing, injuring or obstructing an Avsec dog***

| Act           | Exposure draft |  |
|---------------|----------------|--|
| New insertion | 161            | Threatening or assaulting aviation security officer    |
|               | 162            | Obstruction or interference with aviation security dog |
|               | 163            | Killing or injuring aviation security dog              |

203. It is important that protections for law enforcement officers and the tools they use are consistent across regulatory regimes. There are offences for assaulting Customs, Police and Corrections officers, and a dog used by those officers, but no equivalent offence for an ASO and the dogs they use. The Bill includes three offences for:

- assaulting an ASO
- killing or injuring a dog used by an ASO
- obstructing a dog used by an ASO.

### *Policy decision*

The exposure draft establishes specific offences, consistent with similar offences found in the Summary Offences Act 1981, the Corrections Act 2004 and the Customs and Excise Act 2018, of:

- harming an ASO
- harming or obstructing an Avsec dog.

### *We are seeking feedback on the following questions*

- Does the current drafting in the exposure draft achieve this policy decision?
- Are there any unintended consequences as a result of the drafting?

### **Airport identity cards (AIC)**

| Act |  | Exposure draft |  |
|-----|--|----------------|--|
| 84  | Security areas and security enhanced areas | 114            | Security areas and security enhanced areas       |
|     |  | 116            | Providing evidence of identity and authority     |
|     |  | 117            | Authorised person may seize evidence of identity |

204. The CA Act prohibits people from entering or being in a security/security enhanced area unless they wear an AIC or other ID approved by the Director, and are authorised. AICs are only issued to people who receive a favourable security check determination. Some issues exist with the way the AIC system is set out in the CA Act and Civil Aviation Rules.

#### Inconsistency relating to the production of AIC

205. Section 84(3) of the CA Act requires a person to produce for an “aviation security officer” their authority to be in a security or security enhanced area. Civil Aviation Rule 19.357(e) requires a person to produce for an “authorised person” their AIC or other identity document. There is no definition of authorised person.

206. This issue is addressed in the exposure draft by amending the CA Act to make the requirement in section 84(3) in relation to a request by an “authorised person”.

## Seizure of AIC

207. Following on from the above issue, at present there is no ability under the CA Act or Rules for Avsec (or any other person) to seize any AIC or other identity document. While section 24 of the CA Act gives general authority for a person authorised by the Director to require the production of any other document required to be kept under the CA Act – an AIC does not fit into the category of being required to be ‘kept’.
208. The proposal is to clarify that an “authorised person” may seize any AIC or other identity document approved by the Director (but doesn’t include any identity document that is the property of another agency) to determine whether the person is authorised to be present in any security or security enhanced area.
209. A consequential provision will need to be inserted into Civil Aviation Rule 19.357.

### *Policy decision*

The exposure draft addresses these issues by:

- requiring people in security and security enhanced areas to produce, on request by authorised employees of the CAA (including Avsec) AIC or other identity documents
- giving Avsec the authority to seize an AIC or other identity documents when they are being used in breach of the CA Act or Civil Aviation Rules, or, are being used in circumstances where authorisation has been withdrawn, or where the AIC has expired
- addressing minor inconsistencies in terminology between the CA Act and Civil Aviation Rules.

### *We are seeking feedback on the following questions*

- Does the current drafting in the exposure draft achieve this policy decision?
- Are there any unintended consequences as a result of the drafting?

## ***In Flight Security Officers***

|                    |                    |
|--------------------|--------------------|
| Act                | Exposure draft     |
| Latent legislation | Latent legislation |

210. In Flights Security Officers (IFSOs), also known as air marshals or flight marshals, are covert law enforcement or counter-terrorist agents on board commercial aircraft to counter aircraft hijackings. IFSOs may be provided by airlines or by government agencies.

211. Under current legislation, two steps would be needed to allow IFSOs to operate in New Zealand:
- 211.1. by Order in Council, bring into force *latent*<sup>6</sup> provisions in the Civil Aviation Amendment Act 2007 and the Aviation Crimes Amendment Act 2007; then
- 211.2. having an IFSO agreement between another State and New Zealand.
212. These latent provisions have been in place since 2007. The exposure draft Bill will retain this approach, at this time by simply reflecting provisions from the Civil Aviation Amendment Act 2007 relating to IFSOs. At this time, the commencement clause of the Bill will provide for these provisions to only come into force by a subsequent Order in Council, as is currently the case.

*Policy decision*

The exposure draft reflects provisions from the Civil Aviation Amendment Act 2007 relating to IFSOs. At this time, the commencement clause of the Bill will provide for these provisions to only come into force by a subsequent Order in Council, as is currently the case.

*We are seeking feedback on the following questions*

- Does the current drafting in the exposure draft achieve this policy decision?
- Are there any unintended consequences as a result of the drafting?

***Infringement offence for being found in a security area without being screened, or without authorisation.***

| Act           | Exposure draft |  |
|---------------|----------------|--|
| New insertion | 159            | Being present in security area or security enhanced area without being screened or when not authorised |

213. Section 84 of the CA Act allows the Director to create security and security enhanced areas at security designated aerodromes. It also establishes strict controls as to who may and may not enter those areas. This section is central to aerodrome security.
214. People who avoid the security screening, or who enter a security or security enhanced area when not authorised, create significant security risks. For example, when an individual avoids screening and enters the sterile area, this can require rescreening of all those already in this area. This results in delays and substantial costs for a number of entities operating in an aerodrome and passengers.

<sup>6</sup> Provisions that have been enacted but not yet brought into force.

215. While the CA Act imposes clear legal controls over entry to the security and security enhanced areas, it lacks corresponding offence provisions.
216. With passenger volumes passing through New Zealand's airports continuing to increase, it is important that the screening requirements are understood and adhered to.

*Policy decision*

The exposure draft includes an infringement offence for being found in a security area without having been screened, or without authorisation under the Act or Civil Aviation Rules.

*We are seeking feedback on the following questions*

- Does the current drafting in the exposure draft achieve this policy decision?
- Are there any unintended consequences as a result of the drafting?

***National security considerations within the civil aviation system***

| Act           | Exposure draft |  |
|---------------|----------------|--|
| New insertion | 67             | Application requiring national security assessment                                   |
|               | 279            | Powers of Minister on grounds of national security                                   |
|               | 280            | Review procedure in relation to notice under clause 279                              |
|               | 281            | Effect of disqualification by Minister   |
|               | 282            | Commencement of period of disqualification by Minister                               |
|               | 283            | Retention and custody of document following disqualification by Minister             |
|               | 284            | Offences relating to breach of notice given by Minister on national security grounds |
|               | 50             | Rules relating to national security  |

218. The Outer Space and High-altitude Activities Act 2017 (the OSHAA Act) was enacted in response to the commencement of space launches in New Zealand. This legislation creates a licencing regime to ensure proper consideration of a variety of concerns relating to a launch, including national security.
219. There is the potential for a range of technologies being developed that operate at high altitudes<sup>7</sup> to also operate in lower regions of New Zealand's airspace, with the same national security concerns applicable. The activities using this technology are not subject to the OSHAA Act but are subject to the civil aviation regulatory regime.
220. The CA Act and Civil Aviation Rules regulate aviation safety and security including (but not limited to) personal security. Security in this context relates to civil aviation security. This is relatively narrow in scope—only covering safety risks arising from the carriage of dangerous goods and the risk to aviation security by unlawful interference with an aircraft. Security in this context does not extend to national security concerns.
221. The potential exists that operators or operations may not represent a safety or security concern, but do represent a national security risk. For example, an operator may have satisfied all safety and security requirements enabling them to operate in the civil aviation system, but may represent a risk to New Zealand's national security interest. In this circumstance, where a national security risk exists, civil aviation regulation should enable the mitigation of those risks.

#### *Policy decision*

The exposure draft incorporates national security considerations through the purpose statement, and by providing the Minister with the ability to direct the Director of Civil Aviation, on the basis of national security concerns, to take a particular action in regard to a specific operator, including:

- preventing entry of an operator or operation into the civil aviation system
- imposing conditions on any operator or operation
- removing any operator or operation from the civil aviation system.

#### *We are seeking feedback on the following questions*

- Does the current drafting in the exposure draft achieve this policy decision?
- Are there any unintended consequences as a result of the drafting?

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<sup>7</sup> High altitude activities are those activities taking place above the upper limit of controlled airspace (i.e. above 60,000 feet or approximately 18km from the ground).

## Legislative framework

### *Transport instruments*

| Act   |  | Exposure draft |  |
|-------|--|----------------|--|
| 28(5) | Power of Minister to make ordinary rules | 349            | Director may make transport instruments      |
|       |  | 350            | Procedures relating to transport instruments |

222. Appropriate mechanisms enabling the regulatory system to anticipate and respond to changing circumstances, while providing certainty and ease of access to requirements for users are desirable. Overall, the regime is well placed to meet this regulatory stewardship challenge but there are opportunities for improvement. One area for improvement is the ability for the Minister, through Civil Aviation Rules, to leave matters to the Director to determine (e.g. issues requiring relatively frequent adjustment or that are highly technical in nature resulting in Rules becoming out of date and the regulatory system having to play catch-up to remove unnecessary barriers and compliance costs).
223. The CA Act provides for the Director or other persons to be given flexibility in Rules to set requirements or conditions. The Rules currently use this flexibility to leave some matters to be set out in a Civil Aviation Authority Notice, which could be either administrative or legislative (i.e. law-making) in nature – noting that the boundary between administrative and legislative action is inherently uncertain.
224. It is proposed that a power be created for the Director to make “transport instruments” for the purposes of Rules or regulations, similar to those existing in other legislation. Existing provisions that provide for the Director and other persons to set requirements, impose conditions or carry out approvals or activities under the Rules will be retained.
225. The key control on transport instruments is that their scope and use would be determined by the Minister – they would have no effect except to the extent that a Rule or a regulation refers to them. For example, the Minister could make a Rule that provides for a transport instrument to set alternative means of compliance to cater for new technologies, or to set additional requirements to meet a Rule. The Minister could subsequently change the Rule to remove or limit the use of transport instruments.
226. The following additional safeguards would also apply:
- transport instruments are disallowable instruments – so Parliament can scrutinise them through the Regulations Review Committee
  - the Director must consult before issuing a transport instrument
  - transport instruments must be published in the *Gazette*, and be made available online and in hard copy<sup>8</sup>.

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<sup>8</sup> Once the Legislation Bill is enacted, they would be made by being notified on the Legislation.govt.nz website.

*Policy decision*

The exposure draft creates an additional power for the Director to make “transport instruments” pursuant to Rules.

*We are seeking feedback on the following questions*

- Does the current drafting in the exposure draft achieve this policy decision?
- Are there any unintended consequences as a result of the drafting?

**Amalgamation of the CA and AA Acts**

227. It is proposed that the CA Act and the AA Act will be repealed, and re-enacted as a single statute, to remove the risk of inconsistency between the two pieces of legislation and make it easier for stakeholders to engage with the regulatory regime.

*Policy decision*

The exposure draft incorporates both the CA Act and the AA Act.

*We are seeking feedback on the following questions*

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

**Purpose statement**

| Act                               |                            | Exposure draft |                              |
|-----------------------------------|----------------------------|----------------|------------------------------|
| New insertion – purpose statement |                            | 3 and 4        | Main and additional purposes |
| 72AA                              | Objective of the Authority | 22             | Objective of CAA             |

228. It is common to include purpose statements in modern legislation to provide guidance and clarity about what the Act is intended to achieve, guide statutory decisions made under the Act and help guide interpretation of its provisions.

229. Neither the CA Act or the AA Act include purpose statements.

*Policy decision*

The exposure draft includes a purpose statement. Objectives for the CAA have also been amended in the exposure draft to be consistent with the main purpose statement.

*We are seeking feedback on the following questions*

- Does the purpose statement accurately capture the purpose of the Act, and sufficiently aid interpretation of its provisions?
- Does the current drafting in the exposure draft achieve this policy decision?
- Are there any unintended consequences as a result of the drafting?

**Structure of Part 8 of the CA Act containing aviation security provisions**

| Act    | Exposure draft |
|--------|----------------|
| Part 8 | Part 6         |

230. Part 8 of the CA Act (Part 6 in the exposure draft) contains aviation security provisions. The security amendments outlined in this paper and several amendments to Part 8 in the past decade, mean that it would be useful to make improvements to the structure of the Part to aid interpretation and improve the usability of the section.

*Policy decision*

Part 8 of the exposure draft is designed to enhance usability of the security provisions.

*We are seeking feedback on the following questions*

- Does the current drafting in the exposure draft achieve this policy decision?
- Are there any unintended consequences as a result of the drafting?

**Offence provisions relating to the Levies Order**

| Act           | Exposure draft |                                     |
|---------------|----------------|-------------------------------------|
| New insertion | 344            | Offences in relation of levy orders |

231. Aviation operators' levies under the Levies Order are calculated from activity returns that operators must provide to the CAA. However, the CA Act provides no explicit sanctions connected to a failure to provide an activity return or for providing a misleading or false return.
232. The returns provide information, according to the type of operation, on the amount of passengers or freight carried and the number of hours flown or flights made, or the amount of agricultural products applied.

233. Without the ability to appropriately address non-compliance, the CAA may not be in a position to ensure it receives accurate statistical data and prompt payment of levies to support its operations.
234. Other legislation that relies on the submission of returns to provide information that is the basis for levy calculations also contain corresponding offence provisions to ensure compliance. These include the Biosecurity Act 1993, the Customs and Excise Act 2018 and the Fisheries Act 1996.
235. These statutory offences reflect the importance of maintaining the integrity of the respective cost recovery regimes and ensuring consistent compliance by levy payers. The type of conduct that the offences cover is the same as the conduct that the CAA is concerned with in relation to administration of the Levies Order.
236. The context of the individual case would determine how the offence provisions are applied. The CAA would take into account the circumstances that give rise to non-compliance. If the participant has made a genuine error, or uncharacteristically broken a regular pattern of reporting, the CAA is more likely to issue a reminder, rather than charge the participant with an offence.
237. The CAA is more likely to use the proposed new offence provisions in full if the participant has a record of not reporting, or has deliberately mis-reported information.
238. Penalties for the offences will need to be sufficient to deter operators from providing inaccurate returns but consistent with penalties for comparable offences under the CA Act.
239. These statutory offences reflect the importance of maintaining the integrity of the respective cost recovery regimes and ensuring consistent compliance by levy payers.

#### *Policy decision*

The exposure draft includes new offences for:

- failure to keep or maintain records as required by a levy order under the CA Act
- failure to submit an activity order as required by a levy order
- knowingly providing an activity return that is false or misleading.

#### *We are seeking feedback on the following questions*

- Does the current drafting in the exposure draft achieve this policy decision?
- Are there any unintended consequences as a result of the drafting?

### **Minor changes relating to levies**

| Act |                                    | Exposure draft |                                    |
|-----|------------------------------------|----------------|------------------------------------|
| 42C | Levies are confirmable instruments | N/A            |                                    |
| 42A | Governor-General may impose levies | 340            | Governor-General may impose levies |

240. The CA Act allows the Governor-General to impose levies on participants to ensure the CAA is appropriately funded to carry out its functions under the Act.
241. Levies can currently be prescribed by setting levy rates. This proposal amends the levy powers, to provide that levy regulations may also prescribe the basis on which the rate is to be calculated to provide greater flexibility in how aviation-related levies are prescribed. It would allow, for instance, the ability to set levies by a formula or within a range that adjusts based on estimated and actual over-recovery or short-falls in costs. This change would modernise the provisions and align them with levy powers in similar legislation, such as the Customs and Excise Act 2018.

#### *Policy decision*

The exposure draft provides that levy regulations may also prescribe the basis on which the rate is to be calculated to provide greater flexibility in how aviation-related levies are calculated

243. Levy orders under the CA Act are confirmable instruments which must be specifically confirmed by the House of Representatives. This serves no practical or constitutional purpose, because levy payers are able, and do, seek Regulations Review Committee investigations of levy regulations under the disallowance process and confirmation is unusual for this kind of levy.

#### *Policy decision*

The exposure draft omits the confirmation requirement.

245. Section 42A(3)(b) of the CA Act states that the Minister must be satisfied that the CAA's income from other sources is not or will not be sufficient to enable it to perform its functions under this Act without the imposition of a levy at the rate recommended. This section, if read strictly, is inconsistent with relevant Treasury guidelines and Transport Funding Principles, which tends towards regulators being predominantly funded from levies on participants, rather than Crown (taxpayer) funded.

#### *Policy decision*

The exposure draft removes this requirement.

247. Currently under the Civil Aviation Act, levies may only be imposed on holders of aviation documents, or persons who, but for an exemption granted under the Act, would be required to hold a document. This means that levies can be made payable by certain groups of persons who benefit from, operate within and impose a cost on the system, but do not hold an aviation document (such as uncertificated drone operators).

*Policy decision*

The exposure draft expands the levy making power to allow the collection of levies from all aviation participants.

*We are seeking feedback on the following questions*

- Does the current drafting in the exposure draft achieve these policy decisions?
- Are there any unintended consequences as a result of the drafting?