

LIV DONOVAN-GRAMMER

**‘DON’T SHOOT THE MESSENGER’:
GREATER JUST CULTURE PROTECTIONS
REQUIRED FOR AVIATION PROFESSIONALS
UNDER THE CIVIL AVIATION ACT 2023**

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Abstract

The Civil Aviation Act 2023 (the Act) provides insufficient just culture protections for members of the New Zealand aviation industry. Whilst the introduction of the just culture policy approach into New Zealand aviation law is a welcomed legislative development, serious concerns arise over the application of the just culture framework in practice. This paper addresses two central issues with the intended framework. First, the uncertain circumstances in which aviation professionals who report occurrences may be prosecuted under s 341 of the Act is critiqued. The vague term “public interest” concerningly represents the sole fetter on the Director of Civil Aviation’s otherwise unbridled powers of enforcement action. The section must be limited to only allow prosecution in cases that meet the just culture standard: those involving wilful misconduct, gross negligence, or recklessness. Further, despite the ability of the Civil Aviation Authority (CAA) to bring enforcement proceedings, the industry regulator is empowered by the legislation, and without adequate safeguards, to conduct safety investigations into occurrences. This function of the CAA under s 23(e) constitutes a serious conflict of interest and flouts international civil aviation standards that require the independence of safety investigations from state aviation authorities. Safeguards around these investigations must be incorporated into the Act.

Keywords: “Just culture”, “Prosecution”, “Safety investigations”, “Civil Aviation Authority”, “Civil Aviation Act 2023”.

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I Introduction

A DC-10 aircraft's collision with the northern slopes of Mount Erebus in Antarctica on 28 November 1976, killed all 257 people on-board in the Mount Erebus disaster.¹ The reports following investigations into the tragedy, the worst aviation accident in New Zealand history, exposed its systemic causes.² Whilst the official accident report attributed the accident's main probable cause to pilot error, it criticised Air New Zealand's management practices surrounding sightseeing flights.³ The main cause according to the judicial report was the airline officials' failure to notify aircrew of the changed programmed flight plan.⁴ If high-technology system industries had learnt from this report to identify systemic causes including latent failures like organisational deficiencies, disasters like Chernobyl were preventable.⁵ Importantly, Erebus highlights the need for a proper implementation of just culture. Since Erebus, the aviation industry has adopted a proactive, systemic approach to safety management,⁶ recognising that uniformly blaming human actors for accidents is unfair and ignores that accidents are often also caused by a range of systemic factors.⁷ State safety programmes pre-emptively identify safety hazards to manage risks and prevent accidents, necessitating efficient processes like safety reporting systems and safety occurrence investigations that give timely and accurate feedback.⁸ Just culture protections that clearly limit when aviation professionals can face blame and punishment for occurrences is crucial to ensuring they report safety-related information, which the Civil Aviation Act 2023 (the Act) largely lacks.

¹ Peter Mahon *Verdict on Erebus* (Collins, Auckland, 1984) at 9.

² Office of Air Accidents Investigation *Air New Zealand McDonnell-Douglas DC10-30 ZK-NZP Ross Island, Antarctica 28 November 1979* (Aircraft Accident Report No. 79-139, 12 June 1980) at 33-35; Royal Commission *Report of the Royal Commission to inquire into The Crash on Mount Erebus, Antarctica, of a DC10 Aircraft operated by Air New Zealand Limited 1981* (27 April 1981) at [393].

³ Office of Air Accidents Investigation, above n 2, at 33-35.

⁴ Royal Commission, above n 2, at [393].

⁵ International Civil Aviation Organization *ICAO Circular (Circular 247-AN/148) - Human Factors Digest No 10: Human Factors, Management and Organization* (1994) at 44-45.

⁶ International Civil Aviation Organization, Annex 19 to the Convention on International Civil Aviation: Safety Management (2nd ed, 2016) at ix.

⁷ Samantha Sharif "The Failure of Aviation Safety in New Zealand: An Examination of New Zealand's Implementation of Its International Obligations under Annex 13 of the Chicago Convention on International Civil Aviation" (2003) 68 J Air L & Com 339 at 346.

⁸ SKYbrary "Safety Management" <www.skybrary.aero>.

The Act will come into force from 5 April 2025.⁹ The Act intends to streamline and modernise New Zealand aviation law, its primary purpose being to achieve “a safe and secure civil aviation system.”¹⁰ Another parliamentary purpose is to implement New Zealand’s international obligations.¹¹ Both purposes are eroded by the weak just culture protections the Act provides. This paper analyses two central ways the Act fails to sufficiently protect aviation professionals, with the overall concern that safety is not being maximised in New Zealand aviation. Section 341 concerns when the Civil Aviation Authority (CAA) can take enforcement action against aviation professionals who report occurrences. Although the section was intended as a just culture protection, it is too broad to encourage those involved in occurrences to report them without fear of reprisal. Further, the involvement of the CAA in safety investigations, prescribed by s 23(e), compromises their independence which will harm safety. Submissions on the Civil Aviation Bill 2021 raise similar concerns, and this paper seeks to elaborate on the reasons these sections need amendment.¹²

Part II argues for a just culture approach and contends that an effective just culture must be comprehensively incorporated into legislation. Part III describes New Zealand’s current regulatory context wherein the industry widely distrusts the regulator and doubts the ability of the current laws to protect their professional and safety interests, the legislative safeguards being weak. Part IV outlines the intended statutory framework under the Act. This framework is critiqued in Parts V and VI on the grounds of it insufficiently promoting safety and confidence in the regulator. The relevant sections are compared to the international standard and to regulatory approaches in other jurisdictions. An approach that closely aligns with just culture is argued to best protect aviation safety. Part V addresses the weak protections for aviation professionals under s 341 and recommends the Act confine the circumstances in which individuals can be prosecuted to prescribed behaviours to promote certainty and trust. Part VI emphasises the dangers of the CAA’s ability under s 23(e) to investigate occurrences as the responsible safety

⁹ Ministry of Transport “Civil Aviation Act” <www.transport.govt.nz>.

¹⁰ Civil Aviation Act 2023, s 3.

¹¹ Section 4(c).

¹² New Zealand Air Line Pilots’ Association *New Zealand Air Line Pilots’ Association Submissions on Civil Aviation Bill* (2021) at 34, 40-42, 45-50; New Zealand Law Society *Submissions on the Civil Aviation Bill 2021* (2021) at 12-13.

authority and recommends the Act incorporate safeguards surrounding CAA safety investigations.

II The Importance of a Legitimate Just Culture

A Just Culture Approach

A just culture is an atmosphere of trust within a system's culture that encourages participants to report safety information without fearing unjustified punishment, enabling the system to learn from mistakes. The European Organisation for the Safety of Air Navigation (EUROCONTROL), an intergovernmental organisation responsible for the coordination of European airspace traffic, defines "just culture" as:¹³

A culture in which front line operators or others are not punished for actions, omissions or decisions taken by them that are commensurate with their experience and training, but where gross negligence, wilful violations and destructive acts are not tolerated.

In the aviation context, human errors refer to "unintentional action[s]" and are not punished, whereas gross negligence and violations are considered "intentional failures" which may be prosecuted.¹⁴ Just culture acknowledges different levels of culpability for occurrences, which can be classified as accidents or incidents. An accident is where "a person is fatally or seriously injured", "the aircraft sustains damage or structural failure" or "the aircraft is missing or is completely inaccessible" as a result of the operation of an aircraft.¹⁵ An incident is any other occurrence that affects or could affect the safety of an aircraft's operation.¹⁶ A just culture is not a no-blame culture: it sanctions the minority of

¹³ European Organisation for the Safety of Air Navigation *Establishment of "Just Culture" Principles in ATM Safety Data Reporting and Assessment* (2006) at 11.

¹⁴ Francesca Pellegrino *The Just Culture Principles in Aviation Law* (Springer International Publishing, Cham, 2019) vol 3 at vii.

¹⁵ Civil Aviation Act 2023, s 6; International Civil Aviation Organization, Annex 13 to the Convention on International Civil Aviation: Aircraft Accident and Incident Investigation (12th ed, 2020), at 1-1; Civil Aviation Rules, pt 1.

¹⁶ Civil Aviation Act 2023, s 5; International Civil Aviation Organization, above n 15, at 1-2; Civil Aviation Rules, pt 1.

behaviours considered “egregious” which is imperative to its credibility.¹⁷ David Marx categorised three types of unsafe behaviour: ‘human error’, ‘at-risk behaviour’ and ‘reckless behaviour’.¹⁸ Forms of ‘reckless behaviour’: gross negligence, recklessness and wilful misconduct are punishable in a just culture,¹⁹ whereas other behaviours are handled differently, for instance, through remedial action such as re-training or improved supervision.²⁰ Whilst reckless behaviour is unacceptable and can be sanctioned to uphold the system’s integrity, recognise harm to others and allow for the administration of justice, a non-punitive environment should otherwise be encouraged. EUROCONTROL emphasises, “a legal framework that supports reporting and investigation of incidents in the spirit of a non-punitive environment” is crucial to a just culture.²¹ This means legal protections for reporters must specify the level of culpability required for enforcement action, and safety investigations into occurrences must be kept separate from judicial and administrative proceedings that intend to ascribe blame.

A just culture is preferable to a blame culture.²² A blame culture aims to deter misconduct by criminalising all errors: unintentional mistakes are not distinguished from deliberate violations.²³ A concerning global trend exists towards prosecuting aviation professionals for errors causing occurrences²⁴ but prosecuting errors is not proven to help achieve judicial aims of rehabilitation, retribution or prevention.²⁵ New Zealand health professionals can only be prosecuted for gross negligence rather than ordinary negligence.²⁶ This is appropriate as few health or aviation professionals intend to harm

¹⁷ James Reason “Achieving a safe culture: Theory and practice” (1998) 12 *Work Stress* 293 at 303.

¹⁸ Pellegrino, above n 14, at 18.

¹⁹ At 18.

²⁰ European Organisation for the Safety of Air Navigation, above n 13, at 13.

²¹ At 24.

²² James Reason *Managing the Risks of Organizational Accidents* (Routledge, 1997) at 293; Sidney Dekker and Hugh Breakey “‘Just culture:’ Improving safety by achieving substantive, procedural and restorative justice” (2016) 85 *Safety Science* 187 at ch 1; Pellegrino, above n 14, at 83.

²³ Pellegrino, above n 14, at 83.

²⁴ Sidney Dekker “The criminalization of human error in aviation and healthcare: A review” (2011) 49 *Safety Science* 121 at 121; Pellegrino, above n 14, at vii; John Woodlock “Procedural justice for all? Legitimacy, just culture and legal anxiety in European civil aviation” (2022) 56 *LSR* 441 at 441.

²⁵ Sidney Dekker *Just Culture* (3rd ed, CRC Press, London, 2018) at ch 3.

²⁶ Crimes Act 1961, s 155.

others; the unsafe behaviour occurs during their highly technical work.²⁷ Since the mid-1990s aviation occurrences have been viewed through an organisational accident perspective, that appreciates not only human and technical factors but also systemic factors.²⁸ Occurrences, “are more likely to be attributable to a complex culmination of systemic factors, with the pilot merely being the last causative link in the chain.”²⁹ Effective safety management systems (SMS) depend on a high quality and volume of safety information that can be used to prevent occurrences.³⁰ For a safety reporting system to be widely used it must be trusted by participants, which requires organisations to fairly manage culpability.³¹ A just culture where acceptable and unacceptable behaviour are distinguished and this distinction is understood by participants is therefore crucial to an effective reporting culture, which is necessary for an informed safety culture.³²

The promotion of a just culture is the internationally accepted aviation practice.³³ New Zealand is a party to the 1944 Convention on International Civil Aviation (the Convention) which formed the International Civil Aviation Organization (ICAO), a United Nations agency.³⁴ Annexes to the “Chicago Convention”, created by the ICAO Council, prescribe international Standards and Recommended Practices (SARPs) in aviation.³⁵ A consensus was reached at a March 2006 ICAO conference, to commit to reinforcing the global aviation safety framework through promoting a just culture.³⁶ Annexes 13 and 19 prescribe a just culture approach by affording protections to safety

²⁷ Alan F Merry “Mistakes, Misguided Moments, and Manslaughter” (2009) 41 JECT 2 at 4-5; Sharif, above n 7, at 346.

²⁸ International Civil Aviation Organization *Safety Management Manual (Doc 9859)* (2018) at [2.1.4]-[2.3.4].

²⁹ Sharif, above n 7, at 346.

³⁰ Kevin J McMurtrie and Brett RC Molesworth “Australian Flight Crews’ Trust in Voluntary Reporting Systems and Just Culture Policies” (2018) 8 APAHF 11 at 11.

³¹ Reason, above n 17, at 302.

³² At 293.

³³ Pellegrino, above n 14, at 126; Elaine D Solomon and Dina L Relles “Criminalization of Air Disasters: What Goal, if Any, is Being Achieved” (2011) 76 J Air L & Com 407 at 451; Christopher Griggs “Just Culture and Accountability for Flight Safety Events in Australia and New Zealand” (2014) 79 J Air L & Com 441 at 442.

³⁴ Convention on International Civil Aviation 15 UNTS 295 (opened for signature 7 December 1944, entered into force 4 April 1947).

³⁵ International Civil Aviation Organization, above n 34, art 54(1).

³⁶ International Civil Aviation Organization *Directors General of Civil Aviation Conference on a Global Strategy for Aviation Safety* (2006) at 2-1.

data and reporters and maintaining a separation between safety investigations and administrative and judicial proceedings.³⁷ Under the Civil Aviation Act 1990, Samantha Sharif and Christopher Griggs observed New Zealand lacked compliance with Annex 13.³⁸ Griggs noted New Zealand’s potential to be a global leader in just culture implementation, although this “remain[ed] to be seen”.³⁹ Thirty-three years later, Parliament has largely failed to meet this challenge with the Act: whilst safety information is better protected, safety investigations and prosecutions do not embody just culture. Although SARPs are soft law which states can opt out of through notifying legal differences,⁴⁰ signatories have a responsibility to ensure their domestic law aligns with SARPs as uniformly as practicable.⁴¹

B Legal Implementation of Just Culture

Studies reveal that the threat of punishment deters reporting whereas trust in the just culture of the regulator and service providers encourages reporting. The studies also suggest a correlation exists between the legal incorporation of a just culture, in which safety information and reporters are strongly protected, and increased reporting. Kevin McMurtrie and Brett Molesworth’s 2018 study on voluntary reporting revealed 35.47% of 234 Australian-based pilots were unconfident in their airline’s SMS just culture policy, and 33.76% had failed to report an occurrence using their organisation’s SMS.⁴² The main reason respondents did not report was due to their concerns that the information could be used against them (59.49%).⁴³ Over one-third were concerned about how their regulatory authority would use the information.⁴⁴ Approximately three quarters of unconfident pilots had failed to report, partially reported or both, compared to 42.10% of confident pilots.⁴⁵

³⁷ International Civil Aviation Organization, above n 15; International Civil Aviation Organization, above n 6.

³⁸ Sharif, above n 7, at 383; Griggs, above n 33, at 462.

³⁹ Griggs, above n 33, at 462.

⁴⁰ International Civil Aviation Organization, above n 34, art 38; Paul Stephen Dempsey “Compliance & Enforcement in International Law: Achieving Global Uniformity in Aviation Safety” (2004) 30 NC J INTL L 1 at 14; Griggs, above n 33, at 447.

⁴¹ International Civil Aviation Organization, above n 34, art 37.

⁴² McMurtrie and Molesworth, above n 30, at 14.

⁴³ At 14.

⁴⁴ At 15.

⁴⁵ At 16.

Over half of participants failed to report or partially reported as they feared reprisal from their employer.⁴⁶ Uncertainty surrounding when punishment can occur and distrust in the just culture of the relevant authorities is detrimental to obtaining accurate and abundant safety data. In a comparative study with European Union (EU) pilots, only 7.48% of pilots were unconfident in their airline's just culture: 7.01 times more confident than Australian pilots.⁴⁷ Only 16.58% of respondents did not report an occurrence and less for the reason of fearing reprisal than their Australian counterparts (32.86%).⁴⁸ A likely reason the groups differ is that EU just culture is legally defined and incorporated, directing states not to prosecute unpremeditated or inadvertent legal infringements, whereas Australian just culture is merely advocated by the regulator, the Civil Aviation Safety Authority (CASA).⁴⁹ Another study used MAXQDA software to categorise interview statements of seven commercial aviation safety experts and deduce 36 recurring factors that impact whether pilots voluntarily report a self-inflicted incident.⁵⁰ Factors included 'Trust, general', 'Fear, disciplinary action,' 'Nonpunitive environment' and 'Safety cultural aspects.'⁵¹ The study revealed a relationship between personal and contextual factors, such as between trust and the use of confidential reporting systems, which confirms the 2018 study's findings that a distrust in just culture means pilots do not report.⁵²

Another study initially appears to cast doubt on a correlation between aviation professionals' concerns about legal consequences and an unwillingness to report. John Woodlock examined whether a legal just culture in European Aviation Safety Authority (EASA) States would enhance aircraft maintenance engineers from Norway, Portugal and Sweden's compliance with occurrence reporting requirements through reducing legal anxiety.⁵³ Four-fifths of respondents considered 'fear of legal consequences for not reporting' the least significant reason to report, ranking 'professional duty to uphold

⁴⁶ At 17.

⁴⁷ Kevin J McMurtrie and Brett RC Molesworth "The Impact of a Legally Defined Just Culture on Voluntary Reporting of Safety Information" (2021) 11 APAHF 88 at 90.

⁴⁸ At 90-91.

⁴⁹ At 93.

⁵⁰ Sebastian Sieberichs and Annette Kluge "Why Commercial Pilots Voluntarily Report Self-Inflicted Incidents: A Qualitative Study With Aviation Safety Experts" (2021) 11 APAHF 98 at 98.

⁵¹ At 103.

⁵² At 107.

⁵³ Woodlock, above n 24, at 441.

safety’ and ‘duty to obey legal requirements’ higher.⁵⁴ Woodlock theorises deterrence was enhanced by mandatory reporting requirements now meaning that not reporting attracts criminal sanctions in some EU Member States.⁵⁵ He contemplates that defining just culture and the circumstances in which individuals may be prosecuted also strengthened deterrence, noting 60% of participants were content with EU/EASA regulations.⁵⁶ Whilst criminal sanctions for not reporting may incentivise reporting, considering the above studies,⁵⁷ the likely reason for legal anxiety being the least prevalent is that EU law helps alleviate concerns of reprisal. Just culture encourages reporting beyond any sanctions for not reporting. For example, confidential and non-punitive reporting, except in cases of gross negligence or substance abuse, was incorporated into Danish law in 2001 and non-reporting could be fined.⁵⁸ In one year, air traffic control reports to the provider Naviair increased from 15 to 980.⁵⁹ Under the former system, it was already compulsory for air traffic controllers to report losses of separation between aircraft and such reports could attract punishment.⁶⁰ Two years following the law change, the reports increased from approximately 15 yearly to approximately to 40 to 50.⁶¹ A legal incorporation of just culture encourages reporting.

III New Zealand’s Current Regulatory Context

New Zealand’s civil aviation industry is overseen by the CAA.⁶² The Civil Aviation Act 1990 is the regulatory safety and security framework for New Zealand aviation which establishes aviation rules and ensures New Zealand’s international obligations are implemented.⁶³ Within New Zealand’s current regulatory context there is a distrust in the CAA and minimal protections for reporters of occurrences.

⁵⁴ At 452.

⁵⁵ At 458.

⁵⁶ At 458.

⁵⁷ McMurtrie and Molesworth, above n 30; McMurtrie and Molesworth, above n 47; Sieberichs and Kluge, above n 50.

⁵⁸ European Organisation for the Safety of Air Navigation, above n 13, at 34.

⁵⁹ At 36.

⁶⁰ At 36.

⁶¹ At 36.

⁶² Civil Aviation Authority “What we do” <www.aviation.govt.nz>.

⁶³ Civil Aviation Act 1990, long title.

A The Civil Aviation Authority

The CAA is a Crown entity established in 1992 and New Zealand’s safety regulator for the aviation industry.⁶⁴ The government agency is tasked with ensuring that aviation participants comply with safety and security legal standards in civil aviation set by the Ministry of Transport.⁶⁵ Under the Civil Aviation Act 1990, the CAA can take administrative action against service providers or aviation professionals including to revoke or impose conditions on an aviation document.⁶⁶ The CAA can also take enforcement action, in the form of formal warnings or notices or prosecution.⁶⁷ The CAA conducts both safety investigations which aim to find the causes of occurrences, and investigations into breaches of the Civil Aviation Act 1990 and secondary legislation to apportion blame or liability.⁶⁸

Significant distrust in the CAA exists among industry members, partially due to its poor safety culture. A lack of confidence in the regulator will discourage those involved in occurrences from reporting.⁶⁹ The New Zealand Air Line Pilots’ Association (NZALPA) is an industrial union that represents members of New Zealand’s aviation industry, including over 90% of unionised pilots.⁷⁰ NZALPA has expressed severe distrust in the CAA, stating:⁷¹

Holding CAA to account has been one of NZALPA’s greatest challenges under the Civil Aviation Act 1990. We have often struggled with the impression the regulator is lacking not only in just culture but in the informed, flexible, and learning aspects of positive safety culture too.

The Ministry of Transport expressed concerns about the CAA in 2016, most pressingly, “the industry’s lack of trust of the CAA”, “the accuracy and completeness of the reporting” and “a lack of transparency of CAA processes, including a lack of industry

⁶⁴ Civil Aviation Authority *Civil Aviation Authority 2021-2022: Annual Report* (2023) at 12.

⁶⁵ Civil Aviation Authority, above n 62.

⁶⁶ Section 18.

⁶⁷ New Zealand Government *New Zealand Aviation State Safety Programme* (January 2018) at [1.4.3].

⁶⁸ At [1.4.2].

⁶⁹ McMurtrie and Molesworth, above n 30, at 16; Sieberichs and Kluge, above n 50, at 107.

⁷⁰ New Zealand Air Line Pilots’ Association, above n 12, at 6.

⁷¹ At 8.

awareness.”⁷² Consultation with stakeholders in a 2014 review of the Civil Aviation Act 1990 revealed reporting was hindered by distrust in the regulator and fears that enforcement action would be taken against reporters.⁷³ Strong just culture protections are necessary to improve the reputation of the CAA within the aviation industry.

B Current Legal Framework

The current legislation soon to be surpassed by the Act is the Civil Aviation Act 1990. Under the legislation, a CAA function is to, “investigate and review civil aviation accidents and incidents in its capacity as the responsible safety and security authority”, limited by s 14(3) of the Transport Accident Investigation Commission Act 1990 (the TAIC Act).⁷⁴ Section 14(3) states that no other person can investigate when the Transport Accident Investigation Commission (TAIC) has an investigation in progress without its consent, which should not be unreasonably withheld.⁷⁵ The Director Of Civil Aviation (the Director) can take any appropriate action in the public interest to enforce the legislation.⁷⁶ Safety offences include acts or omissions causing unnecessary danger and operating aircraft in a careless manner.⁷⁷ This is clearly a low bar to liability as neither gross negligence or intention is required. No section prevents enforcement action from being taken against reporters for errors. Civil Aviation Rule 12.63 Non-prosecution states the CAA will not use, or release reported information for prosecution purposes unless, “the information reveals an act or omission that caused unnecessary danger to any other person or to any property.”⁷⁸ The rule is silent as to mens rea and fails to meaningfully limit the circumstances in which reporters may face prosecution. Whether the new framework under the Act would provide greater protections and increase reporting however is dubious.

IV Intended Statutory Framework

⁷² Ministry of Transport *Regulatory Impact Statement: Amendments to the Civil Aviation Act 1990 and Airport Authorities Act 1966: Safety Regulation* (1 July 2016) at 8.

⁷³ At 14.

⁷⁴ Section 72B(2)(d).

⁷⁵ Transport Accident Investigation Commission Act 1990, s 14(3).

⁷⁶ Civil Aviation Act 1990, s 72I(3)(b).

⁷⁷ Sections 43, 44, 43A.

⁷⁸ Civil Aviation Rules, r 12.63.

The Civil Aviation Bill 2021 received royal assent on 5 April 2023.⁷⁹ The Civil Aviation Act 2023 repeals and replaces the Civil Aviation Act 1990 and the Airport Authorities Act 1966.⁸⁰ The Act implements just culture protections, which the Select Committee believes are sufficient,⁸¹ intended to encourage employees to “openly and honestly” report safety information.⁸² As the Act stands, this intention is unlikely to be fully realised.

A “Just Culture” Sections

The Act’s overview directly references just culture. The overview states Part 9, subpart 9 of the Act concerns monitoring, investigation and enforcement, including, “protections provided to people giving accident and incident notifications, implementing a policy approach known as just culture”.⁸³ This reference is appropriate as it helps create an environment where professionals perceive they will be protected when reporting. In addition to these designated just culture protections, other sections that address how culpability is managed also concern just culture, as a just culture is about acceptable and unacceptable behaviour being clearly delineated and understood by participants.⁸⁴

Section 340 provides that notifications cannot be used as evidence in criminal proceedings against the qualifying person unless the falsity of the notification is concerned.⁸⁵ This is an excellent addition to New Zealand aviation law and meets New Zealand’s international obligations under Annexes 13 and 19.

Section 339 defines a notified incident as an incident that the CAA has become aware of due to a notification under section 49(3) by any person.⁸⁶ A law enforcement action denotes a charging document being filed or infringement notice issued to a person alleged to have committed an offence under the Act.⁸⁷ A qualifying person is a person who fully,

⁷⁹ Ministry of Transport, above n 9.

⁸⁰ Sections 487, 488.

⁸¹ Civil Aviation Bill 2021 (61-2) (select committee report) at 2.

⁸² At 2.

⁸³ Section 12(9)(f).

⁸⁴ Reason, above n 17, at 293.

⁸⁵ Section 340.

⁸⁶ Section 339(1).

⁸⁷ Section 339(1).

accurately and in accordance with requirements specified in the rules, notifies an incident to the CAA or to a person required to notify the CAA as per section 49(3).⁸⁸ The duty to notify occurrences to the CAA extends to every aviation participant involved in an occurrence,⁸⁹ and a failure to do so constitutes an offence, with a penalty of up to \$30,000 for individuals and \$100,000 for any other person.⁹⁰ Although like the previous legislation⁹¹ the Act penalises a failure to report, it does not create a non-punitive environment for qualifying persons who report occurrences that do not involve recklessness.

Section 341 dictates the circumstances in which a qualifying person has qualified protection against CAA offence proceedings.⁹² Section 341(1) entails a balancing test that the Director must undertake before taking enforcement action. The Director must satisfy themselves that, “public interest in taking action in the circumstances outweighs any adverse impact that the proceeding will have on further accident or incident notifications.”⁹³ Section 341(2) gives examples of behaviours that may satisfy the test, which include gross negligence, recklessness, or repeated dangerous behaviour, but does not limit subsection one. The Act does not define public interest, giving the Director significant discretion. Offences under the Act have a similarly low bar to liability as the previous legislation and have significant penalties attached.⁹⁴ Individuals can be liable for up to \$30,000 for mere negligence for carelessly operating an aircraft,⁹⁵ and absent of mens rea for causing unnecessary danger to person or property.⁹⁶

B Other Sections Impacting Just Culture

⁸⁸ Section 339(2).

⁸⁹ Section 49(3).

⁹⁰ Section 51(2).

⁹¹ Civil Aviation Act 1990, s 52B.

⁹² Civil Aviation Act 2023, s 341.

⁹³ Section 341(1).

⁹⁴ Part 4.

⁹⁵ Section 40.

⁹⁶ Section 41.

Sections 23(e) and 50 directly impact just culture as they concern the role of the regulator in safety investigations. Under s 23(e), a function of the CAA is to “investigate and review civil aviation accidents and incidents in its capacity as the responsible safety and security authority” subject to the limitations in s 14(3) of TAIC Act. Also repeating the previous legislation,⁹⁷ s 50(1) requires the CAA to notify TAIC of any reported accident or incident if it is an accident involving aircraft or a serious incident as defined by the Convention.

V Section 341 of the Act

A Critiques of s 341

Section 341 does not sufficiently protect aviation professionals who report safety information, and its broadness will discourage aviation professionals from reporting occurrences. The section contains a balancing test. The Director must be satisfied before taking enforcement action that the public interest in doing so outweighs any foreseeable impact prosecution will have on future notifications.⁹⁸

For the liability of aviation professionals for self-reported events to rest solely on a balancing test is highly inappropriate. The New Zealand Law Society observes, ““public interest” may be construed very widely at the Director’s discretion” creating uncertainty about when the information can be used against reporters, and recommends greater clarity including through defining public interest.⁹⁹ The Director’s broad discretion means individuals may be prosecuted for errors and honest mistakes falling below the just culture standard, which would not incentivise compliance with the Act or improve safety.¹⁰⁰ NZALPA evinces “a deep concern” that a concept of public interest in enforcement means public interest in safety is being weakened, stating “the key public interest is and will always be in safety”.¹⁰¹ Sharif argues, “public interest is more concerned with advancing safety than in punishing error”, and so, safety interests always outweighs the public interest in prosecuting individuals.¹⁰² The section does not restrict

⁹⁷ Civil Aviation Act 1990, ss 27(1), 72B(e).

⁹⁸ Civil Aviation Act 2023, s 341(1).

⁹⁹ New Zealand Law Society, above n 12, at 13.

¹⁰⁰ Dekker, above n 25, at ch 3.

¹⁰¹ New Zealand Air Line Pilots’ Association, above n 12, at 11.

¹⁰² Sharif, above n 7, at 347.

the circumstances in which enforcement action can be taken to unacceptable behaviours. This creates uncertainty about when prosecution will occur and fails to preclude the prosecution of individuals for errors, conflicting with just culture.

CAA policies indicate the CAA will only take enforcement action in certain circumstances but these have not been incorporated into the Act to incentivise reporting with legal protections. The CAA has represented that generally unintentional errors and at-risk behaviour where the person knowingly breaks a rule but did not intend the outcome will at most result in remedial action, but repetitive at-risk behaviour and reckless behaviour can result in punitive action.¹⁰³ The CAA declares the way safety information is managed must encourage mandatory and voluntary reporting.¹⁰⁴ The CAA's Regulatory Enforcement Policy states:¹⁰⁵

The CAA prefers not to take enforcement action against those who fully report details of accidents and incidents pursuant to Civil Aviation Rule Part 12. However, enforcement action is more likely to result when reporting is patently incomplete, or inaccurate, or reveals reckless or repetitive at-risk behaviour.

When assessing whether enforcement action is in the public interest, factors including deterrence, the seriousness of a safety issue and culpability are said to be considered,¹⁰⁶ and the principles of consistency and proportionality applied.¹⁰⁷

A significant regulatory issue is industry perception of the CAA's use of its enforcement powers. The Ministry of Transport observes the CAA rarely prosecutes: usually only when reports are patently incomplete or the behaviour is reckless or repetitively at-risk, contrary to stakeholders' views that CAA regularly uses occurrence reports for prosecution purposes.¹⁰⁸ From 2001-2010, on average the CAA commenced 20.6 prosecutions per year, and from 2011-2020, 10.4 prosecutions, as well as taking other

¹⁰³ Civil Aviation Authority "Just Culture—what it means to the CAA" <www.aviation.govt.nz>.

¹⁰⁴ Civil Aviation Authority *Safety Information Policy—The Collection and Use of Safety Information* (2013) at [5.9(d)].

¹⁰⁵ Civil Aviation Authority *Regulatory Enforcement Policy* (2022) at [7].

¹⁰⁶ At [5.1].

¹⁰⁷ At [9.1].

¹⁰⁸ Ministry of Transport, above n 72, at 8.

enforcement actions of issuing written warnings and infringement notices.¹⁰⁹ In comparison, 13 prosecutions occurred in Australia from 2019-2020, 11 from 2020-2021 and 5 from 2021-2022 and significantly more infringement notices were issued, suggesting the number of CAA prosecutions is now relatively standard.¹¹⁰ Whilst reported occurrences steadily increased between 2010-2019 from approximately 5,000 to 8,000,¹¹¹ it is difficult to determine whether this was due to decreased prosecutions, the CAA's increased promotion of reporting various types of occurrences,¹¹² or another reason. To combat negative perceptions about prosecutions, the CAA has committed to publishing the yearly number of prosecutions.¹¹³ Prior to the Act the CAA acknowledged, however, feedback from "industry representative bodies that the lack of Just Culture provisions in the legislation is a barrier to full adoption by participants, including open reporting."¹¹⁴ To improve low industry trust and CAA transparency,¹¹⁵ CAA practice should be legally guaranteed.

B International Law Position

EUROCONTROL states, in accordance with just culture, reporters should only be subject to disciplinary action for gross negligence, criminal activity or intentional misconduct.¹¹⁶ Annexes 13 and 19 to the Convention do not specifically address a prosecution policy concerning reporters of occurrences, but outline the circumstances in which safety records should be protected from disclosure.

To achieve a matured just culture, commentators emphasise the legal circumstances in which conduct may be prosecuted must be aligned with the exceptions to non-disclosure, in which records may be admissible as evidence.¹¹⁷ Elaine Solomon and Dina Relles aver

¹⁰⁹ Civil Aviation Authority *Civil Aviation Authority 2019-2020: Annual Report* (2020) at 127.

¹¹⁰ Civil Aviation Safety Authority *Civil Aviation Safety Authority Annual Report 2021-2022* (25 October 2022) at 176.

¹¹¹ Civil Aviation Authority *Aviation Safety Report: Intelligence, Safety and Risk Analysis Unit: 1 January to 31 December 2019* (2019) at 12.

¹¹² Civil Aviation Authority, above n 109, at 126.

¹¹³ Civil Aviation Authority, above n 103.

¹¹⁴ Civil Aviation Authority, above n 103.

¹¹⁵ Ministry of Transport, above n 72, at 8.

¹¹⁶ European Organisation for the Safety of Air Navigation, above n 13, at 16.

¹¹⁷ Tony Licu, Marc Baumgartner and Roderick van Dam "Everything you always wanted to know about safety culture (but were afraid to ask)" (2013) 18 *Hindsight* 14 as cited in Griggs, above n 33, at 447, n 32.

Attachment E to Annex 13 demonstrates ICAO SARPs support the position that reporters should only be punished if their conduct involves recklessness, gross negligence or wilful misconduct.¹¹⁸ Prosecution should not occur in cases of mere negligence.¹¹⁹ Attachment E states safety information should not be protected where evidence exists that an occurrence was caused by, “conduct with intent to cause damage, or conduct with knowledge that damage would probably result, equivalent to reckless conduct, gross negligence or wilful misconduct.”¹²⁰ The principles of exception are now incorporated into Annex 19, Safety Management, as exceptions to protecting information captured by safety data collection and processing systems including reporting systems and occurrence investigations.¹²¹ Safety information obtained by voluntary reporting systems, and ICAO also recommends, by mandatory reporting systems, should generally be protected from disclosure.¹²² Annex 19 requires states to establish both mandatory and voluntary reporting systems,¹²³ the latter being confidential, non-punitive and generally capturing hazards, near misses or errors.¹²⁴ New Zealand does not have a separate voluntary system due to a lack of resources, although confidential reporting is possible.¹²⁵ The CAA encourages voluntary reports through the mandatory system.¹²⁶ The first principle of exception is where the occurrence may reasonably be thought to result from, “conduct constituting gross negligence, wilful misconduct or criminal activity.”¹²⁷ The other two principles are where releasing the safety information is determined necessary for either the proper administration of justice, or safety, and “benefits of its release outweigh the adverse domestic and international impact such release is likely to have on the future collection and availability of safety data and safety information.”¹²⁸

¹¹⁸ Solomon and Relles, above n 33, at 443.

¹¹⁹ At 441.

¹²⁰ International Civil Aviation Organization *Amendment 11 to the International Standards and Recommended Practices, Aircraft Accident and Incident Investigation, Annex 13, Attachment E* (2006) at [4.1(a)].

¹²¹ International Civil Aviation Organization, above n 6, at [5.1.1].

¹²² At [5.3.1]-[5.3.2].

¹²³ At [5.1.2]-[5.1.3].

¹²⁴ International Civil Aviation Organization, above n 28, at [9.4.4.3]-[9.4.4.5].

¹²⁵ Civil Aviation Authority *Compliance Checklist (CC)/Electronic Filing of Differences (EFOD): New Zealand - Safety Management (First Edition - July 2013, Annex 19)* (2013) at 15.

¹²⁶ Civil Aviation Authority *How to report occurrences (Good Aviation Practice booklet)* (2022) at 3.

¹²⁷ International Civil Aviation Organization, above n 6, at app 3.

¹²⁸ International Civil Aviation Organization, above n 6, at app 3.

The Act appears to attempt to incorporate the principles into s 341 by stating the public interest is satisfied where, “taking action in the circumstances outweighs any adverse impact that the proceeding will have on future accident or incident notifications.”¹²⁹ But to achieve a just culture the circumstances in which legal action against reporters may be taken should mirror the behaviours that warrant disclosure of safety records.¹³⁰ Further, with the current approach the spirit of the principles and Annex 19 as a whole is lost. The Annex instructs states to take measures necessary to encourage safety reporting, including promoting a positive safety culture.¹³¹ The Annex notes:¹³²

A reporting environment where employees and operational personnel may trust that their actions or omissions that are commensurate with their training and experience will not be punished is fundamental to safety reporting.

ICAO guidance asserts that a positive safety culture requires that organisations and individuals feel comfortable reporting information, and believe their mistakes will not result in unfair treatment.¹³³ ICAO clearly intends to encourage states to promote a just culture in which reporters know when information can be used against them. The Act should align the circumstances in which individuals can be prosecuted with the ICAO and just culture standard of recklessness, gross negligence and wilful misconduct in which the release of safety information is permissible.

C Comparison with Other Jurisdictions

The European Union position is that reporters should only be prosecuted in cases of intentional wrongdoing or gross negligence. Regulation 376/2014 protects reporters in most circumstances from administrative, disciplinary and legal proceedings.¹³⁴ The regulation was the first EU legislation to define “just culture” and require member states

¹²⁹ Civil Aviation Act 2023, s 341(1).

¹³⁰ Licu, Baumgartner and van Dam, above n 117, at 14; Griggs, above n 33, at 447.

¹³¹ International Civil Aviation Organization, above n 6, at [5.3.5].

¹³² At [5.3.2 Note 1].

¹³³ International Civil Aviation Organization, above n 28, at 3-2.

¹³⁴ Regulation 376/2014 on the reporting, analysis and follow-up of occurrences in civil aviation [2014] OJ L122/18.

to actively foster a just culture.¹³⁵ The regulation states civil aviation systems should promote safety and just culture principles to encourage occurrence reporting¹³⁶ but this should not prevent states taking necessary safety actions.¹³⁷ The United Kingdom Civil Aviation Authority attributes a 50% increase in occurrence reports from 2015 to 2016 to Regulation 376/2014 becoming applicable in November 2015.¹³⁸ Other state authorities including those in Norway, Portugal, and Sweden also experienced an increased reporting trend.¹³⁹

Article 16 protects reporters in certain circumstances.¹⁴⁰ Article 16 directs member states to refrain from instituting disciplinary or administrative proceedings against reporters for unpremeditated or inadvertent legal infringements unless wilful misconduct or gross negligence is involved.¹⁴¹ Regulation 2018/1139 repeats these protections and exceptions.¹⁴² Guidance on Regulation 376/2014 states the legislation, “highlights the need to establish an environment in which potential reporters feel confident in the existing systems and to report the relevant safety information.”¹⁴³ Member states may implement a higher legal standard of protection against proceedings.¹⁴⁴ The guidance explains this may involve forgoing the exceptions and giving reporters impunity.¹⁴⁵ The regulations contain a proviso that states can take any action they deem necessary to improve safety despite these articles,¹⁴⁶ but unlike the Act the regulations delineate the circumstances in

¹³⁵ Article 2(12). See for example recitals 36, 40.

¹³⁶ Recitals 36, 37.

¹³⁷ Recital 36.

¹³⁸ United Kingdom Civil Aviation Authority *UK Aviation Safety Review for 2016* (December 2017) at 4.

¹³⁹ Woodlock, above n 24, at 444.

¹⁴⁰ Regulation 376/2014 on the reporting, analysis and follow-up of occurrences in civil aviation [2014] OJ L122/18, art 16.

¹⁴¹ Article 16(6)(10).

¹⁴² Regulation 2018/1139 on common rules in the field of civil aviation and establishing a European Union Aviation Safety Agency [2018] OJ L212/1, art 73(2).

¹⁴³ Commission Implementing Regulation (EU) 2015/2018 *Guidance Material—Regulation (EU) No 376/2014* (2015) at 27.

¹⁴⁴ Regulation 376/2014 on the reporting, analysis and follow-up of occurrences in civil aviation [2014] OJ L122/18, art 16(8).

¹⁴⁵ Commission Implementing Regulation (EU) 2015/2018, above n 143, at 30.

¹⁴⁶ Regulation 376/2014 on the reporting, analysis and follow-up of occurrences in civil aviation [2014] OJ L122/18, art 16(5); Regulation 2018/1139 on common rules in the field of civil aviation and establishing a European Union Aviation Safety Agency [2018] OJ L212/1, art 73(5).

which prosecution should not occur. Although states can prescribe penalties, penalties must be effective, proportionate and dissuasive.¹⁴⁷

Pellegrino argues the Italian legislation is neither proportionate or effective and only wilful misconduct or gross negligence should be punished to align the criminal law with just culture principles.¹⁴⁸ Decree No. 173/2017 does not distinguish unpremeditated or inadvertent infringements from more serious conduct but takes a blame culture approach to both criminal and administrative proceedings.¹⁴⁹ For instance, Article 4(2) states the Decree will comply with certain provisions of Italian Law No. 689/81, Article 11 of which states “in determining the amount of administrative fines, set between a minimum and a maximum, the infringement severity shall be taken into account”.¹⁵⁰ Pellegrino evinces the Article wrongly focuses on the objective fact the offence has been committed, referring to the gravity of the offence, rather than assessing the subjective level of culpability.¹⁵¹ Further, Pellegrino argues the Decree ignores the just culture distinction between acceptable and unacceptable behaviour by allowing unpremeditated or unintentional infringements to be prosecuted, meaning professionals can unfairly be liable for honest mistakes.¹⁵² Similarly, s 341 of the Act contains a vague assessment of whether an individual should be punished and does not explicitly exempt reporters from liability for behaviour falling below gross negligence and wilful misconduct. To legislate a just culture rather than an approach that leaves liability open for honest mistakes, the Act must acknowledge different levels of culpability, and preclude liability in these circumstances.

In Australia, CASA has discretion to investigate breaches of the Civil Aviation Act 1988 and the Civil Aviation Regulations 1988, and collects evidence for the Commonwealth Director of Public Prosecutions (CDPP) who prosecutes offences as per the Prosecution Policy of the Commonwealth.¹⁵³ CASA must consult the CDPP “where an investigation

¹⁴⁷ Regulation 376/2014 on the reporting, analysis and follow-up of occurrences in civil aviation [2014] OJ L122/18, art 21.

¹⁴⁸ Pellegrino, above n 14, at 119.

¹⁴⁹ At 119.

¹⁵⁰ At 119.

¹⁵¹ At 119.

¹⁵² At 119-120.

¹⁵³ Civil Aviation Safety Authority *Enforcement Manual* (2018) at [11.3].

discloses sufficient evidence of a serious offence”, even if CASA prefers a different response or considers prosecution is not in the public interest.¹⁵⁴ The decision to prosecute involves a two-stage test: firstly, whether there is sufficient evidence to justify prosecution and secondly, whether prosecution is required in the public interest in light of the facts and circumstances.¹⁵⁵ Factors that may help determine the public interest include the seriousness of the offence and the degree of culpability of the offender.¹⁵⁶ Griggs observes that whilst a requirement to consider just culture does not form part of the test, CASA has a degree of discretion consider just culture as CASA must only consult the CDPP for “matters of real gravity.”¹⁵⁷ Instead, CASA can, for instance, opt to suspend licences or deduct demerit points.¹⁵⁸ CASA can advise the CDPP about how the public interest will be impacted,¹⁵⁹ but the Australian approach is not fully consistent with just culture, and is merely advocated.¹⁶⁰ Although the CAA currently exercises discretion and considers alternatives to prosecution like CASA before prosecuting,¹⁶¹ a legally legitimised just culture inspires more confidence and reports than an advocated just culture approach.¹⁶² To strengthen reporting and safety, unlike the Australian context the Act should contain a statutory guarantee that only certain behaviours will be prosecuted by the CAA.

D Recommendations

The Act should be amended to align New Zealand law with the just culture standard of only prosecuting individuals for offences involving recklessness, gross negligence or wilful misconduct. Section 341 should either explicitly preclude liability for behaviours falling below this standard like Regulation 376/2014, or prescribe liability only where

¹⁵⁴ At [11.3].

¹⁵⁵ Commonwealth Director of Public Prosecutions *Prosecution Policy of the Commonwealth* (2021) at [2.4], [2.8].

¹⁵⁶ At [2.10(a)(f)].

¹⁵⁷ Griggs, above n 33, at 453-454.

¹⁵⁸ At 454.

¹⁵⁹ Civil Aviation Safety Authority, above n 153, at [11.5.1.2].

¹⁶⁰ Australian Government *Aviation Safety Regulation Review Report* (May 2014) at 4.

¹⁶¹ Civil Aviation Authority, above n 105, at 8.

¹⁶² McMurtrie and Molesworth, above n 47, at 93.

conduct meets the standard. Following this second approach, instead of stating “Without limiting subsection (1)”, s 341 should state that enforcement action can be taken in regards to the behaviour of a qualifying person “only” only if it falls under s 341(2). Section 341(2) should state the behaviours of gross negligence, wilful misconduct and reckless conduct. The balancing test in s 341(1) should be removed or preferably be limited by s 341(2).

The NZALPA argues s 341(2) should be changed to provide that the Director may be satisfied the test is met only if the person was reckless or repeated previous dangerous behaviour, and failed to comply with an improvement notice or an enforceable remedial undertaking.¹⁶³ Repetitive at-risk behaviour and reckless behaviour are the types of behaviour the CAA currently targets,¹⁶⁴ however it would be best to closely follow the just culture standard. Just culture strikes the right balance as it requires more than carelessness but allows the CAA to maintain discretion over whether to take other actions before taking enforcement action. The Ministry of Transport’s recommended amendments to the Civil Aviation Act 1990 include introducing a framework that prohibits enforcement action against reporters, “unless the person’s behaviour was reckless or it is in the public interest to pursue such action”, aimed to “improve the level and quality of incident reporting”.¹⁶⁵ The Ministry believes this proposal would improve stakeholder trust in the CAA and increase reporting by creating transparency and alleviating reporters’ fears about prosecution.¹⁶⁶ A statutory guarantee about when the CAA can prosecute would promote trust in the regulator provided it creates certainty, which the current unqualified reference to the public interest fails to do.

VI Section 23(e) of the Act

A Critiques of s 23(e)

Another serious problem with the Act is that it affords the CAA a role in safety investigations. Under s 23(e), the CAA can investigate occurrences as the responsible

¹⁶³ New Zealand Air Line Pilots’ Association, above n 12, at 42.

¹⁶⁴ Civil Aviation Authority, above n 105, at [7].

¹⁶⁵ Ministry of Transport, above n 72, at 4.

¹⁶⁶ At 11, 13.

safety authority.¹⁶⁷ The CAA has a clear conflict of interest in such investigations due to also having responsibility for investigations into legislative breaches that aim to apportion blame or liability,¹⁶⁸ and the ability to take administrative or enforcement action under the Act. The CAA states it, “may take part in an organisation’s internal occurrence investigation or conduct an independent occurrence investigation”, including safety investigations.¹⁶⁹ TAIC must notify the CAA about occurrences reported to it that are outside the scope of its jurisdiction or that it is not required to investigate and decides not to.¹⁷⁰

Only TAIC as New Zealand’s official accident investigation authority should conduct safety investigations. The main purpose of TAIC is not to ascribe blame but to determine the causes of occurrences in the interest of future prevention.¹⁷¹ TAIC is legally required to act independently in exercising its functions, and its investigation reports and findings are inadmissible in proceedings.¹⁷² The CAA presumably conducts safety investigations due to the limited capacity of TAIC but the Act does not incorporate restrictions on CAA investigations like the TAIC Act does on TAIC. The CAA declares the purpose of occurrence investigations is not to attribute blame or liability but such statements are not guarantees.¹⁷³ According to CAA policy, a single CAA unit is responsible for managing all safety information obtained in safety investigations, who can release the information to other CAA groups for safety performance purposes.¹⁷⁴ But the independence of CAA safety investigations from CAA enforcement investigations is not legally safeguarded.

Section 23(e) will harm safety and public and professional trust in investigations. The Act conflicts with just culture which aims to promote trust by establishing a clear boundary between situations where blame does and does not arise. After an occurrence, parallel safety and enforcement investigations generally occur.¹⁷⁵ Safety investigations seek to

¹⁶⁷ Civil Aviation Act 2023, s 23(e).

¹⁶⁸ New Zealand Government, above n 67, at [1.4.2].

¹⁶⁹ Civil Aviation Authority *Advisory Circular (AC12-2)* (2022) at 4.

¹⁷⁰ Transport Accident Investigation Commission Act 1990, s 10.

¹⁷¹ Section 4.

¹⁷² Sections 8(3), 14N.

¹⁷³ Civil Aviation Authority, above n 169, at 5.

¹⁷⁴ Civil Aviation Authority, above n 104, at [5.11].

¹⁷⁵ Solomon and Relles, above n 33, at 411.

identify the occurrence's causes, identify hazards, provide recommendations to control risks, and provide stakeholders with feedback to enhance safety.¹⁷⁶ Enforcement investigations seek to apportion blame and perhaps compensate victims.¹⁷⁷ Uncertainty surrounding the consequences after an occurrence and the interaction between these investigations, can make key investigation witnesses guarded and prevent valuable safety information from being uncovered.¹⁷⁸ Safety investigation records under Annex 13, as discussed, should only be disclosed for prosecution purposes in very limited circumstances,¹⁷⁹ reflecting why safety investigations must be kept separate from enforcement investigations.¹⁸⁰ Paul Dempsey explains safety investigations must be independent, “to protect public safety, and to ensure unbiased accuracy and credibility in the investigatory process and its findings”.¹⁸¹ A lack of independence violates the investigation principle that, “an agency should not investigate itself”, as an investigation may examine, “the regulatory, surveillance, and safety oversight functions of the civil aviation authority”.¹⁸² The CAA's role as safety regulator must not overlap with the distinct role of TAIC as safety investigator, who gives the CAA objective recommendations for safety improvement.¹⁸³ In the United States, the National Transportation Safety Board (NTSB), an independent government agency, investigates all occurrences and gives regulatory safety recommendations to the regulator, the Federal Aviation Administration (FAA).¹⁸⁴ Dempsey argues the NTSB should not be permitted to comment to Congress on actions taken by the FAA based on NTSB recommendations, stating, “the NTSB may be perceived as having co-ownership of the result, thereby compromising its objectivity and independence.”¹⁸⁵ He explains this unwisely, “blends

¹⁷⁶ Paul Stephen Dempsey “Independence of Aviation Safety Investigation Authorities: Keeping the Foxes from the Henhouse” (2010) 75 J Air L & Com 223 at 228.

¹⁷⁷ Solomon and Relles, above n 33, at 411.

¹⁷⁸ At 411.

¹⁷⁹ International Civil Aviation Organization, above n 15, at app 2.

¹⁸⁰ At [5.4.1].

¹⁸¹ Dempsey, above n 176, at 224.

¹⁸² International Civil Aviation Authority *Fourth Meeting of the Asia Pacific Accident Investigation Group (APAC-AIG/4)—The Importance of an Independent Aviation Safety Investigation Authority* (2016) at [2.2.3].

¹⁸³ Transport Accident Investigation Commission Act 1990, s 9(1)(a).

¹⁸⁴ Dempsey, above n 176, at 265.

¹⁸⁵ At 266-267.

the investigation and recommendation roles of the investigator with the regulatory role of the regulator.”¹⁸⁶ The roles of the CAA and TAIC must be distinct.

B International Law Position

The ability of the CAA to conduct safety investigations violates New Zealand’s international obligations under Annex 13, Aircraft Accident and Incident Investigations, centrally standard 3.2.¹⁸⁷ Standard 3.2 requires states to establish an independent accident investigation authority, separate from the regulator and any other entity threatening its impartiality and control over its investigations.¹⁸⁸ An accident investigation authority is, “The authority designated by a State as responsible for aircraft accident and incident investigations within the context of [Annex 13].”¹⁸⁹ According to New Zealand’s filed compliance checklist with Annex 13, New Zealand has incorporated standard 3.2 into domestic legislation, by setting up TAIC under the TAIC Act.¹⁹⁰ Although technically New Zealand complies with this standard, the compliance is superficial because the CAA also conducts safety investigations.

CAA safety investigations directly oppose the intent behind Annex 13. Safety investigations under Annex 13 must, “be separate from any judicial or administrative proceedings to apportion blame or liability.”¹⁹¹ The accident investigation authority must have independence and unrestricted authority over the conduct of safety investigations in accordance with Annex 13.¹⁹² The compliance checklist notes these standards are not met as CAA investigations are not guaranteed to be independent according to CAA Safety Investigation Unit procedures.¹⁹³ Standard 3.1 states:¹⁹⁴

¹⁸⁶ At 267.

¹⁸⁷ International Civil Aviation Organization, above n 15.

¹⁸⁸ At [3.2].

¹⁸⁹ At 1-2.

¹⁹⁰ Civil Aviation Authority *Compliance Checklist (CC)/Electronic Filing of Differences (EFOD): New Zealand - Aircraft Accident and Incident Investigation (Eleventh Edition - July 2016, Annex 13, Amendment 16)* (2019) at 10.

¹⁹¹ International Civil Aviation Organization, above n 15, at [5.4.1].

¹⁹² At [5.4].

¹⁹³ Civil Aviation Authority, above n 190, at 27-28.

¹⁹⁴ International Civil Aviation Organization, above n 15, at [3.1].

The sole objective of the investigation of an accident or incident [by the Accident Investigation Authority] shall be the prevention of accidents and incidents. It is not the purpose of this activity to apportion blame or liability.

TAIC meets this standard.¹⁹⁵ The CAA notes, “investigations by the CAA, although conducted generally in accordance with this Standard, do not have any statutory guarantee to that effect.”¹⁹⁶ A lack of legislative protections for aviation professionals surrounding CAA safety investigations is concerning.

Annex 13 is clear the regulator should not conduct safety investigations. ICAO states:¹⁹⁷

The intent of “independence” is that the [Accident Investigation Authority] shall be functionally independent, in particular from the State civil aviation authorities responsible for airworthiness, certification, flight operation, maintenance, licensing, air traffic control or airport operation...

ICAO guidance states, “The accident investigation authority must be strictly objective and totally impartial and must also be perceived to be so.”¹⁹⁸ Ideally, independence means the authority has an independent statutory body distinct from the administration of the regulator, and report to a different ministry.¹⁹⁹ If full independence cannot be achieved, demonstrable functional independence that complies with standard 3.2 suffices.²⁰⁰ This involves, “no organizational and/or operational connection with other entities that could interfere with the conduct and objectivity of investigations, including judicial authorities and civil aviation authorities.”²⁰¹ This is the position of TAIC as the Ministry of Transport is the responsible ministry for itself and the CAA. The safety investigator being perceived as independent is crucial to creating industry trust in investigations. Even if the CAA conducts safety investigations impartially and with a non-punitive attitude, industry

¹⁹⁵ See Transport Accident Investigation Commission Act 1990, s 4.

¹⁹⁶ Civil Aviation Authority, above n 190, at 10.

¹⁹⁷ International Civil Aviation Authority *Manual on Accident and Incident Investigation Policies and Procedures (Doc 9962)* (2019) at 3-3.

¹⁹⁸ International Civil Aviation Organization *Manual of Aircraft Accident and Incident Investigation (Doc 9756), Part I - Organisation and Planning* (2015) at I-2-1.

¹⁹⁹ International Civil Aviation Authority, above n 197, at 3-2.

²⁰⁰ At 3-2.

²⁰¹ At 3-3.

perception of their fairness will be harmed. The CAA must notify TAIC of accidents involving aircraft or serious incidents,²⁰² but the independence requirement is equally fundamental to accident and incident investigations²⁰³ meaning any CAA safety investigation compromises independence.

C Comparison with Other Jurisdictions

New Zealand's implementation of SARPs under Annex 13 is weaker than other nations including Australia and Canada. These states and many others including the United Kingdom and the United States like New Zealand have formed independent boards to conduct safety investigations.²⁰⁴ But their regulatory framework separates safety investigations by these safety investigators from investigations that ascribe blame, as Annex 13 and just culture require. The European Union also requires the functional independence of the safety investigator from national aviation authorities.²⁰⁵

The Australian regulator CASA was established by the Civil Aviation Act 1988.²⁰⁶ CASA is a government body who, "license pilots, register aircraft, oversee aviation safety and promote safety awareness".²⁰⁷ CASA is separate from the Australian Transport Safety Bureau (ATSB) whose functions include, "independently investigating transport safety matters".²⁰⁸ Apportioning blame for civil aviation matters is strictly outside ATSB's functions.²⁰⁹ Information gathered during investigations cannot generally be disclosed.²¹⁰ Information is only admissible in criminal proceedings involving an offence against the Transport Safety Investigation Act 2003 or civil proceedings where the ATSB or a court is satisfied that investigations will not be adversely impacted.²¹¹ In comparison, the Act only includes a section protecting safety notifications, not safety investigation reports.²¹²

²⁰² Civil Aviation Act 2023, s 50(1).

²⁰³ International Civil Aviation Authority, above n 197, at 3-3.

²⁰⁴ Dempsey, above n 176, at 245.

²⁰⁵ At 225.

²⁰⁶ Civil Aviation Act 1988 (Australia), s 8.

²⁰⁷ Civil Aviation Safety Authority "About CASA" (1 May 2023) <www.casa.gov.au>.

²⁰⁸ Transport Safety Investigation Act 2003 (Australia), s 12AA(1)(b).

²⁰⁹ Section 12AA(3).

²¹⁰ Section 60(1)-(3).

²¹¹ Section 60(4)(b)(c).

²¹² Civil Aviation Act 2023, s 340.

The ATSB must exercise its powers consistently with Annex 13.²¹³ ATSB investigations are separate from regulatory purposes and are intended to promote reporting to advance safety.²¹⁴ A function of CASA is to cooperate with ATSB investigations relating to aircraft under the Transport Safety Investigation Act 2003.²¹⁵ This supporting role is different to the CAA's role, as CASA does not undertake safety investigations. CASA is also legally required to comply with the Convention and "regard the safety of air navigation as the most important consideration" when performing its functions.²¹⁶ The Act does not require the CAA to comply with the Convention, even considering the CAA performs safety investigations. The legal separation of the roles of ATSB and CASA, and CASA's legal obligations demonstrate an ideal implementation of just culture.

In Canada, the creation of an independent accident investigation authority, the Transportation Safety Board of Canada (TSB) has improved safety. Under the previous arrangement in Canada, the regulator Transport Canada was responsible for investigating occurrences through the Aircraft Accident Investigation Branch, and then briefly the independent Canadian Aviation Safety Board.²¹⁷ Former TSB Director Ken Johnson recalls, prior to reform:²¹⁸

The public began to doubt the appropriateness of the system and later began to ask for some reforms... [It was observed that] there was a conflict of interest when the regulator operated much of the air transport system and also analysed its failures.

The Canadian Transport Accident Investigation and Safety Board Act SC 1989 c 3 established the TSB to investigate aviation occurrences.²¹⁹ The legislation prohibits TSB members from having transportation conflicts of interests.²²⁰ TSB policy requires its

²¹³ Transport Safety Investigation Act 2003 (Australia), s 12AD; Transport Safety Investigation Regulations 2021 (Australia), s 39(1)(a).

²¹⁴ Australian Transport Safety Bureau "Transport Safety Investigation Act 2003" <www.atsb.gov.au>.

²¹⁵ Civil Aviation Act 1988 (Australia), s 9(3)(a).

²¹⁶ Sections 9A(1), 11.

²¹⁷ Dempsey, above n 176, at 249-250.

²¹⁸ Ken Johnson "Remarks at the Flight Safety Conference: The Evolution From a Canadian Perspective" (24 October 2000) Transportation Safety Board of Canada <www.tsb.gc.ca> as cited in Dempsey, above n 176, at 249, n 150.

²¹⁹ Dempsey, above n 176, at 250-251.

²²⁰ Canadian Transportation Accident Investigation and Safety Board Act SC 1989 c 3, s 6(1).

board members and managers to conduct themselves in a way that protects TSB investigations against actual and perceived bias.²²¹ The agency closely communicates with Transport Canada to improve safety and notifies Transport Canada and other stakeholders of safety deficiencies and potential remedial action.²²² The TSB's 2020-21 Departmental Plan cited a significant downward trend in the accident rate over the previous 10 year period.²²³ In the years 2016, 2017 and 2019, indicators deduced that transportation safety improved, with the aviation accident rate for Canadian registered aircraft being 4.5, 4.3 and 3.5 accidents respectively on average per 100,000 hours flown, below the 10-year average of 5.7, 4.8 and 5.2 accidents.²²⁴ Although the consistent safety improvements under the TSB cannot be conclusively linked to its independence, the agency believes its independence enhances safety. Chief Operating Officer Jean Laporte gives an example of a railway investigation, the Lac-Mégantic investigation, explaining:²²⁵

Our independence enabled us to fully report on all the contributing factors that led to this accident, including the gaps in Transport Canada's oversight of safety management, and this, in our view, is crucial to advancing transportation safety.

Due to its independent status, the TSB can identify systemic causes of occurrences and give Transport Canada impartial recommendations for corrective action.

D Recommendations

New Zealand's international obligation to be independent in the conduction of safety investigations is only incorporated into domestic law in respect to TAIC, but improved recognition should be given to this obligation. The New Zealand Government may not possess sufficient resources to enable TAIC to solely conduct safety investigations, but

²²¹ Transportation Safety Board of Canada *Policy on Interaction with Stakeholders* (2018) at [4.1].

²²² Transportation Safety Board of Canada "Safety communications" <www.tsb.gc.ca>.

²²³ Transportation Safety Board of Canada *Transportation Safety Board of Canada 2020-21 Departmental Plan* (2020) at 9.

²²⁴ At 9.

²²⁵ Transportation Safety Board of Canada "TSB Independence is critical for our work" (8 January 2015) <www.tsb.gc.ca>.

an improvement should be made on the former legislation. In the future, the CAA should not conduct safety investigations. The Act is silent as to a separation between CAA safety and enforcement investigations. The safety investigative and enforcement teams currently share an internal reporting chain.²²⁶ A statutory guarantee should be incorporated into the Act to the effect that safety investigations are separate from CAA channels that deal with enforcement investigations, and enforcement or administrative action.

TAIC should have more power over CAA investigations and assume more of the CAA's responsibilities for safety investigations. NZALPA's recommendations should be implemented. NZALPA calls the reference to the CAA as the "responsible safety and security authority" for safety occurrence investigations, "repugnant and shocking" as it constitutes "a blatant disregard of New Zealand's obligations under the Convention" and a conflict of interest.²²⁷ NZALPA recommends the removal of this wording and changing the function of the CAA from "investigate and review" to "to assist TAIC in the investigation and review."²²⁸ The association acknowledges government underfunding of TAIC and the CAA and suggests that since it is currently not possible for TAIC to assume sole responsibility for safety investigations, CAA staff conducting investigations should work under TAIC's authority.²²⁹ NZALPA recommends amending s 50 so that the CAA must notify TAIC regarding all occurrences that come to its attention.²³⁰ NZALPA also recommends the Act require the CAA to comply with Annex 13 during safety investigations, and that its staff work under TAIC's direction and report findings to TAIC as assessors appointed under s 5A of the TAIC Act.²³¹ Section 4 of the TAIC Act declares the central purpose of TAIC is to identify causes of occurrences rather than attribute blame to individuals. The Act should contain a guarantee that the purpose of CAA safety investigations is to improve safety not to ascribe blame.

VII Conclusion

²²⁶ New Zealand Air Line Pilots' Association, above n 12, at 46.

²²⁷ At 47.

²²⁸ At 49.

²²⁹ At 47, 50.

²³⁰ At 48.

²³¹ At 48.

A Parliamentary purpose behind the Civil Aviation Act 2023 was to implement New Zealand's international obligations.²³² This necessitates incorporating New Zealand's obligations under Annexes 13 and 19 into the Act. The current sections of the Act are too weak to facilitate the Annexes and introduce an authentic just culture approach into New Zealand aviation. Section 341 is too broad to protect reporters of safety occurrences. If aviation professionals are uncertain about when their reports may be used against them, the quality and volume of reports received will be reduced, impeding safety improvement. Section 341(2) should confine the circumstances in which individuals can face enforcement action by the regulator to the just culture standard of gross negligence, wilful misconduct and reckless conduct. Further, the role the Act affords the CAA in safety investigations directly contradicts Annex 13 which requires safety investigations into occurrences to be conducted independently.²³³ Although TAIC may lack sufficient resources to conduct all safety investigations, the Act does not improve the independence of safety investigations over thirty years on from the Civil Aviation Act 1990. A guarantee of the independence of CAA safety investigations from CAA channels that deal with blame and punishment should be incorporated into the Act. The Act should also include legal safeguards surrounding CAA safety investigations including oversight by TAIC. Industry distrust of the CAA is unlikely to be improved by the extensive enforcement powers afforded to the regulator under the Act and the fact safety investigations are neither independent nor perceived to be. A closer application of New Zealand's international obligations and just culture will help improve the CAA's reputation and the trust of industry members in the CAA.

Word Count

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²³² Civil Aviation Act 2023, s 4(c).

²³³ International Civil Aviation Organization, above at n 15, at [3.2].

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