

Ministry of Transport
PO Box 3175
Wellington
6140

20th July 2019

Submission to the Exposure Draft Civil Aviation Bill

Thank you for this opportunity to comment on the Civil Aviation Bill exposure Draft.

New Zealand Aviation Federation (NZAF) is the largest incorporated general aviation (GA) group in New Zealand. We represent 14 individual sectors of the aviation community and have a combined membership of over 10,000. Of the 5200-total aircraft in New Zealand our members own or control over 4000 of them. Our members are;

Aircraft Owners and Pilots Association of New Zealand Inc. (AOPA)
Sport Aircraft Association NZ Inc (SAANZ)
Flying New Zealand
Aviation New Zealand
Model Flying New Zealand (NZMAA)
New Zealand Warbirds Association
Sports & Vintage Aviation Society
Gliding New Zealand (GNZ)
New Zealand Parachute Federation
The Recreational Aircraft Association of New Zealand (RAANZ)
Aircraft Engineering Association of New Zealand (AEANZ)
The New Zealand Association of Women in Aviation (NZAWA)
New Zealand Airshow Association (NZASA)
Balloon Aviation Association of New Zealand (BAANZ)

- We support the submission from Model Flying New Zealand which is our representative in matters regarding recreational Unmanned Aerial Vehicles or Drones. In particular we believe that across the board registration of all Part 101 Drone operators and registration of all Drones, would not be a cost-effective way of controlling the perceived threat from Drones.
- We support the submission by Aviation New Zealand, which is our representative for matters that involve the commercial side of General Aviation. In particular we support AvNZ call for an Independent Appeal or Complaints Authority. This was also proposed in the AOPA submission in 2014.
- We support the original 2014 submission from AOPA NZ and wish to reiterate some of the details pertaining to Schedule 2 of the Exposure Draft. We assume that this submission made in 2014 will be reviewed and applied to the exposure Draft. If it is not, then we suggest that this be done as the points are still relevant and do not appear to have been adopted in any sections of this Exposure Draft.
- We would like to reiterate the following points from the AOPA NZ submission of 2014 that we consider vital to a Bill that is designed to deliver transparency and fairness.

In the new Exposure Draft, Schedule 2 clause 5 (2) essentially retains the same wording as in the 1990 Civil Aviation Act section 27B (1). This is the wording that the AOPA submission of 2014 specifically referred to and requested that this should be changed to reflect what we consider was the intention of the drafters in 1990 with the existing Act.

We submit that the word “other” should be inserted before ‘characteristic’ making the statement read, “any **other** characteristic that may interfere with the safe exercise of the privileges to which the medical certificate relates”.

Without the word ‘other’, it could be viewed that this allows the Director (or his delegated person), to revisit the standards prescribed in the rules that have already been passed by the applicant. This is contrary to what we believe was the true intent of the clause. To allow the Director to assess other characteristics that are not already covered in the prescribed rules.

1990 Act Section 27B Power of Director to issue medical certificate

.....is satisfied that the applicant meets the medical standards prescribed in the rules, unless the Director has reasonable grounds to believe that the applicant has any characteristic that may interfere with the safe exercise of the privileges to which the medical certificate relates.

Exposure Draft Schedule 2 Clause 5

Decision of Director on application for medical certificate

.....

(2) If the Director is satisfied that the applicant meets the medical standards prescribed in the rules, the Director must issue a medical certificate unless the Director has reasonable grounds to believe that the applicant has any characteristic that may interfere with the safe exercise of the privileges to which the medical certificate relates.

I copy here an extract from a High Court ruling that was focused around this part of the Act. This extract shows our concern that The Act is not clear in the wording and would benefit from the inclusion of the word “OTHER”. This in no way restricts the Directors powers given in other sections to restrict or withdraw a medical certificate if the Director “believes on reasonable grounds” that the applicant may be unable to exercise the privileges of his licence safely.

IN THE HIGH COURT OF NEW ZEALAND

WELLINGTON REGISTRY

CIV 2009-485-000841

BETWEEN THE DIRECTOR OF CIVIL AVIATION

Appellant

AND IAN DOUGLAS ANDREWS

Respondent

Extract from the Judgement of Justice Fogarty

[58] For the Court’s task is to take the text as it is enacted. The text is the expression of the law, and the text is the only means by which Parliament can make law. The superior Courts then have the separate constitutional responsibility and exclusive authority to say what the text means. Any interpretation is of the text. Exploring one participant’s subjective views of the intent or meaning of a

compromise text is an exceedingly dangerous exercise, be it of a deed, contract or statute.

[59] There is a further problem with the statutory text which clouds the proposition that the scheme of the legislation is a coherent devolution of decision making to medical examiners with rights of review and appeal. As we have seen, s 27B(1) falls into two parts. I set it out again, but this time split the last clause, beginning with the term “unless”.

27B Power of Director to issue medical certificate

(1) After considering an application for a medical certificate, the Director must, as soon as practicable but no later than 30 working days after the date of receiving the report of the medical examiner, issue the medical certificate if he or she is satisfied that the applicant meets the medical standards prescribed in the rules,

*unless the Director has reasonable grounds to believe that the applicant has any characteristic that may interfere with the safe exercise of the privileges to which the medical certificate relates.
(Emphasis added)*

[60] Mr Withnall emphasised the word “must” in the first part and argued that the intention of the legislature was that an applicant was entitled to a medical certificate. If a medical examiner was satisfied that the applicant meets the medical standards prescribed in the Rules he argued that participants in the system are to be able to ascertain what medical requirements they have to meet and those requirements are established through the rule making process under s 34.

[61] What then of the second power beginning “unless”? Mr Withnall argued that it was referring to any [other] characteristic [being a medical reason] which was not addressed or prescribed for in the Rules. He argued this proposition from time to time using the word “other”. After I pointed out that the word “other” does not appear in the text, he endeavoured to argue the proposition without using the word “other”. But in my view without success.

[62] The term “any characteristic” of itself must include any one or more of all the characteristics of the applicant including those already considered. Yet such a literal interpretation does not make sense if one approaches the legislation on the understanding that it will always devolve to non-employee medical examiners the final decision as to the issue of a medical certificate based on compliance with medical standards.

[63] The second part of s 27B(1) is a criterion which is repeatedly used in this part of the Act. The same criterion appears in ss 27C, 27H and 27I. The wording of the text reflects a judgment that an existing medical certificate does not adequately satisfy the Director (including a delegate) that the pilot or air traffic controller will exercise his or her privileges safely. If one approaches the legislation as a compromise between devolution and central control then the law makers may have considered it justifiable for the Director to intervene at any time notwithstanding a prior delegation to a medical examiner when the Director has safety concerns. By contrast, the Director’s power, in s 27H(2), to withdraw any medical certificate that a medical examiner has issued within 60 days does not require a threshold judgment

by the Director that the licence holder may be unable to exercise safely the privileges to which the medical certificate relates.

[64] If the legislative scheme has both devolved decision making, but reserved an ultimate power with the Director to intervene, there will inevitably be a complicated and potentially inelegant interface between the two sets of decisions. The attitude of the Court has to be one of “so be it”. For the constitutional responsibility of the Court is to take the legislation as it finds it, not to make it better, not to make it worse, not even to ask the question as to whether it is good or bad.

Further;

A further point of concern with the Exposure Draft is in Schedule 2, 2 (3) which states the applicant must have a medical examination by a medical examiner. A medical examiner is described in Schedule 2 clause 28. We are unsure of the implications on the RPL medical and the proposed new standard for PPL medical (due for NPRM in August 2019) of those clauses. An NZTA DL9 medical, as approved for an RPL and is the proposed standard for the new PPL medical. It is performed by the applicants GP who is unlikely to be a medical examiner as defined in the exposure Draft.

Extract from the exposure draft, Schedule 2 page 214 and page 226.

Issuing of medical certificates

2 Application for medical certificate

(1) A person may apply to the Director for the issue of a medical certificate under this Schedule.

(2) The application must be in accordance with the requirements of the rules.

(3) The applicant must have a medical examination by a medical examiner who must forward the medical examiner’s report to the Director.

28 Designation of aviation examiners and medical examiners

(1) The Director must designate, by issuing an aviation document under section 68, 1 or more medical examiners to conduct examinations under clause 2.

(2) The Director may designate, by issuing an aviation document under section 68, 1 or more aviation examiners to conduct specified examinations that the Director may require under this Part.

We suggest that these Clauses should be reviewed to ensure the NZTA DL9 medical, assessed by the applicants GP, is included in the Bill if acceptable to the Director.

The New Zealand Aviation Federation is available at any time to discuss these issues further if required.

Ian D Andrews
President NZ Aviation Federation
22nd July 2019.