



Review of CAA's Investigation and Enforcement Function

Director of Civil Aviation's Response

August 2023



Introduction

In February 2023 I asked Mike Heron KC to review our investigation and enforcement function. Mr Heron's review report is attached.

In accordance with the Terms of Reference dated 27 February 2023¹ the review:

- examined the Civil Aviation Authority's "management systems, procedures, and practices operating within the investigation and enforcement function, including the way in which expert evidence is obtained and managed and to identify any changes that may be required to the Authority's regulatory policies or practice"
- had the purpose of ensuring that the Authority's investigation and supporting functions are working in a cohesive, coherent, and effective manner - meeting the Authority's strategic and regulatory obligations and goals in accordance with our aspirations to be a values-based, modern regulator
- undertook interviews with Authority staff and external legal counsel, examined best practices by reference to comparable regulatory organisations and literature, and the Authority policies, practices, and procedures
- was informed by the case involving a mid-air collision at Hood Aerodrome, but that case was not the focus of the report.

Acknowledgment

It was pleasing to read that those interviewed provided informative insights and took a candid approach to discussing issues, and the reviewers commented that we have *'a highly experienced, expert, and passionate team who seek to perform their role and fulfil the Authority's objectives to the best of their ability. We do not question the individual capability within the Investigation and Response Unit'* (Paragraph 1).

Strategic context of investigation and enforcement

Prior to commenting on the review, it is useful to highlight the strategic context of investigation and enforcement activity within the Authority's Regulatory Safety and Security Strategy.

Our investigation function is described in our Regulatory Strategy as:

- We examine accidents, incidents, and other occurrences to ascertain what happened and why, and to determine appropriate responses, including actions to share lessons learned and prevent recurrences.

Our enforcement function is described as:

¹ at Schedule 1 of the Report

- Administrative and judicial action: We use a range of administrative and judicial actions to obtain compliance, to address risk, to change behaviour, and to impose or seek penalties.

Often investigation activity can be seen as primarily reactive, and to some extent independent of other regulatory activity. To be successful as a modern regulator we need to understand explicitly investigation activity and its outcomes² as:

- reacting to concerns, occurrences, incidents and accidents in a risk-based way,
- being proactively triggered by intelligence assessments, as well as supported by them,
- integral to understanding the aviation system, supporting safety and security outcomes,
- supporting ongoing improvement of policy, standards and operational activity,
- and where appropriate, based on careful assessment of evidential sufficiency, the Regulatory Enforcement Policy 3 and the public interest, supporting enforcement activity.

Enforcement activity can be used as a means of correcting behaviour directly and for deterrence, providing incentives to support broader compliance and safety and security outcomes; and as means to ensure people are held to account for their actions. This is through the way enforcement actions are targeted and the outcomes used in communication and engagement activity.

The way we use our investigation and enforcement resources must be prioritised to achieve the best results from a system perspective, noting that we cannot respond to everything.

Finally, our Investigation and Response Unit (IRU) must be explicitly seen as, and capable of contributing to both safety and security outcomes.

Responding to the review

Specifically, the review identified a range of areas where we can make enhancements in respect of cohesion, culture, and improving areas of investigative and enforcement practice, particularly around complex investigations. This includes a series of recommendations on how we might achieve these opportunities.

The report highlights that our Investigation and Response Unit (IRU) performs an important function within our regulatory system and emphasises the importance of drawing on, and working with, all parts of CAA to be successful.

It is important to consider how we can best position our IRU alongside supporting functions to enable our continued focus on becoming a modern regulator. It is also important that the range of skillsets and experience that other CAA staff can offer form part of the IRU approach.

I accept the findings and recommendations and we will work quickly toward implementing them.

My clear expectation is that we will all work together to achieve a new operating model – seeking to ensure that we maximise the contribution the IRU makes to our overall regulatory effort. For my part, I am committed to ensuring the appropriate leadership support is in place to drive the changes we need to make. This will also require everyone affected to make an equal commitment to put into

² Investigations can result in responses including engagement, education and enforcement

³ <https://www.aviation.govt.nz/assets/about-us/policies-statements-procedures/regulatory-enforcement-policy.pdf>

place the new arrangements and operating model. I appreciate it will take some time to work out what this means in practice, and we will continue to develop this over time.

Focus Areas

While the review is wide ranging, the first recommendation is that I set expectations for the IRU within the Authority and the way in which it should operate. Accordingly, drawing on the findings and recommendations my expectations are set out in the table below and will guide the more detailed implementation of the report's recommendations.

The work will be undertaken through the development of an Investigation and Enforcement Change Programme (the Programme) that will be established as soon as practicable. It will be overseen by a steering group initially chaired by me, and including the Deputy Chief Executive Aviation Safety, the Deputy Chief Executive Pūmanawa Tangata (People), the Deputy Chief Executive Strategy Governance Risk and Assurance, the Deputy Chief Executive System Practice & Design, the Chief Legal Counsel and the Manager Investigation and Response.

The Governance of the Programme will be reviewed once the Programme is established to ensure it has appropriate links to our Leadership and Management System Committees and the Authority Leadership Team.

Steps will be taken immediately by the Steering Group to identify a Programme Manager and the people and resources required to undertake the Programme. The Programme will work closely with the IRU, drawing on the skills, knowledge and experience possessed by IRU people, building on the engagement that has occurred as part of the review process.

Implementation of this Programme will likely require adjustment to current work programmes particularly in respect to capability, operational policy, process and procedures. The Programme will be expected to work closely with relevant functions in the Authority and our business planning and Enterprise Portfolio Management Office (EPMO) functions to achieve this.

Director's expectations	Reference	Comment on expectations	Proposed next steps
The investigation and enforcement function must be seen as an integral part of our broader regulatory effort.	See above 'strategic context of investigation and enforcement'.	We need to ensure that our investigation and enforcement activity is shaped overall, and in respect to specific actions, to support our broader regulatory effort. This includes addressing both safety and security outcomes.	This context must be used explicitly to guide the implementation, the expectations and recommendations arising from this report.
The location, and internal structure, of IRU will be considered.	Strategic context, paragraphs 71, 131 and 133	<p>While the report does not specifically recommend changes to the location and structure of the IRU (paragraph 8), to ensure that:</p> <ul style="list-style-type: none"> • the IRU is located closely to its most significant supporting function (Legal –paragraphs 131 to 133) • the IRU is internally structured to support personnel to work together effectively (paragraph 71) and follow the strategy of multidisciplinary investigations that can deliver regulatory and/or safety and security outcomes, as determined by the facts and circumstances established by an initial general investigation approach. <p>I expect location and structure within the IRU to both be considered through assessment and consultation processes that follows the usual organisational change decision making processes.</p>	<p>The first step is to consider the location and will be addressed by a consultation document proposing to shift the IRU from the Aviation Safety Group to the Strategy, Governance, Risk and Assurance Group, where it will be located alongside the Legal function. This will also co-locate it with the Communications and Engagement, and Intelligence functions. This consultation and a decision on the proposal will occur within the next month.</p> <p>The internal structure of IRU will be addressed as part of the programme of activity to implement all other recommendations and Director's expectations.</p>
An investigation unit with multidisciplinary expertise, working collaboratively.	Paragraphs 6-8, 74 and 75	All investigations are to commence as general investigations, coded as such, and remain so until there is sufficient clarity to close off any particular outcome. I expect that Investigations will continue	

		<p>to produce safety learnings in addition to, but not to the exclusion of any appropriate regulatory (Civil Aviation Act/rules and/or Health & Safety at Work Act /Hazardous Substances and New Organisms Act/Aviation Crimes Act) outcomes.</p> <p>In addition to maintaining strong safety investigation capability, this will involve comprehensive training for investigators on the initial fact-gathering processes and the rules relating to sharing of investigation information within the IRU.</p>	<p>These expectations and recommendations will be addressed through giving effect to the strategic context, reviewing the internal IRU structure and considering policies, processes, procedures and capability development activity as indicated by the findings and recommendations of the report.</p>
<p>The investigation and enforcement function is fundamental to our work as a safety and security regulator.</p>	<p>Paragraphs 72, and 73, 127 and 128</p>	<p>Our primary role as a regulator, rather than as a ‘no fault’ accident investigation agency is important and must be reflected in our approach to investigation and enforcement. There must be consistency and transparency across investigations without unnecessary premature definition, with firm but fair decision-making.</p>	
<p>The way we appoint and engage with experts is to be changed as recommended.</p>	<p>Paragraphs 85 to 97</p>	<p>The Authority will move towards using external experts on all complex or significant cases including those involving causation issues and HSWA.</p>	<p>The internal policies, processes, procedures and practices for appointing and engaging with experts will be addressed as part of the Programme.</p>
<p>Collaboration across the Authority must be given stronger emphasis, with a clear engagement model developed for the IRU.</p>	<p>Paragraphs 120 to 128, 131 to 133</p>	<p>Collaboration and engagement cross the Authority in supporting investigations and enforcement decision making is critical to ensuring that the IRU is an integrated part of our overall regulatory effort, in the strategic context described.</p> <p>In particular, there must be a strong relationship with the Legal Team.</p>	<p>An engagement model will be developed as part of the Programme. A specific change proposal will consider the relationship with the Legal function.</p>

<p>The investigation process will be revised as recommended by the review.</p>	<p>Paragraphs 9 and 10</p>	<p>We will appoint a multidisciplinary panel at the outset of any significant investigation to assist it through to the end of the 12-month investigation period and to attend a final de-brief session. This will include having clarity on the roles and responsibilities of those who contribute to this function and clear coordination and/or project management processes, and the early inclusion of external expert(s).</p>	<p>The development of the multidisciplinary panel and the associated actions recommended in the report will be addressed as part of the Programme.</p>
<p>Policies and procedures will be updated as recommended by the review.</p>	<p>Paragraphs 11 and 12 paragraphs 41 to 61</p>	<p>Our policies, processes and procedures will be updated to reflect the necessary changes including training and guidance around new processes consistent with the expectations of IRU's approach in the future as per the strategic context.</p>	<p>This work will be addressed by the Programme and will require consideration of capability, operational policy, process and procedures.</p>
<p>We must be aware of and capable of using the full range of regulatory tools.</p>	<p>Paragraphs 98 to 103 and 108</p>	<p>We must ensure that we are capable of and open to using all available regulatory tools at the right time to achieve regulatory safety and security outcomes across our various regulatory regimes as identified in the review, including the Civil Aviation Act and HSWA 'toolkits'.</p>	<p>This is linked to capability, operational policies, processes, and procedures. Specifically, work already underway within IRU to develop the Authority's HSWA capability and practice must be aligned to and integrated with the Programme as appropriate.</p>

<p>We will review and update our regulatory decision-making policies in respect to alleging causation under HSWA, the weighting we give to conduct and consequence in serious harm/fatal accidents and how we consider Transport Accident Investigation Commission (TAIC) reports during investigations and enforcement activity.</p>	<p>Paragraphs 104 to 108, 118 and 119</p>	<p>While we already use appropriate regulatory decision-making processes, the report draws out three areas where our decision-making approach can be further enhanced and guided by a clear internal policy approach, relating to the weighting given to those specific matters, as part of our public interest considerations</p> <ul style="list-style-type: none"> • We will revise our approach to only allege causation in HSWA cases where the cause is very clear and where the defendant’s conduct warrants that. • We will consider and adjust guidance regarding how we weigh up conduct alongside consequences. • We will consider and adjust our approach to considering TAIC reports where they are released during the investigation or enforcement processes that we are engaged in. <p>*Just culture: While the report does not explicitly address this, the above matters are relevant to the application of just culture in the aviation sector and the interaction with regulatory decision making.</p> <p>The Authority will undertake work with the aviation sector to clarify how just culture applies and interacts with regulatory decision making and</p>	<p>These matters will be reflected in updated decision-making policies that will be developed by the Programme. The multi-disciplinary panel will support the IRU to give effect to the updated decision-making policies.</p> <p>*Work relating to the interaction between just culture and regulatory decision making, and the application of just culture in regulated organisations will be undertaken in our System Practice and Design Group, not directly as part of the Programme.</p>
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		within regulated participant organisations. This is timely in consideration of the information protection provisions included in the Civil Aviation Act 2023.	
We will consider our approach to how we decide which matters to investigate. This includes our approach to how we manage compliance with information reporting requirements terms and the balance between trust and verification.	Paragraph 141 Paragraphs 136-139	<p>Our approach to regulatory oversight must reflect a consistent, fair, and transparent approach based on verifying that the trust we place in participants to meet regulatory requirements is supported by very clear action to gain assurance that the trust is well placed, on a regular basis.</p> <p>Larger organisations may well have the capacity and capability to meet regulatory requirements, but they also have significant economic incentives that may create tensions within.</p> <p>With respect to reporting requirements, we must not give greater weight to relationship management than ensuring regulatory reporting requirements are met.</p>	These matters will be reflected in updated decision-making policies that will be developed by the Programme. The multi-disciplinary panel will give effect to the updated decision-making policies.
Facilitated workshop.	Paragraph 8, 13 and 135	Recognising that cultural, operational, and policy changes are required to shift to a different way of working a workshop facilitated by those with appropriate expertise will be undertaken. This will assist in ensuring full integration of the teams within IRU and facilitate a common way of working in a multidisciplinary environment.	This will be arranged as part of the Programme.



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