

The “Fit and Proper Person” test – recent developments

Four years ago I started this column with a series of articles on the fit and proper person test, so I thought it might be time to revisit this issue and discuss legal developments and possible changes to the FPP test as part of the current review of the Civil Aviation Act 1990 (the Act).

Statutory FPP Test re-cap: Entry criteria

Participants in the civil aviation system are required, among other things, to meet the fit and proper person test to “enter” the civil aviation system – for example to hold a pilot licence.

Section 10 (1) sets out the criteria that the Director of Civil Aviation **must** take into account and assess when considering if a person meets the FPP test. This includes a person’s knowledge and experience in the transport industry, their transport safety regulatory compliance history, any history of physical or mental health or serious behavioural issues, and “any conviction for any transport safety offence”, or evidence that a person has committed a transport safety offence or breached the requirements of the civil aviation rules.

Section 10 (2) also gives a general discretion to the Director to consider such other matters and evidence as “**may be relevant**” to a person’s FPP assessment. As the Act is silent, the assessment of what is “relevant” is essentially left to the Director to determine. Section 10 (3) empowers the Director to seek and receive such additional information as the Director thinks fit to aid in this FPP assessment, and to consider information from any source.

It is generally accepted that, when a person first applies to enter the system or to obtain a new document or privilege, s 10 of the Act empowers the Director to seek and receive information about a person’s transport and criminal conviction history. Given that this would otherwise be a breach of privacy, and in order to aid the smooth facilitation of information, it is none the less general practice for the CAA and other government agencies to require applicants to either submit their criminal history record, or consent in their application to the CAA obtaining and receiving such records. Failing to comply would effectively stall the application process and thus, is effective in ensuring this information is forthcoming. It is then for the Director to assess and give appropriate weight to all relevant information in determining whether a person is fit and proper to exercise any particular privileges sought. This is a case by case assessment and no one factor, for example, the existence of a traffic conviction, can alone be determinative of whether a person will be considered fit and proper. It has to be considered in the context of all relevant information and circumstances, including the intended involvement of the person in the system.

Ongoing FPP obligations

Where the assessment becomes somewhat murky, both in practice and as a matter of law under the current Act, is when the Director is attempting to assess a person’s ongoing compliance with the FPP test. Section 9 (3) makes it a condition of every aviation document issued to remain fit and proper to exercise the privileges of that document.

Section 15A permits the Director to investigate the holder of an aviation document if the Director believes on reasonable grounds that the holder has failed to comply with the conditions of an aviation document. This can, and typically does, involve consideration of a person's ongoing compliance with the FPP test.

However, absent a specific and substantiated concern about an identified individual, the Act is less clear on how the Director can in a general sense monitor aviation document holders for compliance with the FPP test. This was highlighted in the Courts when the CAA attempted to initiate random sampling of pilots' criminal conviction histories under an arrangement with the Ministry of Justice.

NZALPA v NZ CAA and The Director of Civil Aviation [2011]

In 2011 NZALPA successfully challenged the CAA process of randomly sampling pilots' criminal records through a Memorandum of Understanding with the Ministry of Justice. The High Court declared the practice was unlawful, and this was upheld by the Court of Appeal. In essence, the CAA relied on the general power in s 10 (3) to seek and receive information from any source, as the basis of its legal authority to conduct the random sampling. However, the High Court and Court of Appeal held that this power related to the assessment of a specific individual's FPP status, as did the general authority to investigate a document holder on FPP grounds under s15A of the Act. There was no generic statutory authority in s 10 (3) of the Act to conduct checks against a random sampling of aviation document holders.

In reaching this view however, both Courts were careful to stress that other sections of the Act do provide express authority to obtain information about a group of participants, including criminal records, on an ongoing basis – most specifically, as part of the CAA's medical certification functions, there is express authority to seek information about any possible alcohol or substance related offending, including through random sampling of medical certificate holders, on an ongoing basis. The Court of Appeal therefore left the question open as to whether, had the CAA relied on another statutory authority under the Act, it might have been able to substantiate legal grounds for random sampling of criminal records for FPP purposes.

My own view is that this is unlikely under the existing Act. The Privacy Act generally protects against disclosure of personal information of this nature, unless it falls within a specified exception in the Privacy Act (which does not apply to the Civil Aviation Act powers), or there is a clear statutory authority in another Statute to enable disclosure. The Courts were clear that section 10 (3) did not provide that authority and, in my view, no other provision of the existing Act provides authority to conduct random sampling in relation to the general FPP assessment provisions. It is unclear whether the current Act review will initiate any change in this area. Certainly, there is no discussion of it in the Consultation Document. If there was any intention, for example, to permit random sampling of pilots or other participants' records, in my view this would require a very clear and transparent legislative proposal to be put forward, so that it could be debated and the extent of any proposed powers and limitations on those powers fully explored. Important privacy considerations exist that would need to be fully considered before any such powers could be granted in my view.

FPP issues raised in Civil Aviation Act Review Consultation Document

The consultation document acknowledges that the existing FPP criteria in section 10 permits the Director to consider other information that may be relevant, and that this is accepted as including “non-transport related” convictions. The consultation document acknowledges that the Act could be more explicit about when (and presumably what type of) offences, **or charges**, may be considered for the purposes of a FPP assessment. It suggests that there may be merit in introducing an explicit requirement to consider other specified convictions, for example relating to drug use, and to provide discretion to consider the fact that a person has been charged with other offences.

In broad terms I would support more clarity and specificity about what types of offending should be considered as potentially relevant. In my view however, particular care needs to be applied when compelling someone to disclose that they have been charged with an offence that is yet to proceed through due process. Natural justice and privacy issues can arise if a person is forced to disclose not only the fact of the charge, but often the nature of the allegations behind the charge – especially when the charge is denied or key facts are in dispute. While any decision maker should be cautious in assessing such matters, in my experience the mere fact that someone has been charged can be enough to taint the view or impression formed about a person by officials. Forcing disclosure of the details of any alleged offending can have even more of a prejudicial effect. For these reasons, I would want to see a careful and critical analysis of when it may be appropriate to require disclosure about a particular charge, and the extent of disclosure of the allegations required. These comments equally apply in my view to the CAA medical disclosure requirements. I would hope to see this issue receive careful scrutiny throughout the law making process.

Other Issues not raised in Consultation Document

In my view, the appropriateness of the criteria requiring that the Director must consider a person’s “history of physical or mental health or serious behavioural problems” is a little problematic, and at the very least, the reference to physical health should be removed. Physical health is relevant to medical fitness rather than fitness of character. Requiring disclosure of a person’s mental health history also involves balancing public safety interests with a person’s privacy rights, particularly if the mental health issues are largely historic. The primary assessment of mental health may be better left to the CAA medical section to assess, where it has the potential to interfere with the safe conduct of flight operations. It seems to me that there should be additional safeguards around when this information is required to be disclosed for FPP assessment purposes. This could be achieved, for example, by requiring that any history of mental illness must be disclosed to the CAA medical section in the first instance, and only subsequently disclosed to the Director for FPP assessment purposes if there is a serious risk that the mental health history identified could pose undue risk to a person’s (non-medical) fitness to hold an aviation document. Absent any such concern, patient medical privilege and privacy laws should prevail in the FPP context.

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