



NEW ZEALAND COUNCIL OF TRADE UNIONS
Te Kauae Kaimahi

**Submission of the
New Zealand Council of Trade Unions
Te Kauae Kaimahi**

to the

Ministry of Transport

on the

Civil Aviation Bill – exposure draft

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July 2017

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1. Introduction

- 1.1. This submission is made on behalf of the 27 unions affiliated to the New Zealand Council of Trade Unions Te Kauae Kaimahi (CTU). With 310,000 members, the CTU is one of the largest democratic organisations in New Zealand.
- 1.2. The CTU acknowledges Te Tiriti o Waitangi as the founding document of Aotearoa New Zealand and formally acknowledges this through Te Rūnanga o Ngā Kaimahi Māori o Aotearoa (Te Rūnanga) the Māori arm of Te Kauae Kaimahi (CTU) which represents approximately 60,000 Māori workers.
- 1.3. We welcome the opportunity to submit on the Civil Aviation Bill exposure draft. Our submission focusses on the Drug and Alcohol Testing changes in the Bill. We aim to provide the Ministry with constructive feedback on drug and alcohol management policy. We appreciate that this is the exposure draft for the Bill and look forward to following the Bill progress through the Parliament process.
- 1.4. The CTU recognises that no one should put others at risk by attending work while impaired to such an extent that they cannot do their jobs safely. This applies not only to impairment by drugs or alcohol but also to impairment due to stress, fatigue or poor working conditions.
- 1.5. While recognising the need for aviation safety, our objective is to ensure that drug and alcohol policies for workplace health and safety are consistent and impinge worker rights no further than necessary to achieve safe workplaces. Where drug testing is necessary we support an impairment based scheme.
- 1.6. Our concern is that drug testing is used as a means to represent impairment at work. It does not. Many workers who may fail a workplace drug test are not impaired and many impaired workers would pass a drug test.

- 1.7. The CTU's mandate includes advocacy for workers' rights including both their rights to safe workplaces and rights to dignity and privacy at work. Sometimes, these rights must be weighed against each other.
- 1.8. Balancing these competing rights is often delicate. Requiring randomised drug testing for persons performing vaguely-defined safety-sensitive activities upsets this balance.
- 1.9. The CTU provided submissions on the similar changes proposed in the Maritime Transport Amendment Bill in 2017, which ultimately saw the removal of DAMP and random drug and alcohol testing requirements at the select committee stage. A number of the submissions made then, are made here as they should be considered again in the context of drafting the Civil Aviation Bill.

2. New Zealand Bill of Rights Act 1990 and other human rights

- 2.1. The introduction of drug and alcohol testing impacts upon fundamental human rights of workers including the right to privacy, rights against discrimination on the basis of health status or disability, the right to refuse medical treatment and rights against unreasonable search and seizure. Workers should not lose their human rights at the door of their workplace.
- 2.2. New Zealand is committed to the recognition of these rights through our ratification of the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR). Many of these rights are explicitly recognised in the New Zealand Bill of Rights Act 1990 including rights to be secure from unreasonable search and seizure (s 21) and freedom from discrimination (s 19) such as on the basis of drug or alcohol dependency (a recognised disability).¹

3. Testing for impairment

- 3.1. The CTU has an affiliate endorsed policy on testing for drugs in workplaces. It states that it is vital that drug and alcohol testing captures actual impairment (fitness for work) rather than simply detecting the presence of a substance. Mere detection can show that a substance was consumed at some point but is not always relevant

¹ The NZ Bill of Rights Act 1990 also includes rights to refuse medical experimentation (s 10) and treatment (s 11). However, the Employment Court has ruled that drug testing more properly falls within the ambit of unreasonable search and seizure (of the body). See the interesting discussion in *Electrical Union 2001 Inc & Cowell v Mighty River Power* [2013] NZEmpC 197 at [58]-[68].

to health and safety risks. There is suggestion from the courts that quick, less invasive, up to date, testing technology should be used by employers.

- 3.2. Drug and alcohol testing must be for genuine health and safety reasons. Random testing may only be justified in safety sensitive roles, otherwise random testing is unreasonable. Our concerns with the broad definition of safety-sensitive in the Bill are set out later in this submission.
- 3.3. While the technology in this area is improving, none of the methods of testing for illegal drug use measure actual impairment per se. The longer the detection window, the less likely the testing is to measure impairment. Urine testing is problematic because of the length of time in which metabolites, particularly cannabis, remain in the body (along with its intrusive nature).
- 3.4. While none of the methods are perfect, the union movement strongly supports whatever method of testing provides the greatest protection for workers' rights and dignity at work. This method may change as the science improves, improvement in technology should be addressed in the Bill.
- 3.5. The Bill also treats alcohol usage and drug usage as equivalent when they are not. As breath and blood alcohol testing are closely correlated with impairment, this provides evidence which links alcohol use to less safe workplaces. Drug testing does not test directly for impairment, only past use (and the length of time that the drug metabolites remain in the body varies significantly between drugs from days to weeks), and there is no conclusive evidence linking drug use to accidents at work.
- 3.6. Given the lack of robust evidence in favour, and, with significant arguments against, we submit that the Bill should not require randomised drug testing without further refinement. We do not object to the requirement for operators to have a DAMP.
- 3.7. Our objection to randomised drug testing is fundamentally one of human rights. This is not simply a theoretical objection. Random testing is unpleasant, invasive and implies distrust of the workers involved. This is particularly the case with urine testing where several drug testing agencies have protocols that involve watching the test subject urinate from behind (if they are men). Unless there is broad support for the testing in that it is seen as a necessary and rational response to a real problem, it will reduce trust in the workplace and will be bad for workplace relations.

- 3.8. We have identified some changes to the Bill that could be made to reflect a scheme which targets impairment and not detection:

3.8.1. Clause 106 - the interpretation of Drug and alcohol testing currently reads

drug or alcohol test means—

(a) a test of a person's bodily sample to determine the presence, but not the level, of alcohol or a testable drug (or both) in the sample; or

(b) a test of a person's bodily sample to determine the presence and the level of alcohol or a testable drug (or both) in the sample

3.8.1.1. This definition should remove (a) and be limited to (b) “a test of a person's bodily sample to determine the presence and the level of alcohol or a testable drug (or both) in the sample.

3.8.2. A second change would be to cl 107(2)(b)(ii) [**DAMP operator must develop DAMP**] which currently reads

(2) A DAMP operator must ensure that a DAMP—

(b) provides for random testing of safety-sensitive workers, including by—

(i) specifying the drugs to be tested for under the DAMP; and

(ii) setting out procedures and other matters (including any permissible levels of alcohol or a testable drug) in relation to the testing; and ...

3.8.2.1. The underlined section would then change to “(*including the permissible levels of alcohol or a testable drug*)”

3.8.3. These, or similar changes, reflect that testing for drugs in the workplace relates to impairment and are necessary to ensure that undue action is not taken when mere detection is found when drug testing workers.

4. **The link between drug use and accidents at work**

4.1. The exposure draft states that “*while the suitability of the Clear Heads scheme in the maritime sector has been tested, there are arguments for treating aviation differently. In particular, the potential consequences from drug and alcohol impairment in the aviation sector can be greater, and events posing flight safety risk*

can unfold very quickly with catastrophic consequences – both for those in an aircraft and for people on the ground. Public tolerance for aviation safety risks is understandably much lower than in maritime transport”

- 4.2. On the face of this quote, there appears to be credibility to the reasons for treating aviation differently, however we are unsure that there is robust evidence to support these claims. In our submissions on the changes in the Maritime Transport Amendment Bill we outlined that one of the most prevalent misconceptions in health and safety is that there is a proven link between drug use and workplace accidents (along with other workplace harms).
- 4.3. While many studies suggest such a connection, no conclusive link has been demonstrated between drug use and workplace accidents, barring alcohol. This information is replicated below for the Ministry to consider:

- 4.3.1. The UK Independent Inquiry into Drug Testing at Work (2004) heard submissions and reviewed the leading evidence regarding drug testing at work. In relation to safety at work:²

[The Inquiry] was able to find no conclusive evidence for a link between drug use and workplace accidents, except for alcohol. A literature review conducted by the Health and Safety Executive reports that ‘five studies have found some association between drug use and work place accidents, whereas seven others have found little or no evidence’. The evidence is inconclusive.

- 4.3.2. Similarly, the Australian Safety and Compensation Council (their health and safety regulator and the predecessor to SafeWork Australia) published a report on ‘Work-related alcohol and drug use’ in 2007. They found that:³

Despite the wealth of opinion and advice on this subject, the evidence for workplace consequences is sparse. For example, ... there is little clear evidence on the links between drug use and absenteeism, low productivity, poor performance and accidents at work. Although there is very good evidence to support the efficacy of road side random breath testing, there is little robust evidence on the deterrent effects of drug testing for either illicit drugs or alcohol in the workplace.

This relative lack of clear evidence on the effectiveness of these programs makes developing sound policy more difficult. However, there is evidence that suggests that good general management practices are the most effective method for achieving enhanced safety and productivity, and lower absenteeism and turnover rates. As such, a comprehensive workplace policy on illicit drug and alcohol use as part of general management policies could help in addressing problems that arise because of alcohol and illicit drug use in the workplace.

² Quoted from executive summary at xii.

³ Quoted from executive summary at 1.

- 4.3.3. More recently, Pidd and Roche (2014) undertook a systematic review of the methodological rigour of studies of workplace drug testing from 1990 to 2013.⁴ They found that:

Only one study was assessed as demonstrating strong methodological rigour. That study found random alcohol testing reduced fatal accidents in the transport industry. The majority of studies reviewed contained methodological weaknesses including inappropriate study design, limited sample representativeness, the use of ecological data to evaluate individual behaviour change and failure to adequately control for potentially confounding variables. This latter finding is consistent with previous reviews and indicates the evidence base for the effectiveness of testing in improving workplace safety is at best tenuous. Better dissemination of the current evidence in relation to workplace drug testing is required to support evidence-informed policy and practice.

- 4.4. In the 2015 RIS, the Government stated that it did not know whether there is a problem justifying intervention *“the Ministry has been unable to establish the true extent of any problem with alcohol or drug impairment in the aviation, maritime or rail sectors. The only way we currently have to gauge the extent of drugs or alcohol use in these sectors is to extrapolate data from international experience”*⁵
- 4.5. This document also went on to say *“The result of the [public] consultation showed that we do not have sufficient evidence to justify the high level of regulation TAIC recommended.”*⁶
- 4.6. With the exception of alcohol impairment, it will be very infrequent that drug impairment is more than a contributing factor to accidents (as opposed to the primary cause). Even the report that was the genesis of the *Clear Heads* proposals changes, TAIC’s inquiry into the Carterton balloon crash⁷ did not find definitively that cannabis use caused or contributed to the crash. Rather, they found at [4.3.24]:

Although it cannot be concluded definitively that the cause of the accident was the pilot smoking cannabis, the possibility that it did contribute to the accident could not be excluded.

- 4.7. Based on the technology we have available, and public consultation undertaken by the Ministry, the only proven link between drug use and accidents at work is that with alcohol. We recommend that the Ministry investigate the current state of scientific knowledge on these issues and specifically the prevalence of this issue in

⁴ Pidd, K & Roche, A. M. (2014) How effective is drug testing as a workplace safety strategy? A systematic review of the evidence. *Accid Anal Prev.* 2014 Oct;71:154-65

⁵ Quoted from the executive summary at 2.

⁶ At 5.

⁷ TAIC Inquiry 12-001: Hot-air balloon collision with power lines and in-flight fire, near Carterton, 7 January 2012

the aviation sector to consider whether the changes in the Bill warrant significant impacts on human rights.

5. Safety-sensitive activities

5.1. In the bill, safety sensitive is defined as:

Safety-sensitive activity

(a) means an activity that—

(i) could significantly affect the health or safety of any person on board an aircraft, including the person performing the activity; or

(ii) if not performed safely could cause or contribute to an accident or incident involving an aircraft

(b) includes an activity prescribed by the rules

5.2. In the context of aviation safety, this is a broad definition, potentially encapsulating any and all workers within the airports' boundaries.

5.3. Taken to its logical conclusion, any work in an airport is potentially safety sensitive due to its close proximity with aircrafts and the 'geography' of security designated aerodromes. The definition also contains no reference to the likelihood that impairment due to drugs or alcohol will increase risks to health and safety. In an emergency, many crew members will be required to undertake safety-sensitive activities such as fire-fighting, first aid, mustering and evacuation.

5.4. The Ministry may want to consider whether the Bill intends that all work within a security designated aerodrome should be safety sensitive and therefore subject to random testing. If this is not what the Bill is intending the definition should be more specific. If this is the intent, then it would be more straightforward to say so directly.

5.5. We suggest that the Committee adopt of the definition used by the Canadian Human Rights Commission (in relation to alcohol and drug testing generally):⁸

A safety-sensitive position is one in which incapacity due to drug or alcohol impairment could result in direct and significant risk of injury to the employee, others or the environment.

⁸Canadian Human Rights Commission (October 2009 revision) Canadian Human Rights Commission's Policy on Alcohol and Drug Testing at footnote 3. Retrieved from http://publications.gc.ca/collections/collection_2009/ccdp-chrc/HR4-6-2009E.pdf on 25 January 2017.

6. Response plans and consultation

- 6.1. One of the most helpful parts of the Bill is the requirement under cl 107 that a DAMP includes a response plan. A response plan is defined under cl 106 as:

response plan means that part of a DAMP that is concerned with actions taken by the DAMP operator in relation to a safety-sensitive worker who refuses to consent to a drug or alcohol test or whose test returns a result other than a negative result, and includes reasonable arrangements and processes developed by the DAMP operator for—

(a) prohibiting the worker from performing a safety-sensitive activity; and

(b) permitting the worker to resume performing safety-sensitive activities, if the worker can do so safely.

- 6.2. This approach suggests that so long as it is reasonable, DAMP operators should take a rehabilitative approach to non-negative test results. We strongly support this as drug use is a health issue.
- 6.3. Given the close nexus between prohibiting a worker from undertaking safety sensitive activities, the potentially wide breadth of safety sensitive activities, and the likely negative consequences in terms of possible suspension or even dismissal from work, the arrangements and process under the response plan ought to be developed in good faith consultation between the operator, their employees and any representative unions.
- 6.4. We believe that the development of a DAMP should include a requirement for DAMP operator who is an employer to consult in good faith with their employees and any representative unions when developing their DAMP.