



NEW ZEALAND COUNCIL OF TRADE UNIONS
Te Kauae Kaimahi

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

to the

Transport and Industrial Relations Committee

on the

Maritime Transport Amendment Bill

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Wellington

February 2017

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1. Introduction

- 1.1. This submission is made on behalf of the 31 unions affiliated to the New Zealand Council of Trade Unions Te Kauae Kaimahi (CTU). With 320,000 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. Several maritime and seafarers unions are affiliated to the CTU including the Maritime Union of New Zealand, the Rail and Maritime Transport Union, the New Zealand Merchant Service Guild, the Aviation and Marine Engineers Association and others.
- 1.4. We welcome the opportunity to submit on the Maritime Transport Amendment Bill ('the Bill'). Our submission is restricted to Part 1 on Drug and Alcohol Testing.
- 1.5. Unions do not support workers attending work while impaired to such an extent that they cannot do their jobs safely. This analysis applies not only to impairment by drugs or alcohol but also to impairment due to stress, fatigue or poor working conditions.
- 1.6. We are concerned that drug testing is used as a proxy for impairment at work. It is 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. There is insufficient evidence of a problem to justify such an extreme intervention. Given the rights and freedoms being impinged upon, we do not think the Bill passes the justification test in s 5 of the New Zealand Bill of Rights Act 1990.
- 1.9. Our submission is in six parts. First, we discuss the lack of robust evidence of a link between drug use (apart from alcohol) and accidents at work. Second, we review the effect this evidence has on the balancing act required by the New Zealand Bill of Rights Act 1990. Third, we discuss the inadequacy (and near impossibility) of weighing the costs and benefits of the proposed measures. Fourth and fifth, we look at the definitions of safety-sensitive activities and response plans in cl 40Y. Finally, we review the unintended consequences of the restrictions on the use of test results in cl 40ZF.

2. No proven link between drug use and accidents at work

- 2.1. 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). While many studies suggest such a link, their methodological rigour is generally weak. Put simply, no conclusive link has been demonstrated between drug use and workplace accidents except for alcohol.
- 2.2. 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:¹

[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 workplace accidents, whereas seven others have found little or no evidence'. The evidence is inconclusive.

¹ Quoted from executive summary at xii.

- 2.3. 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:²

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.

- 2.4. More recently, Pidd and Roche (2014) undertook a systematic review of the methodological rigour of studies of workplace drug testing from 1990 to 2013.³ 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.

- 2.5. Based on the best science we have available the only proven link between drug use and accidents at work is that with alcohol. We recommend that the Committee ask officials to brief them on the current state of scientific knowledge on these issues.

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

- 3.1. 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.
- 3.2. 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

² Quoted from executive summary at 1.

³ 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

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).⁴

3.3. Section 5 of the New Zealand Bill of Rights Act 1990 states that “the rights and freedoms contained in this Bill of Rights may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.”

3.4. The Ministry of Justice has undertaken a vetting exercise to determine whether the Bill complies with s 5 of the New Zealand Bill of Rights Act 1990 (the so-called s 7 vet).⁵ The Ministry considers that (unlike testing implemented by an employer) the blanket nature of the testing requirements engages the provisions of the New Zealand Bill of Rights Act 1990. At [17]-[19] the Ministry notes that

Misuse of drugs and alcohol can lead to impairment and safety risks at work. The effects of blood-alcohol levels on cognitive function are well-documented. While the reliability of testing for the presence or level of certain drugs (to establish impairment at the time of testing) may be less settled, we consider there is a clear connection between reducing the risks of drug use and testing for drugs.

The possibility of alcohol and drug testing, coupled with consequences for failure or refusal to comply, can be expected to have a deterrent effect on alcohol and drug use in the commercial maritime sector. Testing applies only to safety-sensitive workers whose activities are capable of significantly affecting the health or safety of any person aboard a ship.

We also consider the testing regime is proportionate to the importance of the objective. Only workers who perform safety-sensitive activities may be tested. There is a stronger case for testing safety-sensitive workers to reduce risks in the context of workplace drug and alcohol management, and those workers can reasonably expect to be subject to correspondingly increased scrutiny.

3.5. We disagree, particularly insofar as random testing for drugs is concerned. The evidence is far from settled in relation to the links between safety at work, use of drugs and testing. According to the best international evidence, there is no clear link between drug testing and workplace accident rates. According to the RIS, the Government does not know whether there is a problem justifying intervention. We therefore consider that random drug testing (either by the employer or the regulator)

⁴ 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].

⁵ Ministry of Justice (26 October 2016) Consistency with the New Zealand Bill of Rights Act 1990: Maritime Transport Amendment Bill <https://www.justice.govt.nz/assets/Documents/Publications/maritime-transport-amendment-bill.pdf>

fails to constitute a reasonable limitation on the right of commercial maritime workers not to be subject to unreasonable search and seizure.

4. Insufficient cost-benefit analysis

4.1. 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.

4.2. However, we also question the economic rationale for these changes.

4.3. The NZIER report to the Ministry of Transport 'a cross-modal risk analysis of substance impairment' (2014) relies strongly on assumptions and guess work. The sheer scope of these assumptions significantly limit the value and weight that can reasonably be placed upon the report. In relation to deaths in the commercial maritime sector, the report states at 8-9 that:

There is a paucity of estimates of the role of drugs and/or alcohol as a contributing factor in fatalities in commercial maritime activities. We have assumed commercial incentives and health and safety regulations reduce the incidence of substance impairment. Therefore, we have assumed that substance impairment is a contributing factor in 8% of commercial maritime fatalities.

4.4. The assumed 8% figure is not explained but appears to be based on equivalence with NZIER's assumption that substance impairment is a contributing factor in 8% of aviation fatalities. NZIER states at 8 that "[t]he assumption [of 8% in aviation] is based on the result of Li and Baker (2007) in the United States." However, as NZIER notes on the same page, Li and Baker's work only considered the incidence of alcohol (not other substances).

4.5. NZIER's assessment of the costs of alcohol and drug use are insufficiently rigorous to form a basis for intervention under any reasonable evidence-based policy making framework.

4.6. A significant weakness of the Bill therefore is that it treats alcohol usage and drug usage as equivalent. They are not. Because alcohol is processed so quickly, breath and blood alcohol testing are closely correlated with impairment there is evidence linking 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.

- 4.7. 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 crash⁶ did not find that 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.

- 4.8. The RIS contains an estimate of the potential costs for businesses at 12-13.

- 4.9. There is insufficient evidence to understand how significant a departure from the status quo this represents. As the RIS notes at 13:

In the maritime sector, the majority of operators are small, one or two people operators and will have a sufficient drug and alcohol policy under Maritime Rule Part 19, or will be working towards entering the Maritime Operator Safety System in the next three years. ...

[T]he majority of commercial maritime vessels ... already require some degree of drug and alcohol management plan, and as such will incur few additional costs. However, if a more comprehensive testing regime is required there may be some further expenditure. The regulators will work with industry to minimise unnecessary costs and ensure the plans reflect an appropriate level of safety.

- 4.10. The requirement to implement random testing across all operators (which was not considered in the RIS presumably because it was seen as too extreme) will push all operators towards the high estimate. As we note below in section 5, the definition of safety-sensitive activities may potentially capture all workers on ships.

- 4.11. The *Clear Heads* Discussion Paper states at [2.41] that there around 2,000 commercial maritime operators with 10,000 employees between them. Depending on the frequency of random testing these costs may be significant in aggregate.

- 4.12. So a remotely reasonable cost-benefit analysis is impossible for these changes. We have an unknown but potentially significantly overstated benefit measured against unknown but potentially significant costs. This is poor law-making from an evidence-based policy standpoint.

⁶ TAIC Inquiry 12-001: Hot-air balloon collision with power lines and in-flight fire, near Carterton, 7 January 2012

- 4.13. As a concise summary of the issue, it is impossible to improve upon the words of the Ministry of Transport's own Regulatory Impact Statement ('the RIS') for this part of the Bill:⁷ "We do not have the data to know the true scale of the problem of if there is a problem... Until we know the true extent, we will not know what the appropriate level of intervention is."
- 4.14. Given the lack of robust evidence in favour and with significant arguments against, we submit that the Bill should not require randomised drug testing. We do not object to the requirement for operators to have a DAMP although we note that this is effectively an existing requirement for MOSS certification.

5. **Safety-sensitive activities (cl 40Y);**

- 5.1. Safety-sensitive activity is defined in cl 40Y as "an activity that could significantly affect the health and safety of any person on board a ship, including the person performing the activity" and "includes an activity prescribed by the maritime rules."
- 5.2. This definition is broad, vague and unhelpful. The use of the phrase "health and safety" is puzzling. Must the activity potentially significantly affect **both** the health **and** the safety of a person on board a ship?
- 5.3. Why is this definition restricted to the health and safety of any person on board a ship? Does this include other ships? What about other marine vessels such as kayaks, surfboards and jet-skis? What about the health and safety of swimmers or port workers?
- 5.4. 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. Taken to its logical conclusion, any work on a ship is potentially safety sensitive due to risks of falling overboard or the ship sinking.
- 5.5. The Committee may wish to consider whether it intends that all maritime work should be safety sensitive and therefore subject to random testing. If this is not the intent, then the definition should be more specific. If this is the intent, then it would be more straightforward to say so directly.

⁷ Regulatory Impact Statement: Options to reduce the risks of alcohol and drug related impairment in aviation, maritime and rail (undated) at 9

- 5.6. We submit that the definition of safety sensitive work needs a significant tidy up. 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.

6. Response plans (cl 40Y) and consultation

- 6.1. One of the most helpful parts of the Bill is the requirement under cl 40Z(2)(d) that a DAMP includes a response plan. A response plan is defined under cl 40Y 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.
- 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 submit therefore that cl 40Z regarding the development of a DAMP should therefore include a requirement for DAMP operator who is an employer to consult in good faith with their employees and any representative unions

7. The use of test results in prosecutions (cl 40ZF)

- 7.1. Given the potential employment consequences of a non-negative drug test (whether random or not) it is puzzling that civil proceedings under the Employment Relations Act 2000 are not included in the list of Acts where test results may be admissible.

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.

- 7.2. To give two examples of the oddity of this position, an employer who dismisses or disadvantages a worker on the basis of a non-negative random test may not bring evidence that the test was, in fact, non-negative. Equally, a worker in a similar case who claims that the thresholds used were much too low to be reasonable cannot bring evidence of their actual results. This is odd and unsustainable.
- 7.3. We submit that civil proceedings under the Employment Relations Act 2000 should be included in cl 40ZF.