

4 July 2019

Ministry of Transport  
**Wellington**

By email: [ca.bill@transport.govt.nz](mailto:ca.bill@transport.govt.nz)

**Re: Civil Aviation Exposure Draft Bill**

The New Zealand Law Society welcomes the opportunity to comment on the Civil Aviation Exposure Draft Bill (the draft Bill) and associated Commentary.

**General comment**

1. The Law Society supports the proposal to amalgamate and restructure the Civil Aviation Act 1990 and the Airports Authorities Act 1966 into a Civil Aviation Bill, and to set out the statutory purposes in clauses 3 and 4 of the Bill. This will reduce inconsistencies and improve accessibility for users and those affected by the legislation.
2. The Law Society suggests that the Ministry also consider a more streamlined approach to the empowering provisions relating to the making of rules in clauses 44 – 51. These clauses appear to be a direct extraction from the Civil Aviation Act 1990. The empowering provisions have evolved and been amended over many years, and the Bill would be more accessible if these provisions were rationalised.

**Part 3 – Rules**

**Clause 43: Rule-making power**

3. Clause 43 sets out a very broad power for the making of rules, allowing a rule to be made that relates to any of the specified purposes, which are generally stated.<sup>1</sup> Any such rule could have significant legislative effect. Although clause 43 is similar to the broadly worded rule-making power in section 28 of the Civil Aviation Act 1990, it would be prudent to review it to ensure the power is appropriate, because it involves a significant delegation of Parliament's law-making power.
4. One option could be to qualify the clause 43 power with a requirement that, in making rules, the Minister must consider whether the subject matter of the rule is appropriate for a rule, taking into account the effects of the rule on parties (particularly individuals and the public), and the extent to which it applies to persons who are not participants in the aviation industry. This requirement could be added to clause 53 (the procedure for making rules). A similar requirement exists in section 155 of the Local Government Act 2002 in relation to the making of bylaws under that Act or the Maritime Transport Act 1994.

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<sup>1</sup> For example, clause 23 (Functions of the CAA) refers broadly to "civil aviation safety and security".

### **Clause 65(6): Incorporation by reference**

5. Clause 65(6) provides that “Part 2 of the Legislation Act 2012 does not apply to material incorporated by reference in a rule or to an amendment to, or a replacement of, that material.”<sup>2</sup>
6. While that reflects the current law under section 36(7) of the Civil Aviation Act, it is contrary to good practice requirements relating to access, consultation and amendment of such material. It reduces access to material incorporated by reference, which should generally be available.
7. It is also inconsistent with section 53(3) of the Legislation Act 2012, which provides that amendments to material incorporated by reference are of no legal effect unless they are specifically incorporated by a later instrument.
8. Clause 65(6) therefore has the effect that amendments to material incorporated by reference will become part of New Zealand law without going through the same legislative process and examination as when they are first referred to in rules. Although the amendment must be notified in the Gazette under clause 65(5), that process requires fewer checks and balances than for the initial rule-making. The approach in this clause therefore impinges on the sovereignty of New Zealand to determine its own laws. It is also not consistent with the Legislation Design and Advisory Committee’s Legislation Guidelines and the underlying policy of the incorporation by reference provisions in the Legislation Act.<sup>3</sup>
9. The Law Society recommends that, at a minimum, clause 65(5) is amended to require all material incorporated in rules to be freely available online and that any replacement material does not have legal effect unless it is specifically incorporated by a later instrument.

### **Part 5, subpart 2 – Drug and Alcohol Management Plans and testing**

#### **Clause 107: DAMP operator must develop DAMP**

10. The policy objectives are to strengthen the management of the risk of drug and alcohol impairment in the commercial aviation sector, including by requiring aviation operators to have a drug and alcohol management plan (DAMP) for workers carrying out safety-sensitive activities. The Commentary and clause 107(1) of the draft Bill specify random testing, but do not expressly provide for non-randomised testing (such as pre-employment or post-incident testing, including on the grounds of ‘reasonable cause’). Since the purpose of DAMPs is to manage risks, consideration should be given to whether the policy objective would be better met by amending clause 107(2) to include a requirement for non-random testing.
11. It is not clear from clause 107 how the “permissible levels” of alcohol/testable drugs are to be determined in the DAMP. The definition of “drug and alcohol test” in clause 106 suggests that there may be zero tolerance (“... a test ... to determine the presence, but not the level, of alcohol or a testable drug ... in the sample”), but the definition of “negative result” and clause 107(2)(b)(ii) provide that the DAMP may specify a level of alcohol or testable drug. Guidance for DAMP operators in how to set permissible levels would be helpful.

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<sup>2</sup> This seems to be an incorrect reference; the reference should be to subpart 2 of Part 3 of the Legislation Act 2012.

<sup>3</sup> [http://www.ldac.org.nz/guidelines/legislation-guidelines-2018-edition/issues-particularly-relevant-to-empowering-secondary-legislation/chapter-15/#part\\_3](http://www.ldac.org.nz/guidelines/legislation-guidelines-2018-edition/issues-particularly-relevant-to-empowering-secondary-legislation/chapter-15/#part_3)

#### **Clause 108: Random testing by DAMP operator**

12. Clause 108 sets out the requirements for random testing by a DAMP operator, but the wording of subclauses (1) and (2) are inconsistent. Clause 108(1) provides that a DAMP operator *must* ensure that random testing is carried out, whereas clause 108(2) provides that random testing may only be carried out if the worker consents to be tested. This tension could be removed by framing clause 108(1) as an obligation to carry out the testing *programme*, rather than the actual test.
13. Clauses 108(2) and 108(4) refer respectively to the need for the worker's consent to testing, and the requirement to explain to the worker the consequences of refusing consent, but do not explicitly require notifying the worker that they can refuse consent. Given the potential infringement of bodily integrity and privacy involved in testing, the clause should explicitly require the worker to be notified of the right to refuse consent.
14. Clause 108(4) provides that the person who carries out random testing (for or on behalf of a DAMP operator) must: request the worker's consent before testing; explain to the worker the consequences of refusing consent; and carry out tests in accordance with the DAMP and any requirements in the rules. The clause does not require the information to be provided to the worker in writing and appears to allow only for the information to be conveyed verbally. It would be preferable to require both written and verbal information, to accommodate people for whom English is a second language, or those who are dyslexic or have limited literacy skills.
15. It may also be desirable to require the person carrying out the testing to determine whether the person to be tested has sufficient competence in English that they will understand the information. If the person does not have sufficient competence in English a translation should be required, given that important issues – such as the person's right not to consent to a medical procedure, and the consequences of non-consent – are involved.

#### **Clause 109: Director testing**

16. As with clause 107, guidance should be provided on how to set the permissible drug/alcohol levels for testing.
17. Clause 109(4)(a) describes the required contents of a statement which must be shown to a worker before a test is administered. Clause 109(5) expands on the information that must be included and provides in paragraph (d) that the statement must include an explanation of the consequences of refusal to undergo testing. However, there is no requirement that the worker be notified of their right to refuse testing. As outlined above in relation to clause 108, the right to refuse consent to testing should be included in the clause 109(5) list of information to be provided to the worker.
18. Clause 109(4)(e) requires only that written information be provided to the worker. As discussed above in relation to clause 108, it is desirable that both a verbal and written explanation are provided.
19. It should also be a requirement that the statement (written or verbal) be translated if necessary to assist the worker to understand the information.
20. There are some incorrect cross-references in the following subclauses:
  - a. the reference in cl109(4)(e) should refer to "subsection (5)" instead of "subsection (4)";

- b. the reference in cl109(5) should refer to “subsection (4)(e)” instead of “subsection (3)(e); and
- c. the reference in cl109(5)(a) should refer to “subsection (4)(a)’ instead of “subsection (3)(a)”.

## **Part 6 – Aviation security**

### **Clause 136: Requirements and incidental powers relating to the manner of searching persons**

21. Clause 136(1)(b) provides that when searches are made by means other than solely mechanical, electrical or electronic devices, the aviation security officer carrying out the search must be a “suitable searcher” in relation to the person being searched. The term “suitable searcher” is not defined and its meaning is unclear. For example, if “suitability” is intended to relate to gender, and prohibits all or some cross-gender searches, the legislation should say so (as it does in section 80(1)(b) of the Civil Aviation Act 1990). It may be helpful to specify that gender, for the purposes of a search, is based on the gender presentation of the individual. Any uncertainties regarding gender presentation should be resolved by asking the individual how they wish to be treated, not by asking them to specify their gender. We therefore recommend that the term “suitable searcher” is defined in the Interpretation section (clause 123).

### **Clause 159: Being present in security area or security enhanced area without being screened or when not authorised.**

22. Clause 159 creates an infringement offence of being present in a security area or security enhanced area without being screened or when not authorised. A defence of reasonable excuse should be added, so that the clause is consistent with the offence of trespass in clause 287, and with the offence of being found on property without a reasonable excuse under section 29 of the Summary Offences Act 1981.

## **Part 10 – Investigation, intervention and compliance, and enforcement**

### **Subpart 2 – Protections in relation to accident and incident notifications under subpart 1 of Part 5 (clauses 263 – 266)**

23. Clauses 263 – 266 contain protections in relation to the reporting of safety information (‘Just Culture’). Just Culture seeks to improve accident and incident reporting and the identification of aviation risks, by ensuring that certain protections from enforcement action are provided to those who self-report.<sup>4</sup>
24. The drafting of these clauses and the exceptions are such that the protections are not clear or unambiguous. In the case of clause 265(1), the test “the public interest in taking action in the circumstances outweighs the aviation safety benefits of full accurate, and timely notification of aviation incidents” is reasonably broad. While clause 265(2) gives some clarity around how the Director may exercise the discretion to take law enforcement action, it is not express that these are the only grounds on which the Director may exercise the discretion. The term “public interest” may be construed very widely at the Director’s discretion, which raises the question

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<sup>4</sup> Commentary to the draft Bill, at [47] – [49].

how people making a report can have certainty that the information will not be used against them.

25. A similar issue arises in relation to the protection in clause 266 (when the Director may take administrative action), although it is noted that the test is slightly different, i.e. that “the interests in taking the action in the circumstances outweigh the aviation safety benefits of full, accurate, and timely notification of aviation incidents”. It is not clear what test the Director would use in this situation, because the word “interests” is not measured against the “public interest” standard as used in clause 265, and in both cases those concepts are not defined. As with clause 265, this will not give certainty to persons about how information might be used against them.
26. It would be desirable to provide greater clarity in the drafting of these clauses, including providing definitions of the terms “interest” and “public interest”.<sup>5</sup>

#### **Clause 279: Powers of Minister to intervene on grounds of national security**

27. The term “national security” is not defined in the draft Bill. There is a risk it will be interpreted to mean whatever is expedient in the circumstances. For clarity, and to prevent abuse, the term should be defined. The list of harms referred to in section 58 of the Intelligence and Security Act 2017 would be an appropriate frame of reference.

### **Part 11 – Regulations and miscellaneous provisions**

#### **Clauses 349, 350:**

28. Clauses 349 and 350 provide a new power for the Director to make “transport instruments”. The key control on transport instruments is that their scope and use would be determined by the Minister and they would have no effect except to the extent that a rule or a regulation refers to them. Transport instruments will be legislative instruments, subject to disallowance and Regulations Review Committee scrutiny, public consultation and publication requirements once the Legislation Bill is enacted. The power for rules or regulations to provide for the Director to impose requirements is not affected (under clause 56(4) or clause 329(3)).
29. There is a need for very clear delineation between the rules made by the Minister and the transport instruments made by the Director. This is necessary to avoid overlapping or confusing requirements.
30. The relationship between the Director’s power to impose requirements (an administrative rather than legislative power) and the Director’s power to make transport instruments also needs to be clearly defined; otherwise the unintended consequence may arise of the Director making requirements administratively under clause 56(4) or clause 329(3), when a legislative instrument (a transport instrument) is required.
31. We recommend that the purposes for which transport instruments can be made should be refined because clause 349(2) is currently broader than any rule-making power of the Minister.
32. The proposal to provide for transport instruments also raises an issue about the regulator (who is responsible for administering and ensuring compliance with the rules) also being the law-


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<sup>5</sup> Statutes often define the features of the public interest that are relevant to the context – see for example section 34(5) of the Financial Markets Authority Act 2011.

maker, because usually these roles are separate.<sup>6</sup> We suggest that any powers for the Director to make transport instruments should be limited to implementing the requirements of the rules or regulations or specifying how compliance may be achieved.

We hope these comments are helpful to the Ministry in finalising the draft Bill. If you wish to discuss the comments, please do not hesitate to contact the convenor of the Public and Administration Law Reform Committee, Jason McHerron, through the committee's Law Reform Advisor Dunstan Blay (██████████).

Yours faithfully

A handwritten signature in black ink, consisting of a large, stylized loop followed by a long horizontal stroke extending to the right.

Andrew Logan  
**Vice President**

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<sup>6</sup> Legislation Guidelines: 2018 edition at 18.2, available at <http://ldac.org.nz/guidelines/legislationguidelines-2018-edition/>.