



NEW ZEALAND
LAW SOCIETY

NZLS EST 1869

Maritime Transport Amendment Bill

02/02/2017

Submission on the Maritime Transport Amendment Bill

1 Introduction

- 1.1 The New Zealand Law Society (Law Society) welcomes the opportunity to comment on the Maritime Transport Amendment Bill (Bill). This submission sets out the Law Society's recommendations on a range of issues to ensure the proposed amendments are clear and workable in practice and achieve the Bill's stated objectives.
- 1.2 The Law Society's comments are grouped under the following headings:

Part 1 — Drug and alcohol testing amendments

- Compliance with the New Zealand Bill of Rights Act 1990
- Test results only to be used in certain proceedings
- Competence of the operator
- Informing the person subject to testing
- Refusal to undergo testing
- Drafting of definitions

Part 3 — Miscellaneous amendments

- Retention of infringement fees

Part 1 — Drug and alcohol testing amendments

2 Compliance with the New Zealand Bill of Rights Act 1990

- 2.1 The Bill provides for the development of Drug and Alcohol Management Plans (DAMPs) including what is effectively mandatory random testing.¹ This engages the right to be free from unreasonable search or seizure in section 21 of the New Zealand Bill of Rights Act 1990 (NZBORA).
- 2.2 The Law Society agrees with the Ministry of Justice advice on the Bill's consistency with the NZBORA. The policy aims of the Bill mean that the enactment of such a random testing regime is reasonable, and is not contrary to section 21 of the NZBORA.
- 2.3 However as noted elsewhere in this submission, there are some points of detail which should be addressed to ensure that any possible inroads into the right are clearly defined and easily understood.

3 Test results only to be used in certain proceedings

- 3.1 Proposed section 40ZF (inserted by clause 6 of the Bill) provides that test results obtained by a DAMP operator from carrying out random testing are not admissible in any proceedings other than the prosecution of an offence against one of four listed Acts.
- 3.2 A DAMP operator is defined in proposed section 40Y and in many situations may be the employer of a worker who is the subject of the random test. Yet the test results obtained by a DAMP operator who is the employer of the worker may not be used in any employment proceeding. Those employment proceedings are likely to arise where the employer takes disciplinary action against the

¹ While people may refuse to be tested, there are consequences for this.

worker that is then contested by the worker via proceedings in either the Employment Relations Authority or the Employment Court, or the testing process itself is at issue.

- 3.3 There are good reasons to have such a restriction in regard to unrelated proceedings, including preventing the misuse of the information, or its use for a purpose that is unrelated or inconsistent with the purpose of the Bill. However, it is not clear what the reason is for this restriction also applying to related employment proceedings. There may be good reasons, consistent with the purpose of the Bill, why either party would want to use the test results in an employment proceeding.
- 3.4 It is also noted that there is no similar restriction as regards the outcome of Director testing carried out under proposed section 40ZC. There is no explanation in the Bill's explanatory note or the Regulatory Impact Statement to explain the difference in approach.

Recommendation:

- 3.5 Amend the proposed section to make it clear that the test results obtained by a DAMP operator from carrying out random testing are admissible in proceedings in the Employment Relations Authority or the Employment Court related to the drug testing of the worker.
- 3.6 For consistency, consider applying the same restriction to the admissibility of test results obtained by the Director from testing carried out under proposed section 40ZC.

4 Competence of the DAMP operator

- 4.1 Proposed section 40ZB(3) (inserted by clause 6 of the Bill) currently reads:

"The DAMP operator must ensure that a person who carries out random testing is capable of carrying out the testing, including by having any necessary experience or qualifications."

- 4.2 The standard of ability required is set too low. A person may be "capable" of carrying out testing without being adequately skilled. If the rights of an individual to be free from random testing are to be limited, Parliament should ensure that any testing is done by a suitably qualified and competent person.
- 4.3 The same issue arises in proposed section 40ZC(2)(d) in relation to random testing carried out by the Director.

Recommendation:

- 4.4 Replace proposed section 40ZB(3) as follows:

"The DAMP operator must ensure that a person who carries out random testing is competent by reason of that person's experience or qualifications to carry out the testing."

- 4.5 Replace proposed section 40ZC(2)(d) as follows:

"Director testing –

(d) must be carried out by a person competent by reason of that person's experience or qualifications to carry out the testing."

5 Informing the person subject to testing

- 5.1 Proposed section 40ZC(3)(e) (inserted by clause 6 of the Bill) requires a written statement to be given to the person to be tested. The statement will contain quite complex information (see proposed section 40ZC(4)). However, the section does not require a verbal statement conveying the same information. Given the real possibility the person to be tested may have limited literacy, or limited

literacy in English, a verbal explanation in addition to the written statement is desirable. The proposed section should be modified to require the contents of the listed material to be explained verbally.

- 5.2 It may also be desirable to require the person carrying out the testing to ascertain whether the person to be tested has sufficient competence in the English language that he or she will understand the nature of the information to be given. If the person does not have sufficient competence in English, a translation should be required, given that it involves important matters such as the person's right not to consent to a medical procedure, the consequences of non-consent, and appeal rights.

Recommendation:

- 5.3 The obligation to provide information to a person to be tested in proposed section 40ZC(3)(e) should include a requirement for the tester to convey verbally to the person on whom the test is being carried out the same information as is required in the written statement.
- 5.4 Provision should be made for the statement, written or oral, to be translated if required for the person to understand the information.

6 Refusal to undergo testing

- 6.1 Proposed section 40ZD(1) (inserted by clause 6 of the Bill) expressly provides that a person to be tested may refuse to undergo testing. There is no mention of this in the list of matters in proposed section 40ZC(4) of which the person is to be informed, although that list does require information to be given about the consequences of refusal to take the test (subsection (4)(d)). It is highly desirable that the list be amended to require an express statement to the person that he or she may refuse to be tested.

Recommendation:

- 6.2 The list of matters of which the person to be tested is to be informed in proposed section 40ZC(4) should be amended to include an express statement to the person that he or she may refuse to be tested.

7 Drafting of definitions

- 7.1 Proposed section 40Y (inserted by clause 6 of the Bill) includes the following definitions to be used in proposed Part 4B of the Bill:

testable drug, in relation to a DAMP developed by a DAMP operator, means a drug of any kind that—

- (a) could impair a safety-sensitive worker's performance of a safety-sensitive activity; and*
- (b) is specified in the DAMP as a drug that is to be tested for the purposes of this Part.*

- 7.2 The part of the definition contained in paragraph (b) is not clear. The grammatical meaning is that the drug is to be tested for the purposes of the Act. What is intended is that the drug is one for which testing for the purposes of the Act is specified.

Recommendation:

7.3 Redraft paragraph (b) as follows:

“(b) is specified in the DAMP as a drug for which testing may be undertaken for the purposes of this Part.”

Part 3 — Miscellaneous amendments

8 Retention of infringement fees

- 8.1 Proposed section 33Q (inserted by clause 31) expands the entitlement of regional councils to retain infringement fees when issuing infringement notices. The policy rationale for this expansion is to incentivise enforcement of national rules directly rather than replicate them in local bylaws, and encourage greater levels of enforcement overall. However, no account seems to have been taken of the fact that in many cases regional councils have transferred the responsibility of enforcing the maritime rules or local bylaws to other authorities, including other territorial authorities or Council Controlled Organisations. Under the Act, this may occur under section 33X, although there are some longstanding transfers under previous maritime legislation. Unless those other entities are able to retain infringement fees, there is a risk the policy rationale will not be achieved.
- 8.2 While proposed section 33X(4B) (inserted by clause 32) provides for the responsibilities and powers of the party receiving the transfer to be extended, it is not clear whether this extension would include the entitlement to retain fees, which is expressly referred to as an entitlement as opposed to a responsibility or power.
- 8.3 Consideration should be given to clarifying that the entitlement to retain infringement fees should belong to the entity actually responsible for enforcing the relevant rules. This could be achieved by amending proposed section 33Q or proposed section 33X(4B).

Recommendation

8.4 Amend proposed section 33Q by either:

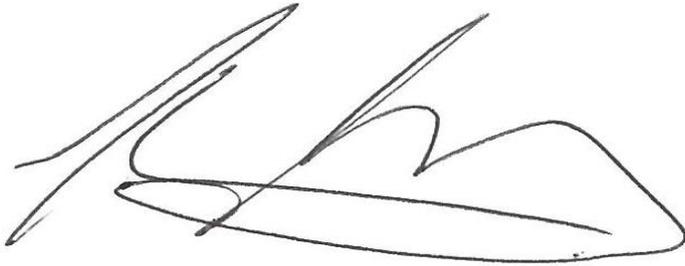
- making the existing provision subsection (1) and adding a subsection (2) as follows:
*“For the purposes of subsection (1), **regional council** includes a territorial authority or other public authority to which responsibility for issuing infringement offence notices for breaches of maritime rules has been transferred.”*

or
- replace “is entitled to” with “may”.

8.5 Alternatively, amend proposed section 33X(4B) by replacing “responsibilities and powers” with “responsibilities, powers and entitlements”.

9 Conclusion

9.1 The Law Society does not wish to be heard, but is available to meet with the officials advising on the Bill if the Committee considers that would be of assistance.

A handwritten signature in black ink, appearing to be 'K. Beck', written in a cursive style.

Kathryn Beck
President
2 February 2017