

Discussion Paper
Clear heads: options to reduce the risks
of alcohol-and drug-related impairment in
aviation, maritime and rail

March 2015



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Section one – summary report

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- 1.1 A number of recent and high-profile fatal and serious accidents have occurred in the aviation and maritime sectors where drug and alcohol impairment may have been a contributing cause. As a result, the Transport Accident Investigation Commission (the Commission) and coroners recommend legislation be developed to manage the risks of substance impairment.
- 1.2 Most recently, the Commission's report *Inquiry 12-001: Hot-air balloon collision with power lines and in-flight fire, near Carterton, 7 January 2012*, released in October 2013, contains specific recommendations including:

... the Secretary for Transport complete, as a matter of priority, all necessary work that will support the introduction of appropriate legislation or rules that will:

- ▶ *prescribe allowable maximum levels for alcohol*
- ▶ *prohibit persons from operating an aircraft, vessel or rail vehicle if they are impaired by drugs*
- ▶ *require operators to implement drug and alcohol detection and deterrence regimes, including random testing*
- ▶ *prescribe post-occurrence testing requirements for drugs and alcohol.*

This legislation or these rules should apply:

- ▶ *across the aviation, maritime and rail transport modes*
- ▶ *to persons operating an aircraft or a marine craft for recreational purposes.*

- 1.3 Although the Commission has requested that the Ministry of Transport consider both alcohol and drugs, the discussion paper proposes that any specific legal requirements around drug impairment in the aviation, maritime and rail sectors are considered at the same time as the review of drug-driving in the road transport sector. The drug-driving review is being undertaken as part of the *Safer Journeys Action Plan 2013–2015*. Because of this, the discussion paper covers the issue of drugs as part of an operator's alcohol and drug detection and management systems, but does not cover it in relation to legal enforcement.

Commercial sector

- 1.4 The commercial aviation, maritime and rail transport sectors in New Zealand currently manage alcohol and drug impairment through a combination of health and safety in employment legislation, transport Acts¹, and transport rules. The transport Acts governing the respective sectors set out the criteria for participating, and include basic safety obligations. The transport

¹ The Civil Aviation Act 1990, the Maritime Transport Act 1994 and the Railways Act 2005.

rules, which sit under their respective Acts, contain detailed technical standards and procedures. The sectors each have their own approach to drug and alcohol management, which relates to the risk level of the sector.

1.5 All employers must comply with the Health and Safety in Employment Act 1992 (the HSE Act). The HSE Act² already requires that:

- ▶ employers take “all practicable steps” to ensure the safety of employees and other people at work
- ▶ employees take “all practicable steps” to ensure their own safety
- ▶ no action or inaction of the employee while at work causes harm to any other person.

1.6 In 2012, the government amended the Health and Safety in Employment (Adventure Activities) Regulations 2011. At the same time, aviation and maritime rules were changed (Civil Aviation Rule Part 115 and Maritime Rule Part 82). Maritime Rule Part 81 was enacted in 2011 and is included as one of the adventure tourism regulations. Adventure tourism operators must now describe in their safety plans how they will manage risks associated with alcohol or drug impairment.

1.7 In recent years, the government has introduced a number of changes to clarify and strengthen the requirements on commercial maritime vessels. A number of these changes explicitly outline the need for drug and alcohol management plans. This includes the introduction of Maritime Rule Part 19, which requires maritime transport operators covered by the rule to include a drug and alcohol policy in their safe operating policy.

All employers must follow a number of specific regulations in the aviation, maritime and rail sectors, as well as meeting general health and safety requirements.

1.8 We seek your feedback on the options in the discussion paper. The options fall into two categories – managing drug and alcohol impairment through:

- ▶ the HSE Act and specific legislative requirements (options 1–3)
- ▶ creating an offences regime with associated penalties (option 4).

1.9 We have developed a number of proposed options for the commercial sector. Several of the options could either be independently actioned or grouped together as part of a package in a final proposal. At this stage, the Ministry of Transport does not have a preferred option.

² The HSE Act will soon be replaced with the Health and Safety at Work Act. The Bill is currently before the House.

Option 1 – status quo

- 1.10 Option 1 would leave the current regime in place. There would be an increase in education on the risks associated with alcohol and drug impairment in the aviation, maritime and rail sectors.
- 1.11 It is clear from the road transport sector that it has taken almost a generation to achieve a change in attitudes and behaviour towards drink-driving. Education has been a significant part of the work to achieve this. A new or expanded advertising campaign directed at the aviation, maritime and rail sectors could increase the benefit of the already established road sector programmes.
- 1.12 An education campaign would be implemented for any of the other options discussed in this paper.
- 1.13 Education and increasing awareness can highlight the risks associated with alcohol or drug impairment and the responsibility of those in both the commercial and recreational sectors to manage these risks. Education campaigns that increase awareness may not be adequate to produce long-term changes. Education campaigns that are combined with enforcement measures have been found to have greater success in shifting attitudes and behaviour by alerting people to the increased risk of being caught.

Option 2 – drug and alcohol management plan

- 1.14 Option 2 would require commercial operators who are not already covered under other regulations³ to develop and implement specific alcohol and drug management plans, including appropriate testing requirements, as part of their safety management plans.
- 1.15 Many operators, especially larger ones, may already meet the proposed requirements to manage alcohol- and drug-related drug risks. For example, in rail, the National Rail System Standards⁴ (NRSS) and the overarching requirements set out that each organisation's Safety Case requires all rail personnel to follow a drug and alcohol policy.
- 1.16 Under option 2, the regulatory model introduced in 2012 for adventure aviation⁵ and maritime tourism operators⁶ would be expanded to apply to all commercial operators in the aviation,

³ Such as Civil Aviation Rule Part 115 or Maritime Rule Part 19.

⁴ NRSS 7 – Rail Operations Interoperability, Section 13.1 and NRSS 3 – Health Assessment of Rail Workers.

⁵ http://www.caa.govt.nz/rules/Part_115_Brief.htm.

⁶ <http://maritimenz.govt.nz/Rules/List-of-all-rules/Part81-maritime-rule.asp> and <http://maritimenz.govt.nz/Rules/List-of-all-rules/Part82-maritime-rule.asp>.

maritime and rail sectors. They would be required to prepare specific drug and alcohol management plans.

- 1.17 Each business would scale the plans to suit the size of the business and the amount of risk in their operations. The plans would need to include information on employment relations processes, such as education, discipline and rehabilitation as well as specific plans on testing. The plans will be signed off once the director of the overseeing agency is satisfied it meets the agency's requirements.
- 1.18 The amount of extra work a business needs to do to prepare and operate a drug and alcohol management plan would determine the costs for this option. Larger operators are unlikely to face high additional costs or significantly increased workloads, due to the extent of existing laws in the commercial sectors. Costs will vary and will be proportional to the size of the business.

Option 3 – drug and alcohol management plan with mandatory post-occurrence testing

- 1.19 Option 3 would require testing for impairment after an incident, but the tests would not include enforcement or penalties beyond what the sector already has in place. The term 'incident' would need to be defined for this purpose. This option would allow the Commission to gather more information on the extent to which alcohol and drug impairment contributed to the cause of an accident. The option does not have an enforcement or a prosecution focus.
- 1.20 The commercial operator, as part of its drug and alcohol management plan (option 3.1), or the Commission, through an approved third party (option 3.2), could test under this option.
- 1.21 The cost would vary depending on whether option 3.1 or 3.2 was implemented, how post-occurrence testing was defined and who would carry out testing.

Option 4 – maximum limits for alcohol, with testing for enforcement

- 1.22 Option 4 proposes setting a maximum legal limit for alcohol in the commercial aviation, maritime and rail sectors. This option would include specific alcohol-related offences and penalties.
- 1.23 The following are two sub-options that would enable Police to test for alcohol impairment when they consider it necessary:

- ▶ post-occurrence – following an incident or accident
- ▶ ‘good cause’ testing – where the Police have reason to suspect impairment.

1.24 We initially considered an option that allowed the Police to undertake random testing for enforcement purposes. However, given the level of intrusion and the cost associated with implementing a random testing regime, we have not included random testing by the Police in this discussion document. We have considered random testing in relation to workplace testing, where employers can require employees to be randomly tested. Further information on the difference between random testing for enforcement and random testing in the workplace can be found in Appendix One.

1.25 We will need to consider the following issues for any of the options that include testing for enforcement purposes.

What should the maximum alcohol level be?

1.26 The discussion paper suggests two options:

- ▶ The maximum limit would be the same across all transport sectors allowing for a simpler system.
- ▶ Each sector would be treated differently, reflecting the different risks in the different sectors.

Who can be tested?

1.27 A number of people can be responsible for the safe operation of an aircraft, vessel, or rail vehicle⁷. For this reason, most countries use a broader definition of those who are required not to be impaired than the equivalent of ‘driver’ in the road transport sector. We need to consider if all safety-sensitive⁸ roles should be tested, or if the ‘driver’ equivalent is adequate.

What penalties should be set for breaching these limits?

1.28 Setting a maximum blood alcohol level means offences and penalties need to be set in legislation. The easiest solution is to use the road transport scale of penalties. However, this may not be appropriate in the aviation, maritime and rail sectors as the sectors differ vastly, including the levels of participation, the licensing regime and the size of the vehicles. It would not be practical to confiscate large planes or vessels.

1.29 Any form of new testing will create significant extra costs for the Police. It will be vital that the Police can test in the legally prescribed manner and maintain the chain of custody to reduce the likelihood of results being challenged in court. Testing after an incident would require the lowest level of new powers and funding, as ‘good cause’ testing would cover a larger number of

⁷ Rail vehicles can include maintenance vehicles such as those operating alongside rail tracks.

⁸ Sometimes referred to as ‘safety critical’ or other similar terms.

incidents compared to a larger number of incidents where there is 'good cause to suspect' impairment.

- 1.30 Most workplaces are not public places. An enforcement officer may require powers to enter premises such as ports, airports and rail yards to test employees. The officer may create safety and security issues and risk significant harm if they are not familiar with the work environment. These issues need to be balanced against whether testing for enforcement purposes in the commercial sectors adds value.

Recreational sector

- 1.31 The government has very different approaches for managing alcohol and drug impairment in the recreational aviation and maritime sectors, as they have different associated risks. A body of research suggests there is widespread alcohol and drug use in society, and therefore this is likely to be the case also in the recreational maritime and aviation sectors. In the recreational sector⁹, the status quo would not address the concerns the Commission has raised, particularly in the maritime sector.
- 1.32 There are only two proposed options for the aviation and maritime recreational sectors: to keep the current regime in place, or to introduce maximum alcohol limits, combined with a penalty regime.

Option A – status quo

- 1.33 The recreational maritime sector has very few controls on unsafe activity, such as licensing and preventing the operation of a vessel while the person in charge is impaired. Section 65 of the Maritime Transport Act 1994 prohibits dangerous activity involving ships or maritime products, but this has not been widely used for enforcement in the recreational sector. Restrictions on recreation boat operators do exist regionally, with different regional councils making navigation bylaws to govern safe boating and water-based activities. Different regions have different bylaws on the use of alcohol and drugs in maritime activities.
- 1.34 In contrast, the recreational aviation sector already has requirements relating to impairment. Civil Aviation Rule Part 19.7 imposes on pilots a legal obligation not to fly if they are impaired. Civil Aviation Rule Part 1 defines 'impaired' as "affected by fatigue, injury, medical condition, or by the consumption of alcohol or other drugs such that the person may be a risk to the safety of himself or herself or of any other person". The Civil Aviation Authority guidance is that "there is no measurable level of blood alcohol that is safe for aviation".

⁹ In the recreational sectors we are only referring to aviation and maritime, as there is effectively no recreational rail sector.

1.35 Option A would include an education campaign, which may be a cost-effective option. Greater public awareness of the risks from impairment (including from drugs), and the existing obligations under section 65 of the Maritime Transport Act and the Civil Aviation Rules could be sufficient to increase safe behaviour in the recreational maritime sector.

Option B – enforce maximum legal limits for alcohol

1.36 The Commission has recommended the government prescribe maximum allowable levels of alcohol for recreational participants. At present, there are no legally prescribed limits for the presence of alcohol (or other substances) for recreational participants in sectors other than road transport.

1.37 It would be possible to introduce maximum legal limits for alcohol and prescribe specific alcohol-related offences and penalties. The Civil Aviation Act 1990 and the Maritime Transport Act 1994 would need to be amended. Setting maximum legal limits for alcohol for the recreational sector would allow monitoring and enforcement, and would align the aviation and maritime recreation sectors with the road transport sector.

1.38 Alcohol use by passengers appears to be partly responsible for fatalities in the recreational maritime sector. However, this discussion paper proposes that legislated maximum limits would apply just to the master or skipper. It would be difficult to enforce restrictions for passengers on certain vessels, particularly on larger recreation boats that have the capacity for overnight passengers.

1.39 In Option B we have identified two sub-options outlining what level of testing would be permitted:

B.1. **post-occurrence** – where an incident or accident occurs during an aviation or maritime activity

B.2. **‘good cause’** – where there is reason to believe a person is impaired by alcohol while undertaking an aviation or maritime activity.

All sectors

Option 5 – the Commission to have the power to test those involved in an occurrence

- 1.40 The Commission has asked for specific powers to test people for the presence of alcohol or drugs if they have been involved in an accident. The Commission's recommendation could only be fully implemented if the Transport Accident Investigation Commission Act 1990 was amended.
- 1.41 Option 5 would enable the Commission (or a suitably approved third party) to require samples from any person after a defined incident to determine if the presence of alcohol or drugs was a causal or contributing factor. This option is solely to assist the Commission to determine the causes and circumstances of an accident.
- 1.42 Option 5 would enable testing of any person involved in an incident, whether they were on the plane, boat or train or not. Further thought is needed on the scope of this testing, whether it would be for all defined incidents or only for the ones the Commission is investigating. The cost would depend on the level of testing the Commission requests.
- 1.43 This option is a stand-alone option that could be implemented with or without any of the other options.