

Chair  
Cabinet Economic Growth and Infrastructure Committee

## RECOMMENDATIONS TO REDUCE THE RISKS OF ALCOHOL AND DRUG IMPAIRMENT IN AVIATION, MARITIME AND RAIL

### Proposal

1. I seek the Committee's agreement to introduce the following measures aimed at reducing the risks of alcohol and drug impairment in the aviation, maritime, and rail sectors.
  - 1.1. Require all commercial aviation and maritime operators to have a drug and alcohol management plan, which will include mandatory random alcohol and drug testing.<sup>1</sup> In sectors such as adventure aviation or domestic maritime, this will mean the introduction of mandatory random drug and alcohol testing. This is more stringent than the current aviation and maritime rules.
  - 1.2. As part of the regulators' oversight and monitoring role, allow the regulators to undertake non-notified<sup>2</sup> drug and alcohol testing against the standards set in the organisation's drug and alcohol management plan.
  - 1.3. Officials will undertake policy work to consider enabling the Transport Accident Investigation Commission to require drug and alcohol testing for survivors. Only those who have a material causality on an accident or incident will be tested in order to determine the cause of the accident. I expect to report back to this Committee on the outcome of this work in September 2016, if a changes to legislation is required.
  - 1.4. I ask the Committee to note that these changes will not apply to the recreational sectors in these modes, or to the commercial rail sector because adequate mechanisms are already in place:
    - 1.4.1. section 65 of the Maritime Transport Act 1994 makes it an offence to operate a maritime vessel in a dangerous manner
    - 1.4.2. sections 43a or 44a of the Civil Aviation Act 1990 make it an offence to operate an aircraft in a careless or dangerous manner
    - 1.4.3. Civil Aviation Rule Part 19.7 makes it an offence for a crew member to be intoxicated or impaired by drugs

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<sup>1</sup> Random testing is the unscheduled, unannounced testing of randomly selected employees by a process designed to ensure that selections are made in a non-discriminatory manner.

<sup>2</sup> Non-notified testing is unannounced testing. It can be with or without good cause to suspect impairment.

1.4.4. the Railways Act 2005 requires operators to describe the policies in place to ensure rail personnel are not impaired by alcohol or drugs.

1.5. I also ask the Committee to note that I do not recommend alcohol limits set in legislation over and above what already exists.

### **Executive summary**

2. Following TAIC's response to the Carterton hot-air balloon crash, and a number of other high-profile transport accidents, I instructed the Ministry to consult on options to reduce the risks of alcohol and drug related impairment in the aviation, maritime and rail sectors [EGI Min (15) 10 refers].
3. Consultation highlighted the importance of a strong safety culture and encouraging workplace cooperation. This consultation has led me to develop proposals designed to create a culture of zero tolerance of operator impairment.
4. The major change I am proposing is in the aviation and maritime commercial sector. The change will ensure members of the public and staff working in aviation and maritime know that all practical steps have been taken to ensure their safety. The changes will not affect rail operators, as adequate mechanisms exist under the Railways Act 2005.
5. The first part of the proposal is to require all commercial operators in the aviation and maritime sectors to have alcohol and drug management plans. These plans will require random testing of all safety sensitive staff members.
6. To add extra assurance to members of the public, I also plan to introduce powers for the regulators to undertake non-notified testing of any safety sensitive staff member working in the aviation or maritime sector. This will ensure that all operators are managing alcohol and drug risks appropriately. These powers will be part of the regulators' oversight and monitoring role.
7. This approach will be low cost for the majority of operators, but will impact most on those who are not managing the risks. The focus is on improving the safety culture.
8. I propose to retain the current regime for the recreational sectors. This reflects the measures already in place, the potentially complex and costly nature of enforcement for these sectors, and the limited direct evidence of a problem.
9. Table 1 below summarises the recommended changes in the commercial sectors.

**Table 1: Current and proposed legal requirements for managing drug and alcohol impairment**

	Group	Current requirements	Proposed requirements
Aviation	<b>Adventure Aviation</b>	Explicit drug and alcohol management programme outlined in Civil Aviation Rule Part 115.	Explicit drug and alcohol management programme <b>that includes mandatory random drug and alcohol testing.</b> <b>CAA will be able to undertake non-notified testing.</b>
	<b>Crew members</b>	Requires both commercial and recreational crew members to be unimpaired outlined in Civil Aviation Rule Part 19.	Requires both commercial and recreational crew members to be unimpaired outlined in Civil Aviation Rule Part 19. <b>Crew members will be subject to mandatory random drug and alcohol testing.</b> <b>CAA will be able to undertake non-notified testing.</b>
	<b>Other commercial aviation</b>	General requirement for crew members to be unimpaired outlined in Civil Aviation Rule Part 19.	<b>Explicit drug and alcohol management programme that includes mandatory random drug and alcohol testing.</b> <b>CAA will be able to undertake non-notified testing.</b>
Maritime	<b>Domestic maritime operators</b>	Drug and alcohol policy must be included, as appropriate, in a maritime transport operating plan under Maritime Rule Part 19.	Explicit drug and alcohol management programme <b>that includes mandatory random drug and alcohol testing.</b> <b>MNZ will be able to undertake non-notified testing.</b>
	<b>Seafarers with Standards Training Certification and Watchkeeping convention requirements</b>	Legislated alcohol limits outlined in the Maritime Transport Act. Maritime Rule Part 21 require drug and alcohol be considered as part of the safety management system.	Legislated alcohol limits outlined in the Maritime Transport Act. Explicit drug and alcohol management programme <b>that includes mandatory random drug and alcohol testing.</b> <b>MNZ will be able to undertake non-notified testing.</b>
	<b>Adventure Maritime</b> (Adventure Tourism and Commercial Jet Boat Operations – River)	Safe Operational Plans, including drug and alcohol as part of the management of hazards are required as outlined in Maritime Rule Parts 81 & 82.	Explicit drug and alcohol management programme <b>that includes mandatory random drug and alcohol testing.</b> <b>MNZ will be able to undertake non-notified testing.</b>
	<b>Adventure Maritime</b> (Kayaking and River boarding)	These are regulated by WorkSafe under the Health and Safety in Employment (Adventure Activities) Regulations 2011.	These are regulated by WorkSafe under the Health and Safety in Employment (Adventure Activities) Regulations 2011.

	Group	Current requirements	Proposed requirements
Rail	National Railway System operators	Drug and alcohol policy outlined in legislation.	Drug and alcohol policy outlined in legislation.

10. Finally I propose to consider enabling TAIC to require alcohol and drug testing from any survivors of an aviation, maritime or rail accident in the commercial and recreational sectors. This will help TAIC determine the cause of an accident and allow us to monitor if the measures in place are sufficient.
11. These are significant powers to give to TAIC. Therefore, before I recommend the final changes I will instruct the Ministry to undertake further policy work to determine how the policy will be implemented.

## Background

12. New Zealand generally has a good safety record in the aviation, maritime and rail sectors. However, accidents in these sectors, while rare, can have catastrophic consequences.
13. Over the last decade, TAIC has reported on fatalities in the aviation, maritime and rail sectors. These reports have identified gaps in how New Zealand manages impairment from alcohol or drugs in these sectors.
14. Following the hot-air balloon crash near Carterton in 2012, in which all 11 people on board died, TAIC recommended changes to the management of alcohol and drug impairment in the aviation, maritime and rail sectors. The Coroner who investigated the crash recommended changes in the aviation sector.
15. TAIC's and the Coroner's recommendations are summarised in Appendix One.
16. The alcohol and drug impairment management regime in aviation and maritime has been significantly strengthened since 2012 (primarily through strengthened requirements for adventure tourism operators). An outline of the current regime (and the proposed amendments) is appended to this paper.
17. Despite the changes since 2012, the Ministry and the transport sector regulators cannot be sure that all operators are managing alcohol and drug related safety risks appropriately, consistently and to a uniform standard.
18. We also cannot be sure of the size of the problem. The Ministry commissioned NZIER to estimate the size of the problem in New Zealand based on international evidence (table 2).

**Table 2: Fatalities where impairment may be a factor 2002–2011<sup>3</sup>**

Transport mode	Estimated drug and alcohol impairment related fatalities 2002–2011
<b>Road</b> (for comparison purposes)	<b>1,335.9</b>
<b>Total aviation</b>	<b>12.2</b>
Commercial aviation	6.5
Recreational aviation	5.7
<b>Total maritime</b>	<b>48.4</b>
Commercial maritime	5.1
Recreational maritime	43.3
<b>Rail</b>	<b>1.0</b>

19. Table 2 indicates recreational maritime is the riskiest activity across the three sectors, with a social cost over 10 years of approximately \$167.8 million. However, this needs to be considered more broadly. In all modes, fatalities are usually the result of a number of factors, and focusing solely on drug and alcohol impairment is unlikely to achieve the sought after outcome. NZIER has calculated the real social cost of fatalities from drug and alcohol impairment may be as low as \$4 million per year. This is compared to a cost of \$136 million per year in the road sector.

### Clear heads consultation

20. In March 2015, I released a discussion paper (the Clear heads paper) and instructed the Ministry to consult with targeted industry organisations and businesses [EGI Min (15) 1/12 refers].
21. The Ministry’s Clear heads consultation ran from 10 March to 8 May 2015. The Ministry sought feedback from industry and the public on options to reduce the risks of alcohol and drug related impairment in aviation, maritime and rail.
22. The Ministry received 37 submissions and held 10 face-to-face meetings with 14 organisations. The organisations represented large firms, small and medium enterprises, industry representative groups and members of the public.
23. The options the Ministry consulted on are set out below in table 3.

<sup>3</sup> Source: NZIER report - A cross-modal risk analysis of substance impairment.

**Table 3: Options from the Clear heads consultation**

<b>Sector</b>	<b>Option (preferred highlighted)</b>
Commercial	Status quo
	Require operators to develop drug and alcohol plans
	Mandate post-occurrence testing by operators
	Mandate post-occurrence testing by an approved third party
	Enable post-occurrence testing for enforcement
	Enable good cause to suspect impairment testing for enforcement
Recreational	Status quo
	Enable post-occurrence testing for enforcement
	Enable good cause to suspect impairment testing for enforcement
All	Enable TAIC to test all persons involved in an accident

*There were two major concerns raised in the Clear heads consultation*

24. During consultation, a number of submitters highlighted two problems, outlined below.
  - 24.1. We do not have sufficient data to know the true scale of any problem with drug and alcohol impairment.
  - 24.2. We cannot be confident that every operator is appropriately managing the risk of alcohol or drug impairment.
25. While the consultation did not provide additional evidence on the extent of the problem, there was general agreement that the following would help improve safety in the sector.
  - 25.1. **An approach that focused on employer responsibility rather than enforcement.** Enforcement is seen as detrimental to improving the safety culture of a workplace, as it reduces the likelihood of honest reporting and does not encourage taking a rehabilitative approach for employees.
  - 25.2. **Increasing the evidence base before implementing extreme responses.** Submitters supported testing for data collection purposes rather than for enforcement, citing the complexities of evidential thresholds and the absence of accident and incident reporting.
  - 25.3. **Understanding the costs, benefits, risks and practical issues associated with implementation.** Some submitters highlighted the lack of evidence of a problem and were sceptical of the costs and benefits of some of the options (especially the enforcement options). Some submitters suggested that impairment by alcohol and drugs was not as significant a problem as impairment by fatigue.
26. The Ministry will not conduct a second Clear heads consultation as originally intended, due to:
  - 26.1. the relatively low level of interest from the sectors in the first consultation



26.2. further consultation that will occur during relevant legislative amendment processes.

### **The preferred package of proposals will improve safety and data collection**

27. Following analysis of the consultation feedback, I consider there is not sufficient evidence to proceed with the level of intervention that TAIC has proposed and I am not presenting any options in this paper that will include enforcement by the New Zealand Police. In the most egregious circumstances the Police can take action under the Crimes Act 1961.
28. To enable Police to undertake random testing for enforcement purposes would require a legal limit to be set in legislation and an infringement and enforcement regime established. This level of intrusion is not justified by the current evidence base, and would likely breach the New Zealand Bill of Rights Act 1990.
29. My preferred package of proposals is in three parts and is outlined below.
- 29.1. Part 1: Explicitly require commercial operators to have a drug and alcohol management plan that includes random alcohol and drug testing.
- The regulators will undertake non-notified testing as part of their oversight and monitoring role.
- 29.2. Part 2: Continue with the current approach in the aviation and maritime recreational sectors.
- 29.3. Part 3: Enable TAIC to require alcohol and drug testing from survivors involved in an aviation, maritime or rail accident or incident.

#### **Part 1: Explicitly require commercial operators to develop drug and alcohol plans with the regulators undertaking non-notified testing**

*This proposal will not affect commercial rail legislation*

30. This proposal will not amend the current legislative regime for commercial rail operations. The Railways Act 2005 already requires operators to describe the policies in place to ensure rail personnel<sup>4</sup> are not impaired by alcohol or drugs.
31. There are currently two large organisations and six small organisations operating on the National Railway System and over 90 rail licence holders operating on their own tracks. The larger organisations have explicit drug and alcohol policies that include random testing. A number of the smaller rail holders run infrequently and are staffed by volunteers. The potential cost of a workplace-testing regime would place a significant cost on these organisations. The risk with smaller rail licence holders is minimal and does not justify random testing for all participants.

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<sup>4</sup> Rail personnel include employees, contractors and volunteers engaged by an operator to carry out rail activities.

32. The intent of this proposal can be achieved under current legislation for commercial rail. I will instruct officials to work with rail licence holders and applicants to ensure these policies are up to standard.

#### *Changes to the aviation and maritime sectors*

33. Currently, there is a mix of implicit and explicit requirements across the aviation and maritime sectors. This creates inconsistencies in application of the requirements and does not provide assurance that the drug and alcohol requirements are well managed.

33.1. The adventure aviation sector requires drug and alcohol management plans, including random testing. Other parts of the aviation sector have no explicit requirements, other than for crew members to be unimpaired.

33.2. Domestic maritime operators are required to have a drug and alcohol policy but there are no explicit requirements for what is to be included in the policy, while large ocean going merchant ships have a maximum alcohol limit.

34. The proposed amendments will make the requirements explicit in primary legislation for all parts of the aviation and maritime sectors. The legislation will also require mandatory random drug and alcohol testing. Random testing will cover safety sensitive staff.<sup>5,6</sup> In sectors, such as adventure aviation or domestic maritime, this will mean the introduction of mandatory random drug and alcohol testing. This is more stringent than the current aviation and maritime rules.

35. The employer, or an agent on their behalf, will undertake the testing on health and safety grounds. The criteria for testing must be included in the employment agreement, and incorporate the employment relations processes outlining what will happen if a positive test result occurs. The drug and alcohol management plans will:

35.1. reflect the risk of the activity being undertaken

35.2. not contravene the employee's rights.

36. The regulator will agree to all drug and alcohol management plans, including the frequency of testing. The Crown Agencies will ensure that similar operations are consistent, including frequency, the level of testing, and consequences.

37. I propose to amend the Civil Aviation Act 1990 and the Maritime Transport Act 1994 to achieve this change. The legislation will include explicit requirements for all aviation and maritime operators to develop drug and alcohol management plans that include random alcohol and drug testing. The associated rules will set out what needs to be included in the plans.

38. Alongside this, I propose to introduce powers for the regulators in aviation and maritime to undertake non-notified testing. The regulator will be able to undertake non-notified testing of any employee engaged in a safety sensitive activity as part of

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<sup>5</sup> Safety sensitive activity means any activity carried out by any person in the course of their work in relation to a transport system that could significantly affect the health or safety of persons on a transport system.

<sup>6</sup> The case *NZ Amalgamated Engineering Printing and Manufacturing Union Incorporated & Ors v Air NZ & Ors (2004)* determined random testing of employees working outside safety sensitive areas is not justifiable.



their auditing role. The testing standards and limits will depend on what the operator has stipulated in their drug and alcohol management plan. As outlined above, the Crown Agency will agree to the drug and alcohol management plan before it is signed off. The expectation of what is to be included will be clearly outlined to all commercial operators.

39. In practice, for a positive (or “non-negative”) result, the regulator will instruct the operator to implement the consequences of a failed test as outlined in the drug and alcohol management plan. In some circumstances, the offending will be significant enough to justify the regulator taking action against an individual or company. This could be administrative, such as the removal of a maritime or aviation document, or prosecution if the case is strong.
40. Two potential offences the regulator could prosecute under are Section 44 of the Civil Aviation Act 1990 or Section 65 of the Maritime Transport Act 1994. Under both Acts, an offender is liable on conviction to imprisonment for a term not exceeding 12 months, or a fine not exceeding \$10,000 for an individual or \$100,000 for a body corporate. If a case is egregious enough, the Police will take action under the Crimes Act 1961. A list of the offences the Crown Agencies can use to take administrative action or prosecution is attached at Appendix Two.
41. Giving Crown Agencies the flexibility to prosecute or take administrative action will allow for a scalable approach that addresses the risks of each organisation, while balancing the costs for smaller, less risky businesses. Making each business examine and manage their risk creates wider safety benefits, with greater buy-in from both management and staff. This approach also improves the Crown Agencies’ ability to collect evidence to aid prosecution.
42. This is a similar approach to managing drug and alcohol impairment as in the Australian civil aviation sector.
43. The purpose of the requirements is preventative, rather than being a punitive measure after an accident has occurred. This is intended to help improve the safety culture of a workplace. If reckless behaviour is demonstrated, punitive responses will still apply.

*TAIC requested allowable maximum levels for alcohol be prescribed*

44. In TAIC’s report following its investigation of the 2012 Carterton hot-air balloon crash, it recommended that allowable maximum levels for alcohol should be prescribed. The Coroner has recommended amending the Civil Aviation Act 1990 to enable random testing by Police.
45. The immediate advantage of setting alcohol limits is ease of prosecution, as the intoxication itself would be sufficient for the regulator to take a prosecution. Under some of the current offences, the regulator would have to link the intoxication with dangerous or careless activity to take a prosecution.
46. However, there are a number of difficulties with legislating maximum limits, including how to set limits and if they should be the same as the road and maritime or a zero tolerance, the practicality of implementing testing for enforcement purposes, with

aviation and maritime environments being difficult to undertake testing, and undermining the current safety systems.

47. The same deterrent effect could be achieved without legislating the limits. If the regulator states its expectations for the drug and alcohol management plans, there would be, in effect, a consistent approach to setting limits across the sector. The Civil Aviation Authority (CAA) already does this, by stating no level of alcohol is acceptable when undertaking aviation activities.
48. I recommend using a non-legislative approach to limits. Legislating a limit would add complexities without achieving better results.

*TAIC also recommended prohibiting persons from operating a aircraft, vessel or rail vehicle if they are impaired by drugs*

49. In the aviation sector, this provision already exists. No crew member may be intoxicated or impaired by drugs under Civil Aviation Rule 19.7. In the maritime sector, a number of practical difficulties mean I do not recommend any changes in this sector.
50. For road users there is currently an impairment test for drugs. In addition to this, the Ministry of Transport is developing a proposal to introduce random drug testing for drivers to test for the presence of stipulated drugs.
51. However, we do not recommend this for commercial aviation and maritime operators. As the focus of this intervention is on commercial operators, using the drug and alcohol management plans to manage drug impairment should see similar results.

*This proposal is a relatively small change for most operators*

52. Many operators already have drug and alcohol plans in place. Rule changes, including the adventure tourism changes introduced in 2012 and the Maritime Operator Safety System (MOSS), already require drug and alcohol plans.<sup>7</sup> Alongside the regulatory requirements, random testing is becoming more common in the aviation sector. It is not as common in the maritime sector.
53. The primary benefit of this proposal is to ensure all commercial operators are appropriately managing risk. The proposal targets operators who currently have less or no formal controls and ensures all companies comply with an appropriate standard of safety. It will also benefit operators that have proactively met the standards by reducing the risk of reputational damage to their sector from companies that are not managing the risk adequately.
54. The regulators will agree with the operator on what the requirements are for testing. All operators will be required to have random alcohol and drug testing. The CAA and Maritime New Zealand will work with operators to ensure they meet the standards.

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<sup>7</sup> Civil Aviation Rule Part 100 will introduce Safety Management System (SMS) later this year, and Maritime Rule Part 19 introduced MOSS in 2014. These two systems require operators to develop safety plans covering all aspects of safety in their operations. It is likely that rule changes to implement mandatory drug and alcohol management plans will simply add an explicit requirement to existing rules.

55. Allowing regulators to undertake non-notified testing in their sector will add further safety measures into the system. This will ensure independent verification that the risk of drug and alcohol impairment is being managed, and will provide additional assurance to the public.

*The financial impacts of this proposal will vary for different operators*

56. Many operators have already developed an appropriate plan, which means additional costs will be negligible or non-existent. Additional costs may be incurred through possible increases in the regulators' auditing fees. However, as regulators regularly audit an operator as part of the usual safety auditing, any additional cost is expected to be negligible.
57. However, costs will be higher for operators who do not meet the required standard. For example, a non-compliant, two person small operator could face increased costs of around \$295 as a one off cost, with \$260 annually to undertake testing. A non-complying medium size business with 25 staff conducting safety sensitive activities could face increases of approximately \$1,965 one off cost, with ongoing annual costs of \$2,820 for a testing agency to undertake 25 tests per year and to calibrate in-house equipment. Operators who are already meeting the required standard will already be incurring these costs.
58. Additional administration cost for the regulator will be addressed during the rules process.

*Next steps: amending Acts and rules to explicitly require operators to develop drug and alcohol management plans*

59. I seek Cabinet's agreement to amend the Civil Aviation Act 1990 and the Maritime Transport Act 1994 to give effect to this proposal.
60. Once the Acts are amended, the procedural details of the random testing programme will be included in rules. Rule changes will be prepared alongside amendments to the Acts.
61. The table below sets out the details of the proposed legislative changes:

**Table 4: Proposed legislative changes**

<b>Legislative instrument</b>	<b>Nature of amendment</b>	<b>Next steps</b>
Civil Aviation Act 1990 Maritime Transport Act 1994	<ul style="list-style-type: none"> <li>• Introduction of a requirement for operators to have a drug and alcohol management policy that includes random testing of safety sensitive staff.</li> <li>• An empowering provision to allow the process for conducting testing to be set out in subordinate legislation.</li> <li>• Introduction of addition powers for regulator to undertake non-notified drug and alcohol testing.</li> </ul>	The Ministry will develop drafting instructions to include with the Civil Aviation Amendment Bill and the Maritime Amendment Bill.

<p>Several Civil Aviation Rules and Maritime Rules will need to be amended to cover personnel in safety sensitive activities</p>	<p>The requirement will be similar to Civil Aviation Rule Part 115 – Adventure Aviation – Certification and Operations.</p> <p>The rules will include requirements for the drug and alcohol management plans to include information on:</p> <ul style="list-style-type: none"> <li>• which roles are considered safety sensitive</li> <li>• who will undertake the testing (e.g. accredited person or agency or a health practitioner)</li> <li>• in what situations testing will be undertaken (e.g. pre-employment, post incident, random)</li> <li>• how testing will be undertaken (e.g. what body sample will be tested such as breath, oral fluids, urine, hair or blood).</li> </ul>	<p>The CAA and Maritime New Zealand will consult with their respective sectors on the drug and alcohol management plan through the usual rule amendment process.</p>
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**Part 2: Continue with the current actions in the recreational sector**

62. I propose to take no further action for the aviation and maritime recreational sectors (there is no recreational rail sector).
63. I have considered the information in table 2 on the estimated fatalities for alcohol and drugs alongside the following factors when determining what level of intervention should be undertaken.
- 63.1. There are already adequate mechanisms in place to address impairment causing danger or harm in this sector.
- 63.1.1. Civil Aviation Rule Part 19 – Transition Rules prohibits a crew member (both commercial and recreational) from acting in his or her official capacity if impaired by the use of any drug.
- 63.1.2. Sections 43A and 44 of the Civil Aviation Act 1990 prohibit anyone from operating aircraft in a careless or dangerous manner, respectively.
- 63.1.3. Section 65 of the Maritime Transport Act 1994 prohibits dangerous activity involving ships or maritime vessels<sup>8</sup>.
- 63.2. There is limited evidence in other jurisdictions that enforcement-based responses have improved safety in the recreational sectors.
- 63.3. Enforcing these options would be complex, especially in the recreational maritime sector. These complexities include the high number of recreational maritime participants dispersed over a large area, the low number of Police vessels, the lack of licensing or registration and the difficulties of conducting drug impairment testing to an evidential standard on the water.

<sup>8</sup> Two recent successful cases have seen recreational maritime users prosecuted for the misuse of alcohol, among other charges, while in charge of a boat.

64. I consider that most issues in the recreational aviation and maritime sectors can be addressed under existing (but potentially under-utilised) legislation. Any further response, including introducing maximum limits and Police-enforced testing regimes, is not justified at this stage.
65. Taking no further action does not mean Police or a regulator would be unable to prosecute impaired recreational aviation or maritime users if they were acting in a careless or dangerous manner, as outlined in paragraph 66.1 above.
66. I will instruct officials to use existing campaigns to continue to raise awareness of the risks of alcohol and drug impairment in recreational aviation and maritime activities.

*There are no expected financial impacts of this proposal*

67. The recreational proposal will not have any cost impact on the Crown or the recreational aviation and maritime sectors.

### **Part 3: Consider enabling TAIC to require alcohol and drug testing for any survivor involved in an aviation, maritime or rail accident**

68. Currently, TAIC only has powers to order drug or alcohol testing from deceased victims. TAIC cannot order testing on survivors of an accident or incident, regardless of whether a fatality has occurred because of the accident.
69. The ability to access test results of survivors of accidents or incidents would help determine whether alcohol or drug impairment was a contributing factor in causing an accident or incident.
70. The Transport Accident Investigation Commission Act 1990 (TAIC Act) could be amended to allow TAIC, or an agent on its behalf, to direct any survivors who have a material causality on an aviation, maritime or rail accident to be tested for alcohol or drugs. Consistent with their current powers, there would be no penalty for a positive test result.
71. Officials will undertake policy work to determine how such amendments would be implemented, as there are a number of difficulties in implementing this proposal. These difficulties include:
- 71.1. Survivors would need to be tested at, or close to, the time of the accident (to get an accurate idea of presence levels).
  - 71.2. Accidents in the aviation, maritime and rail sectors can often happen in inaccessible places (due to remote locations or security requirements).
  - 71.3. There are likely to be New Zealand Bill of Rights Act 1990 and Privacy Act 1993 implications for this proposal.
  - 71.4. There are issues around what happens when a survivor refuses or is unable to give consent to be tested, what powers TAIC or regulators could have to require tests, and for what purposes the results of tests could be used.

72. This proposal is in line with TAIC's purpose, which is to determine the circumstances and causes of incidents or accidents, with a view to avoiding similar occurrences in the future.
73. This proposal will enable data collection to determine if further regulation is appropriate and cost effective. Knowing the percentage of accidents that potentially have alcohol or drug impairment as a factor will help us ascertain the extent of the issue across these sectors. If it is significant, we can re-evaluate if more regulation is required.

*Next steps: further policy work*

74. I propose to instruct the Ministry to undertake further policy work, including financial impacts, with a view to potentially amending the TAIC Act. I expect to report back to this Committee, if there are recommendations for amendments, by September 2016.

### **Stakeholder risks**

75. The proposals are not as wide-ranging as those proposed by TAIC and the Coroner. This may raise public criticism from some stakeholders. In the Clear heads consultation, some stakeholders argued that Police random testing with maximum legal limits was needed, while other stakeholders commented that there was no justification for any further intervention given the low incidence level.
76. The proposals are designed to improve safety without imposing unnecessary costs, and to collect data to provide evidence to inform any future changes.
77. Potential reactions from different parts of the sectors are outlined below. The Ministry will develop key messages and questions and answers in collaboration with the transport agencies as part of a media package to respond to any public criticism.

*Families of the victims of the Carterton hot-air balloon crash may believe the proposals do not go far enough*

78. Some families of the victims of the 2012 Carterton hot-air balloon crash have publicly supported random testing by Police. Their submission to the Clear heads consultation stated the proposals do not go far enough. As part of the consultation, I instructed officials to offer to meet with the families of the victims directly. While no families accepted the offer, some liaised with the Ministry through their lawyer.
79. I will instruct officials to keep the families informed through their lawyer.

*Commercial maritime operators may be sensitive to further compliance costs following the Maritime Operator Safety System (MOSS) implementation and they may criticise the approach to recreational maritime*

80. Maritime New Zealand has been working with commercial maritime operators to assist them in implementing MOSS. This was a significant change in how operators manage safety risks.



81. Around 30 percent of the approximately 2,000 commercial maritime operators in New Zealand have implemented MOSS to date, with the rest expected to comply in the next three years. Some operators may need to strengthen their drug and alcohol management plans to include random alcohol and drug testing. However, clarified expectations for the remaining 70 percent of operators will mean they can incorporate the proposed requirements in their normal MOSS implementation. Other operators, such as jet boat operators, may also require amendments to their drug and alcohol management plans to include random testing. Some smaller operators with low-risk levels may feel the intervention is disproportionate to the risk.
82. Additionally, during the Clear heads consultation, several operators supported managing impairment from drugs and alcohol in the recreational sector. These operators said this would be the most effective way to reduce risks for commercial operations by improving general safety on the water.

*The New Zealand Safer Boating Forum may believe the proposals do not go far enough in recreational boating*

83. The New Zealand Safer Boating Forum released a safety strategy for the recreational sector in 2007, and updated it in 2014. The strategy recommended mandatory alcohol limits for recreational skippers.

#### **Departmental consultation**

84. The Treasury, the Ministry of Business, Innovation and Employment, WorkSafe, the New Zealand Transport Agency, the New Zealand Police, the Ministry of Justice, and the Department of Internal Affairs were consulted on this Cabinet paper and agree with its recommendations. The Department of the Prime Minister and Cabinet has been informed.
85. The CAA agrees with the the proposals, including the power for a regulator to undertake non-notified testing.
86. Maritime New Zealand supports the continued use of Maritime Rule Part 19 for commercial operators. Maritime New Zealand has also expressed support for enforceable drug and alcohol limits in the commercial sector.
87. In the recreational sector, the Police and Maritime New Zealand have expressed support for enforceable drug and alcohol limits in the recreational sector.
88. TAIC's feedback reflected that the proposals in this paper do not fully address its recommendations following the Carterton hot-air balloon crash (see Appendix One). TAIC contested the absence of new action taken for the recreational sectors in aviation and maritime.
89. The Ministry has advised that the current data on drug and alcohol related incidents do not justify the higher levels of intervention that the above-mentioned agencies propose. If new data gathered by the regulators through monitoring of drug and alcohol plans indicates a widespread problem, this decision can be revisited.
90. The Minister of Transport agrees with the submission of the paper.

## Financial implications

91. The proposals in this paper have no immediate financial implications for the Crown. Any additional cost the regulators face will be funded through their current budget, or included in the cost recovery for the audits.
92. I will report back to this Committee with recommendations on the proposal to enable TAIC to access the results of drug and alcohol testing for all persons involved in an aviation, maritime or rail accident by September 2016, if needed. These recommendations may have financial implications for the Crown.

## Human rights, gender and disability

93. The proposals in this paper are consistent with the New Zealand Bill of Rights Act 1990 and the Human Rights Act 1993. There are no gender or disability implications. The drug and alcohol management plans sit exclusively within the employment relationship. Any prosecutions by the Crown Agencies are unlikely to have new New Zealand Bill of Rights Act 1990 implications as the prosecutions would be for existing offences.
94. Depending on the outcomes of analysis, the TAIC proposal is likely to have New Zealand Bill of Rights Act implications in the future. These could include issues with how to compel uncooperative survivors of an accident to undertake testing, or how testing results will be used. The Ministry will consider Bill of Rights Act implications for the TAIC proposal in its advice to me.

## Legislative implications

95. The proposal for drug and alcohol management plans will require legislative amendments to the Civil Aviation Act 1990 and the Maritime Transport Act 1994 amendments to several Civil Aviation Rule Parts and Maritime Rule Parts.
96. The changes to the legislation will include require all aviation and maritime commercial operators to have drug and alcohol management plans that include randomly test staff in safety sensitive activities for the presence of alcohol or drugs, or both.
97. In order to incorporate how operators would conduct the random drug and alcohol tests into the transport rules, I will add empowering provisions into the relevant Acts. The rules will include requirements for the drug and alcohol management plans to contain information on which roles are considered safety sensitive, who will undertake the testing, in what situations testing will be undertaken and how testing will be undertaken.
98. The Acts will also include powers for the Directors of Civil Aviation and Maritime New Zealand, in order to monitor compliance, to undertake non-notified testing.
99. The TAIC proposal will require primary legislative amendments. I expect to recommend next steps on these amendments to this Committee in September 2016 if appropriate.

## Regulatory Impact Analysis

100. The Regulatory Impact Analysis requirements apply to these proposals. The Ministry has prepared a Regulatory Impact Statement (RIS), attached to this paper.
101. The transport sector independent RIS panel has reviewed the RIS prepared by the Ministry of Transport and considers that the information and analysis summarised in the RIS meets the quality assurance criteria. The information in the RIS is generally sufficient. Where data or other evidence is not available or relevant, this is discussed and the gap is reflected in the options analysis and, ultimately, the options selected. Further, the recommended options clearly address the data/evidence gap.
102. The Ministry confirms that the proposals in this paper are consistent with the expectations set out in the *Government Statement on Regulation*.
103. The Regulatory Impact Statement supports the proposals in this Cabinet paper, but it has only considered risk-based random testing and not mandatory random testing.


## Publicity

104. The CAA and Maritime New Zealand will consult on any rule amendments in 2016.
105. The Ministry will implement its communications plan in consultation with my office.

## Recommendations

106. I recommend that the Committee:

### *Part 1: Explicitly require commercial operators to develop drug and alcohol plans*

1. **agree** that all commercial operators in the aviation and maritime sectors are to have drug and alcohol management plans to reduce the risks of drug and alcohol impairment
2. **agree** that the all drug and alcohol management plans for commercial operators in the aviation and maritime sectors are to require random testing for alcohol and drugs
3. **agree** that the Directors of Civil Aviation and Maritime New Zealand will have powers to undertake non-notified testing in accordance with the details set out in recommendation 4
4. **agree** that changes to primary legislation can be progressed in the Maritime Transport Amendment Bill and the Civil Aviation Amendment Bill that will require all aviation and maritime commercial operators to have drug and alcohol management plans that include randomly testing staff in safety sensitive activities for the presence of alcohol or drugs, or both
5. 

Withheld to maintain the constitutional conventions which protect the confidentiality of advice tendered by Ministers of the Crown and officials.

6. **agree** that subordinate legislation will set out the procedural requirements for random testing, and for drug and alcohol plans
7. **invite** the Associate Minister of Transport to issue drafting instructions to the Parliamentary Counsel Office to give effect to recommendations 3 and 4
8. **authorise** the Associate Minister of Transport to make decisions that are consistent with the overall policy decisions in this paper, on any issues that may arise during the drafting process

*Part 2: Continue with the current actions in the recreational sector and commercial rail*

9. **note** that the recreational sectors and the commercial rail sector have sufficient mechanisms in place and do not require additional regulation

*Part 3: Enable the Transport Accident Investigation Commission to access the results of alcohol and drug testing*

10. **note** officials will undertake policy work to consider enabling the Transport Accident Investigation Commission to require drug and alcohol testing for survivors who have a material causality on an accident or incident, to determine the cause of the accident. I expect to report back to this Committee on the outcome of this work in September 2016, if changes are required.

Hon Craig Foss  
**Associate Minister of Transport**

Dated: \_\_\_\_\_

**Appendix One – Transport Accident Investigation Commission and Coroner recommendations**

1. In October 2013, the Transport Accident Investigation Commission released a report on the 2012 Carterton hot-air balloon crash. The report recommended that the Secretary of Transport work to introduce appropriate legislation or rules that will:	
1.1. prescribe allowable maximum levels for alcohol	Maximum alcohol levels are currently in place for large ships. Domestic maritime, aviation and rail will manage alcohol impairment through drug and alcohol management plans. See paragraphs 44-46.
1.2. prohibit persons from operating an aircraft, vessel or rail vehicle if they are impaired by drugs	Civil Aviation Rule Part 19.7 prohibits aviation crew from being impaired. All aviation, maritime and rail operators will manage drug impairment through drug and alcohol management plans. See paragraphs 49-51.
1.3. require operators to implement drug and alcohol detection and deterrence regimes, including random testing	All aviation and maritime operators will be required to have a drug and alcohol management plan that includes random testing. See paragraphs 33-37.
1.4. prescribe post-occurrence testing requirements for drugs and alcohol.	Regulators will be able to undertake non-notified testing as part of their monitoring role. This can include post-occurrence testing. See paragraph 38.
2. The report recommended that this legislation or rules should apply:	
2.1. across the aviation, maritime and rail transport modes	Alcohol impairment through drug and alcohol management plans will be required across all aviation and maritime commercial operators. See paragraph 30.
2.2. to persons operating an aircraft or a marine craft for recreational purposes.	Section 65 of the Maritime Transport Act 1994 and sections 44 and 45 of the Civil Aviation Act 1990 provide sufficient mechanisms to address impairment in the recreation sectors. See paragraphs 62-67.

<p>3. In May 2015, the Coroner who investigated the Carterton crash released his report. The report made a series of recommendations including:</p>	
<p>3.1. mandating random drug and alcohol testing by the operator as part of an adventure aviation operator's drug and alcohol management plans</p>	<p>All aviation operators, including adventure operators will be required to have a drug and alcohol management plan that includes random testing.</p> <p>See paragraphs 33-37.</p>
<p>3.2. mandating drug testing as part of initial and ongoing medical certification for pilots</p>	<p>Medical certification requires the disclosure of drug or alcohol convictions or a history of drug or alcohol abuse.</p> <p>All aviation operators, including adventure operators will be required to have a drug and alcohol management plan that includes random testing.</p>
<p>3.3. amending the Civil Aviation Act 1990 to enable random testing by Police</p>	<p>All aviation operators will manage impairment from alcohol or drugs through the operator's health and safety requirements, which will include random drug and alcohol testing by the employer or an agent on their behalf.</p> <p>See EGI paper EGI Min (15) 10 refers.</p>
<p>3.4. considering amending the Civil Aviation Act 1990 to include tougher sanctions on adventure aviation pilots who fail drug and alcohol testing.</p>	<p>There are a number of sanctions for an aviation document holder who acts in a careless or dangerous manner.</p> <p>An individual could face a maximum fine of \$7,000 or 12 months prison. A body corporate could face a maximum fine of \$100,000.</p> <p>Being intoxicated or impaired by drugs could attract a fine of \$5,000.</p>



## Appendix Two – Potential offences

Instrument	Section	Regulatory tool or penalty
<b>Statutory Offences</b>		
<b>Crimes Act 1961 section 177</b>	Punishment of manslaughter. This charge would be taken by the Police.	Everyone who commits manslaughter is liable to imprisonment for life.
<b>Maritime Transport Act 1994 section 40</b>	A seafarer may not perform, or attempt to perform, designated safety, security, or marine environmental duties on a ship while— (a) the proportion of alcohol in the seafarer's breath, as ascertained by an evidential breath test subsequently undergone by the seafarer under section 40I, exceeds 250 micrograms of alcohol per litre of breath; or (b) the proportion of alcohol in the seafarer's blood, as ascertained from an analysis of a blood specimen subsequently taken from the seafarer under section 40L or 40M, exceeds 50 milligrams of alcohol per 100 millilitres of blood.	An enforcement officer may arrest a seafarer without warrant if the officer has good cause to suspect that the seafarer has committed an offence.
<b>Maritime Transport Act 1994 section 43</b>	The Director may from time to time— (a) suspend any maritime document issued by the Director under this Act or under any maritime rules, or impose conditions in respect of any such maritime document; or (b) suspend the Director's recognition as a maritime document of any document issued by another person or any organisation, or impose conditions in respect of such recognition,— if he or she considers such action necessary in the interests of maritime safety, and if he or she— (c) is satisfied that the holder has failed to comply with any conditions of the relevant maritime document or with the requirements of section 17; or (d) is satisfied the holder has contravened or failed to comply with section 406; or (e) is satisfied such action is necessary to ensure compliance with any provisions of Parts 1 to 15 or any regulations or maritime rules made under this Act; or (f) considers that the privileges or duties for which the document has been granted, or the relevant document has been recognised as a maritime document, are being carried out by the holder in a careless or incompetent manner.	Suspension of maritime documents or imposition of conditions
<b>Maritime Transport Act 1994 section 44</b>	Revocation of maritime documents (1) If, at any time after an investigation carried out to decide whether any action should be taken under section 43, the Director believes that any relevant maritime document or the recognition of a document as a maritime document should be revoked, the Director may revoke that document or the recognition of that document.	Revoking a maritime document.

	<p>(2) Where the Director proposes to revoke a maritime document or the recognition of a document as a maritime document, the Director shall give notice in accordance with section 51, which shall apply as if the proposed revocation were a proposed adverse decision under this Act.</p> <p>(3) Where a maritime document or recognition of a document as a maritime document has been revoked under this section, the holder shall forthwith surrender that document or notification of recognition of that document to the Director.</p> <p>(4) Any person in respect of whom any decision is taken under this section may appeal against that decision to a District Court under section 424.</p>	
<b>Maritime Transport Act 1994 section 64</b>	Every holder of a maritime document commits an offence who, in respect of any activity or service to which the document relates, does or omits to do any act, or causes or permits any act or omission, if the act or omission causes unnecessary danger or risk to any other person or to any property, irrespective of whether or not in fact any injury or damage occurs.	Conviction – individual max \$10,000 or 12 months prison Conviction – body corporate max \$100,000
<b>Maritime Transport Act 1994 section 65</b>	Every person commits an offence who— (a) operates, maintains, or services; or (b) does any other act in respect of— any ship or maritime product in a manner which causes unnecessary danger or risk to any other person or to any property, irrespective of whether or not in fact any injury or damage occurs [or causes/permits the same].	Conviction – individual max \$10,000 or 12 months prison Conviction – body corporate max \$100,000
<b>Civil Aviation Act 1990 sections 17, 18 and 19</b>	<p>Section 17 gives power to suspend aviation documents, and section 18 gives power to revoke or impose conditions. Section 19 sets the criteria for these powers:</p> <p>(1) The Director may suspend any aviation document issued under this Act or rules made under this Act or impose conditions in respect of any such document, if he or she considers such action necessary in the interests of safety, and if he or she—</p> <p>(a) considers such action necessary to ensure compliance with this Act or rules made under this Act; or</p> <p>(b) is satisfied that the holder has failed to comply with any conditions of an aviation document or with the requirements of section 12; or</p> <p>(c) is satisfied the holder has contravened or failed to comply with section 49; or</p> <p>(d) considers that the privileges or duties for which the document has been granted are being carried out by the holder in a careless or incompetent manner; or</p> <p>(e) in the case of a holder of a New Zealand AOC with ANZA privileges, has received from the Director of CASA a copy of an Australian temporary stop notice given to the holder.</p>	Suspension/revocation of aviation document or impose conditions (administrative safety action)
<b>Civil Aviation Act 1990 section 43A</b>	Every person commits an offence who operates any aircraft in a careless manner	Conviction – individual max \$7,000 Conviction – body corporate max \$35,000

<b>Civil Aviation Act 1990 section 44</b>	Every person commits an offence who— (a) operates, maintains, or services; or (b) does any other act in respect of— any aircraft, aeronautical product, or aviation related service, in a manner which causes unnecessary danger to any other person or to any property [or cause/permits the same]	Conviction – individual max \$7,000 or 12 months prison Conviction – body corporate max \$100,000 (a non-negative test by the regulator would only be relevant for this penalty if there was a clear link between the test result and the impaired use of an aircraft etc.)
<b>Regulatory offences</b>		
<b>Maritime Rules (MR) 19</b>	NOTE Maritime Offences have not been set for Part 19. However, they are currently being developed.	
<b>MR 21.6(1)(b)</b>	Owner of ship must maintain safety management system	Conviction – individual \$5,000 Body Corporate – \$30,000
<b>MR 22.39</b>	Responsibilities of owners and persons responsible for navigation of vessel re observance of collision prevention requirements	Conviction – individual \$5,000 Body Corporate – \$1,000
<b>MR91</b>	Navigation safety rules cover various offences for navigating unsafely	Conviction – individual \$1,000 – \$2,000 Body Corporate – \$30,000
<b>Civil Aviation Rule (CAR) 19.7</b>	No crew member may be intoxicated or impaired by drugs.	Conviction – individual \$5,000
<b>CAR 65.25(a)</b>	Responsibilities of holder of air traffic trainee licence or air traffic controller licence to comply with prescribed medical requirements.	Conviction – individual \$2,500 Infringement – individual \$1,000
<b>CAR 91.201</b>	Responsibilities of pilot-in-command for safety of aircraft.	Conviction – individual \$5,000
<b>CAR 91.602(a)</b>	Person must not operate aircraft unless requirements of prescribed rules are met.	Conviction – individual \$5,000 Conviction – body corporate \$30,000 Infringement – individual \$2,000 Infringement – body corporate \$12,000
<b>CAR 115.101(b)(2)</b>	Holder of an adventure aviation operator certificate must comply with the exposition [the exposition includes the drug and alcohol plan].	Conviction – individual \$5,000 Conviction – body corporate \$30,000 Infringement – individual \$2,000 Infringement – body corporate \$12,000

# CURRENT VS PROPOSED

## ALCOHOL AND DRUG REGIME IN NZ TRANSPORT

### COMMERCIAL AVIATION



No legal maximum alcohol limit.  
**Explicit drug and alcohol plan requirements under Civil Aviation rules.**

### ADVENTURE AVIATION



No legal maximum alcohol limit.  
**Explicit drug and alcohol plan requirements under Civil Aviation Rule Part 115.**

### RECREATIONAL AVIATION



No legal maximum alcohol limit.  
 General requirement to not act in a careless manner in the Civil Aviation Act 1990.



Explicit powers to test for alcohol or drugs after an accident

### DOMESTIC SHIPS



No legal maximum alcohol limit.  
 Drug and alcohol plan requirements under Maritime Rule Part 19.  
**Strengthened drug and alcohol plan requirements under Maritime Rule Part 19.**

### MERCHANT SHIPS



50mg/100ml maximum alcohol limit set in the Maritime Transport Act 1994.  
 Drug and alcohol plan requirements under Maritime Rule Part 21.

### RECREATIONAL MARITIME



No legal maximum alcohol limit. General requirement to not act in a dangerous manner in the Maritime Transport Act 1994.



### COMMERCIAL FISHING

No legal maximum alcohol limit.  
 Drug and alcohol plan requirements under Maritime Rule Part 19.  
**Strengthened drug and alcohol plan requirements under Maritime Rule Part 19.**

No legal maximum alcohol limit.  
**Explicit drug and alcohol plan requirements in Railways Act 2005.**



### RAIL

### PRIVATE VEHICLES



50mg/100ml maximum alcohol limit and drug impairment tests set in the Land Transport Act 1998.

### COMMERCIAL VEHICLES



50mg/100ml maximum alcohol limit and drug impairment tests set in the Land Transport Act 1998.  
 No explicit drug and alcohol plan requirements.

### LANDSIDE PORT OPERATIONS



No legal maximum alcohol limit.  
 No explicit drug and alcohol plan requirements.

