New Zealand Law Society
Te Kāhui Ture o Aotearoa

Civil Aviation Bill

1/12/2021

Submission on the Civil Aviation Bill 2021

1 Introduction

1.1 The New Zealand Law Society | Te Kāhui Ture o Aotearoa (**Law Society**) welcomes the opportunity to comment on the Civil Aviation Bill 2021 (**Bill**).

1.2 The Bill seeks to repeal and replace the Civil Aviation Act 1990 and the Airport Authorities Act 1966. The collective aim of the Bill is to modernise and improve safety, security, emissions and economic outcomes within the civil aviation sector. The Bill also seeks to promote compliance using a range of regulatory tools, including revising penalty levels to provide deterrence and aligning them with other comparable legislation, including the Health and Safety at Work Act 2015 **(HSWA)**.

1.3 The Law Society supports the purpose of this Bill, but has identified some aspects requiring further consideration or clarification.

1.4 The Law Society wishes to be heard in relation to this submission.

2 Other relevant submissions

2.1 The Law Society made a submission on the Exposure Draft of this Bill in 2019. [1] Some of the recommendations made then have been incorporated into this Bill. Some have not, and to the extent that they still apply, they are addressed again in this submission.

3 Summary of recommendations

3.1 In summary, the Law Society recommends that:

(a) Any intended strict liability offences and the availability of a "no fault" defence are clearly specified (clause 41).

(b) Some of the penalty levels should be adjusted to reflect similar offences and penalties in comparable legislation (clauses 41(2) and 41(3)).

(c) There is an associated need for parity of penalties across the Bill, particularly if strict liability is intended (clauses 169 and 171).

(d) The mens rea elements of offences involving recklessness in causing unnecessary danger to people or property need to be more clearly specified (clause 41(3) and 103).

(e) The rule-making powers of the Minister and Director be qualified with requirements as to the appropriateness of the rule, its objective and consultation on the rule (clauses 52, 61, 62 and 67).

(f) Compliance with international standards and conventions must properly reflect the process for how New Zealand gives effect to them (clauses 61, 63, 69 and 72).

(g) The consequences of refusing drug and alcohol testing requirements should be more explicitly stated and drafting inconsistencies removed (clauses 115 to 116).

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[1] A copy of that submission is available on our website: https://www.lawsociety.org.nz/assets/Law-Reform-Submissions/0009-136737-l-MoT-Civil-Aviation-ED-Bill-4-7-19.pdf.

(h) Changes should be made to the Aviation Security provisions in Part 5 of the Bill to:

(i) clarify the entry requirements into an aviation security area (clause 124);

(ii) introduce a reasonable belief requirement by an officer before seizing evidence of identity (clause 125);

(iii) address problems with the workability of the offence of failing to comply with a Director's requirement to withdraw or revoke an authorisation (clause 133);

(iv) clarify the search powers which apply to passengers and to consent searches (clause 144); and

(v) clarify the circumstances in which warrantless search powers can be used as an alternative to applying for a search warrant (clause 148).

(i) Amendments to the enforceable regulatory undertaking provisions are required to clarify how these will operate (clauses 242 to 251).

(j) Clarity is also needed as to what examinations and tests can be directed by an inspector (clause 292) and when civil and criminal immunity should be conferred on inspectors (clause 295).

(k) Care be taken to ensure the Bill properly distinguishes between primary offences in the Act and infringement offences which are prescribed by regulation (clause 168).

4 Offences relating to dangerous or reckless activity - clause 41

The proposed new strict liability offence (clause 41(2))

4.1 The Explanatory Note to the Bill refers to clause 41(2) creating a strict liability offence for regulated persons who cause unnecessary danger, in failing to follow regulatory requirements. The stated intention is to split section 44 of the current Act into two offences, one being a strict liability offence (s 41(2)) and the other being an offence which carries a term of imprisonment. If that is the intention, it should be made clear in the wording of clause 41(2) that it is a strict liability offence. Adding a subsection providing for a "no fault" defence is highly desirable, given the substantial penalties involved. [2]

The mens rea element of recklessness (clause 41(3))

4.2 The Law Society suggests consideration be given to amending clause 41(3) to clarify the state of mind required as being reckless as to whether a breach *may* endanger others. Currently, the clause is drafted in terms of recklessness as to whether a breach *will* endanger others.

4.3 The proposed wording of clause 41(3) captures acts or omissions relating to operating, maintaining, or servicing aircraft but not conduct which creates a risk of harm through the reckless failure to ensure proper procedures are followed for those purposes. For example, it

[2] The approach taken in other legislation has been to include a separate section in the Act dealing with strict liability and available defences: see for example section 341 of the Resource Management Act 1991, which specifies the strict liability offences under the Act and sets out the basis for a defence to the charge.

would not capture a person who knows that work required to operate, maintain or service an aircraft may not be properly carried out but takes no action, without going on to consider whether the failure might pose a risk to the safety of other persons or property. We recommend extending clause 41(3) to cover this conduct.

Penalty levels

4.4 The maximum penalty for an individual under clause 41(2) is a fine of $150,000. While the Law Society appreciates that it is necessary for the penalty to be high because of the important safety element, this level of fine seems particularly high for a proposed strict liability offence where there may be no intention to be dangerous or to endanger property.

4.5 Similarly, the maximum penalties under clause 41(3) (a fine of $300,000, or imprisonment for a maximum term of 5 years) seem high when compared to the similar offence of reckless driving not causing injury, which carries a maximum penalty of up to 3 months imprisonment or a fine not exceeding $4,500.[3]

4.6 We acknowledge that the higher expectations on aviators means there must be greater consequences. When compared with other professional and high stakes regulatory fines, these penalties are not entirely out of scope. [4] However, a maximum penalty of 5 years' imprisonment for reckless endangerment under clause s 41(3) of the Bill, where no harm is actually caused or property endangered, seems to be out of proportion when compared to the same maximum penalty under section 189(2) Crimes Act 1961 (injuring with intent or reckless disregard for the safety of others).

5 Offence of operating aircraft in controlled airspace or restricted area – clause 42

5.1 Clause 42 of the Bill seeks to create a new offence for operating aircraft in a controlled airspace or a restricted area without appropriate authorisation, and without reasonable excuse. It seems the aim of this clause is to prohibit operating an aircraft in a controlled space or a restricted area where the operator knows or is reckless as to their authority to do so.

5.2 The Law Society recommends that this clause be redrafted. If it is the case that "without reasonable excuse" is intended to deal with cases where circumstances dictate operating in a controlled or restricted area (for example, engine failure), it would be better to word the clause as penalising the operation of the aircraft in the controlled area where the pilot:

(a) is aware he or she is in the controlled or restricted space, and

(b) he or she knows, or is reckless, as to her or his authority to do so.

5.3 That could be followed by a subclause stating that the offence is not committed if the pilot had a reasonable excuse for so operating the aircraft.

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3 Section 35, Land Transport Act 1998.

4 For example, section 47 of HSWA provides for a maximum fine of $300,00 for an individual who has a relevant duty of care and, without reasonable excuse, exposes a person to a risk of death or serious injury and is reckless as to that risk. However, this contemplates serious harm being caused.

6 Rule-making powers granted to the Minister and the Director – clauses 52, 61, 62 and 67

6.1 Clause 52 provides that the Minister may make rules relating to civil aviation for the specific purposes listed at clause 52(1), including the ability to make rules for anything incidental or required to give full effect to the Act. These potentially broad rule-making powers could be qualified 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 relevant parties and the extent to which it applies to persons who are not participants in the aviation industry.

6.2 Clause 61(1) requires consultation by the Minister before making a rule. Clause 61(2) requires that the Minister:

(a) is satisfied before making a rule that the rule is not inconsistent with—

(i) the standards of International Civil Aviation Orgnization **(ICAO)** relating to aviation safety and security, to the extent adopted by New Zealand:

(ii) New Zealand's international obligations relating to aviation safety and security; and

(b) has regard to, and gives the weight that the Minister considers appropriate in each case, to the criteria specified in clause 72.

6.3 Clause 62 requires that each rule made by the Minister contain a statement specifying the objective of the rule and the extent of any consultation under clause 61. It would be helpful if clause 61(2) allowed for a provisional statement of objectives and a description of the matters under clause 61(2) to be provided for consultation purposes also.

6.4 These points also apply to the making of emergency rules by the Director under clause 67.

7 Compliance with ICAO standards and recommendations – clauses 61, 63, 69 and 72

7.1 Clauses 61(2)(a)(i), 63(2)(a)(i), 69(2)(a)(i) and 72(b) refer to compliance with ICAO standards and recommendations "to the extent adopted by New Zealand".

7.2 There is no procedure whereby New Zealand can formally "adopt" the standards and recommendations made by the ICAO Council under Article 37 of the ICAO Convention (**Convention**). Instead, there is a procedure under Article 38 of the Convention which would enable New Zealand to notify ICAO of an intention to depart from a standard or recommendation by filing a "notification of difference" or equivalent.

7.3 The Law Society recommends that the relevant clauses be reworded by replacing the words "to the extent adopted by New Zealand" with "except to the extent that New Zealand has filed a notification of difference with ICAO".

8 Offence of endangerment by holder of aviation document – clause 103

8.1 In relation to clause 103, the Explanatory Note to the Bill states:

> Clause 103 is an offence provision relating to where an aviation document holder causes unnecessary danger to persons or property. It replaces section 43 of the current Act but differs from that provision in the requirements about the state of mind of the person. Under this offence, the person must

cause unnecessary danger and know, or be reckless as to whether, the danger will be caused.

8.2 However, the drafting of clause 103 does not reflect that statement. Other than the use of "permit" in clause 103(1), which would require the holder of an aviation document to have knowledge and be reckless as to the danger caused, the wording of the clause suggests absolute or strict liability. If clause 103(2) is intended to be a strict liability offence, it should say so. More suitable wording would recast "permitting" a breach as "failing to prevent" an act or omission.

9 Developing drug and alcohol management plans – clause 114

Random testing

9.1 The policy objectives of the Bill include "improving the safety and security of New Zealand's aviation system by strengthening the management of the risk of drug and alcohol impairment in the commercial aviation sector".[5] This includes requiring aviation operators to have a drug and alcohol management plan (**DAMP**) for workers carrying out safety-sensitive activities.[6]

9.2 The Explanatory Note and clause 114 of the 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 114 to include a requirement for non-random testing.

Determining "permissible levels" of alcohol or testable drugs

9.3 It is not clear from clause 114 how the "permissible levels" of alcohol or testable drugs are to be determined in the DAMP. The definition of "drug and alcohol test" in clause 113 suggests there may be zero tolerance ("… a test … to determine the presence, but not the level, of alcohol or a testable drug … in the sample"). However, the definition of "negative result" and clause 114(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 therefore be helpful.

10 Drug and alcohol testing by Director or DAMP operator – clauses 115 and 116

Obligation to carry out testing programme

10.1 Clause 115 sets out the requirements for random testing by a DAMP operator, but the wording of subclauses (1) and (2) are inconsistent. Clause 115(1) provides that a DAMP operator *must* ensure that random testing is carried out, whereas clause 115(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 115(1) as an obligation to carry out the testing *programme*, rather than the actual test.

Consequences of refusing tests

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5 Explanatory Note of the Bill.

6 Clause 114.

10.2 Clauses 115(2) and 115(4) also refer 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.

10.3 Clause 116 similarly provides that the Director of Civil Aviation may carry out drug or alcohol testing. This clause should similarly be amended to explicitly require workers to be notified of their right to refuse consent.

The provision of information to workers

10.4 Clause 115(4) further 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.

10.5 It may also be desirable to require the person carrying out the testing to determine whether the person to be tested can understand the information. If they cannot, a translation or other communication assistance 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.

11 Aviation security : definitions – clauses 120 and 135

11.1 There is a risk of confusion between the defined terms "authorised security person" and "aviation security service providers" in clauses 120 and 135. These definitions are hard to follow and could be simplified. Both involve security operations in the same places ("security designated aerodromes" and "security designated navigation installations"), but the definitions do not otherwise reference each other.

11.2 It would be helpful if the relevant definitions were included in the general interpretation section at the beginning of the Bill, in one place, rather than placed throughout the subpart. This would allow the terms to be more easily distinguished and cross-referenced. This includes the definitions of "aviation security dog", "aviation security officer", "aviation security services" and "AvSec".

12 Aviation security: security checks and search powers

Providing evidence of identity and authority – clause 124

12.1 Clause 124(1) provides an authorised security person with the power to require proof of identity, the purpose of the person's presence in an airside security area, and proof of that person's authority to enter that area. Clause 124(3) provides a further power to use force that is reasonably necessary to remove the person from that area if they fail or refuse to comply with the requirements in clause 124(1).

12.2 These clauses do not clearly connect to the entry requirements in clause 123, which provide that certain people may enter an airside security area with evidence of identity only, in accordance with any rules,[7] and that others are exempt from this requirement.[8]

12.3 The Law Society therefore suggests revising clause 124 for clarity, perhaps in terms that:

(a) With the exception of a constable, no one may enter an airside security area unless that person has, and is carrying, authorisation given under the rules; is a person exempted from the requirement to carry authorisation under the rules; or is a passenger, carrying such authorisation as required under the rules; and

(b) Any person in an airside security area can be required to provide evidence of authorisation.

Authorised security person may seize evidence of identity – clause 125

12.4 Clause 125 provides that an "authorised security person" may seize any evidence of identity that is produced under clause 123(1) if the "authorised security person" is "satisfied" of certain grounds, including that they are being used in breach of civil aviation legislation. This would seem to be a lower standard than required under section 21 of the NZBORA,[9] while "satisfied" may be too stringent in this context.

12.5 The Law Society therefore recommends amending this clause to refer to "reasonably satisfied", or consistent with other search and seizure powers "has reasonable grounds to believe that …".

Director's power to carry out security checks – clause 127

12.6 Clause 127 frames the "security check" requirement simply as "carrying out" a check for the purpose of "determining whether the person poses a threat to aviation security" of any person required by rules to have such a security check. Given that this could, for example, see an operator or staff member unable to operate or remain in employment, it would be appropriate to:

(a) Set out in primary legislation those who are subject to the requirement; and

(b) Provide an express power for the Director to determine whether that person meets the requirement and a standard for that decision.

12.7 Clause 127(4)(b) provides that the Director may "give weight to any component of the information as the Director considers appropriate in the circumstances". This provision follows the 1990 Act (as amended in 2007), but does not appear to be found in any other legislation. Given the consequences of these decisions, the Director's decision should be governed by conventional administrative law principles requiring consideration of only relevant factors, and not qualified or limited, as appears intended by this clause.

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7 Clause 123(1)(b)(ii).

8 Including an approved person or member of a class of persons (cl 123(2)), a passenger (cl 123(3)(i), or a person permitted under the rules (cl 123(3)(ii)).

9 The right to be secure against unreasonable search or seizure. It is noted that clause 125 was not within the scope of the Ministry of Justice's section 7 BORA advice.

12.8 Clause 127(5) is new and provides that the Privacy Act 2020 **(Privacy Act)** does not prevent an agency from disclosing personal information to the Director in response to a request made by the Director under this clause. While this may confirm how the Privacy Act applies in this context, it is unnecessary, as section 20 of the Privacy Act (and Information Privacy Principles 11 & 12 set out in that section) already provide for the use and disclosure of information for reasons of the maintenance of the law.

Failure to comply with Director's requirement to withdraw or revoke authorisation – clause 133

12.9 Under the Bill, the Director may – after either having declined a positive security check for a given person or while reconsidering a previously issued positive security check – require a third party to withdraw an authorisation based on that check (clause 131(b)). Given that the third party is itself acting under and pursuant to statutory powers, it is both incongruous and problematic to make it an offence to fail to do so.

12.10 The fine of $37,500 for this offence is also quite specific and may be a drafting error.

Search powers of aviation security officers – clauses 142, 143 and 144

12.11 Generally, "reasonable" searches of persons and things are permitted at designated security places. The exception is for "crew members and passengers" who can be searched anywhere in the airport (clause 142(c)(i)).

12.12 As members of the general public, a general search power in relation to passengers is difficult to justify because passengers may reasonably have expectations of privacy outside of designated security places, at least to the extent of the search needing to be personalised if they are not in those places. Therefore, the exception which applies to passengers is likely not justified in terms of section 21 of the NZBORA.

12.13 The Law Society therefore recommends amending clause 142(1) by deleting the reference to "passengers" in subclause (c), and inserting a new subclause (d), as follows:

> "a passenger and any thing in that passenger's possession, if the officer believes on reasonable grounds such a search is necessary for detecting any relevant item or substance".

Consent requirements for searching

12.14 "Reasonable" searches are defined in clause 143 as including opening outer clothing, taking off belts and shoes, and being subject to a pat down search. These searches can only be done by consent (clause 144(1)). People can withhold consent to searches, but are deemed to consent if they are in security screening areas (clause 144(4)).

12.15 Clause 144(2) provides that consent in security screening areas only includes consent to searches involving "little or no physical contact". It is not clear whether pat down searches conducted at a screening point are considered to be searches that involve "little or no

physical contact", and it is recommended that the Bill be amended to clarify if that is the case.[10]

Powers of constables – clause 148

12.16 Clause 148(3) provides constables with a warrantless search power to search and detain individuals who refuse consent to searches carried out under clause 144. It would be preferable for this clause to reflect the threshold for warrantless search under section 6 of the Search and Surveillance Act 2012. As currently drafted, clause 148(3)(1)(b)i(ii) sets a lower threshold than is found in section 6(b) – the constable need only 'suspect', rather than 'believe' that a search is likely to disclose evidence.

12.17 Given aviation security officers can refuse to allow people to board a plane where they have refused to be searched (section 12 of the Aviation Crimes Act 1972), there is no apparent justification for not restricting the circumstances in which these warrantless powers can be used.

12.18 The Law Society therefore suggests amending clause 148(1)(b) by inserting a warrant-preference rule within the Bill (which indicates the circumstances in which warrantless powers will be used as an alternative to applying for a search warrant) or by inserting the following new subclause (iii):

> The constable has reasonable grounds to believe that it is not practicable to obtain a search warrant under section 6 of the Search and Surveillance Act 2012.

13 Infringement offence for being present in a security area – clause 168

13.1 The scheme of the Bill is to prescribe infringement offences by regulation (see the related submission below on the regulation-making powers in clause 408).[11] Some clauses in the Bill, however, create or potentially create, infringement offences in the main Act.

13.2 Clause 168 creates a stand-alone aviation security infringement offence of being present in a security area or security enhanced area without being screened or when not authorised.[12] It specifies both an infringement fee and a fine, but otherwise specifies this as an infringement offence only.

13.3 The Law Society recommends that clause 168 be clarified to make it clear that the intention is to create a specified offence in the Act, which can then also be prescribed as an infringement offence by regulation.

13.4 The alternative would be to remove reference to the infringement offence and add a "without reasonable excuse" defence, making clause 168 consistent with the offences of trespass in clause 366, and the offence of being found on property without a reasonable excuse under section 29 of the Summary Offences Act 1981. As the clause currently reads, emergency responders could commit offences under this provision.

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10 If the select committee considers that pat down searches do *not* involve "little or no physical contact", the proposed scheme for exercising these powers in a security screening area will not be workable.

11 At paragraph 20.

12 Clause 372 also contemplates an infringement offence being created in relation to the breach of the bylaws prescribed in clause 235 of the Bill.

14 Parity of penalties for aviation security offences - clauses 169 and 171

14.1 Clause 169 of the Bill (impersonation of an aviation security officer) has a maximum term of imprisonment of up to 3 months or a $10,000 fine. These penalties are low compared to similar offences (for example, impersonation of a policer officer or police vehicle under section 48 of the Policing Act 2008, which carries a maximum penalty of 12 months' imprisonment and a fine not exceeding $15,000).

14.2 The penalty proposed in clause 171 for threatening or assaulting a security aviation officer (up to 12 months' imprisonment or a fine of up to $15,000) seems high by comparison with the very similar offence in section 10 of the Summary Offences Act 1981.[13] Again, there seems to be no particular justification for a higher penalty in the civil aviation field.[14]

14.3 It is noted that clause 173 of the Bill (killing or injuring an aviation security dog) has exactly the same penalty as in section 53 of the Policing Act 2008 for similar conduct toward a police dog so parity has been applied in that context.

14.4 The Law Society's overall recommendation is that further consideration be given to parity of penalties across all similar offences in the Bill.

15 Enforceable regulatory undertakings – clauses 242 to 251

15.1 These provisions seek to create a new regime of enforceable regulatory undertakings that are not currently used in New Zealand (although they do appear to be used in Australia).

15.2 The Law Society notes that enforceable undertakings have been used as a regulatory compliance tool and as an alternative to prosecution under HSWA, and are also included in this Bill (at clauses 326-322). However, the proposed new enforceable regulatory undertakings regime appears directed at regulating airport space requirements, with the ability to enforce the requirements through the District Court.

15.3 The Law Society suggests amending clauses 242 to 251 to clarify:

(a) The relationship between direction orders under clause 249 and Court enforcement under clause 248. It is unclear whether these are intended to operate independently or sequentially. It would be sensible for them to operate sequentially – that is, the Secretary may make a direction order in cases of non-compliance as a first step; and, if that order is not complied with, then apply to the Court for enforcement of the undertaking as a second step.

(b) The consequences that follow if the Secretary does not accept an undertaking under clause 244. Clearly, under clause 245, if an undertaking is rejected there will be nothing to enforce. It is unclear whether the intention is for airport operators to continue to operate without an undertaking in place.

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13 Section 10 of the Summary Offences Act 1981 provides that *"every person is liable to imprisonment for a term no exceeding 6 months or a fine not exceeding $4,000 who assaults any constable, or any prison officer, or any traffic officer, acting in the execution of his duty."*

14 See also section 179 of HSWA where the offence of hindering or obstructing an inspector in the exercise of compliance powers carries a maximum penalty of $10,000 for an individual.

(c) That any undertakings that have been accepted by the Secretary under clause 244 should be included in the information required for the register under clause 220.[15]

15.4 To avoid confusion, the Law Society also recommends using a different term to describe these proposed new types of undertakings which clearly differentiates between the general "enforceable undertaking" and the "airport enforceable regulatory undertaking". It is suggested that a term be used that will not be confused with the general provisions elsewhere in Bill relating to enforceable undertakings.

16 Requirement to conduct or undergo examinations and tests – clause 292

16.1 Clarification is needed as to what types of examinations or test can be ordered under clause 292, given the exclusion relating to medical tests or medical examinations in clause 292(3).

16.2 The Law Society considers it may also be helpful to amend clause 292(2) to make it clear that the power to direct a person to undergo testing, inquiries etc in Australia can only be exercised when the person is in Australia.

17 Immunity from civil and criminal liability – clause 295

17.1 Clause 295(1) provides an inspector with immunity from civil or criminal liability where the inspector has acted in good faith in exercising functions or duties. It currently requires the power to have been exercised by "that person" in a reasonable manner and that "the person" believes on reasonable grounds that the preconditions for the exercise of the power have been met. The clarity of this provision would be improved by replacing “person” with “inspector” in both clauses (1)(a) and (1)(b).

17.2 Clause 295(2) as currently drafted gives immunity to those not compelled to assist the inspector. This subclause could be usefully amended to confer immunity only where the person claiming it has been directed under the Act to perform the relevant acts.

18 Enforceable undertakings – clause 332

18.1 The potential effect of clause 332 is to bar both civil and criminal proceedings against a person who has made or discharged the requirements of an enforceable undertaking. This is a breach of the general rights to sue for wrongs done or to bring a private prosecution (to have recourse to the courts). However, it is noted that these provisions mirror those in HSWA (sections 123-129) so there is legislative precedent for their inclusion.

19 Just culture provisions – clauses 341 – 343

19.1 Clauses 341 – 343 contain protections in relation to the reporting of safety information (‘Just Culture’). Just Culture seeks to improve the quality and level of safety information reported to the safety regulator, including ensuring people who self-report incidents are provided certain protections from enforcement action and protection of reported information.[16]

19.2 The clause 343(1) test *(“the public interest in taking action in the circumstances outweighs any adverse impact that the proceeding will have on further accident or incident*

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15 For comparison, it is noted that clause 327(2) requires the Director to publish notice of a decision to accept an enforceable undertaking and the reasons for that decision.

16 Above n 6.

notifications") is broad. While clause 343(2) gives some clarity around how the Director may exercise the discretion to take law enforcement action, it is not clear 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 of how people making a report can have certainty that the information will not be used against them.

19.3 It would therefore be desirable to provide greater clarity in the drafting of these clauses, including by providing a definition of the term "public interest".[17]

20 Regulation-making powers (infringement offences) – clause 408

20.1 Clause 408 confirms the regulation-making power to prescribe infringement offences, either by specifying the offences in the Act that are infringement offences (clause 408(1)(b)) or by prescribing breaches of the regulations or rules that constitute infringement offences (clause 408(1)(c)). It also provides for infringement fees to be prescribed at specified levels (1)(g).

20.2 The Law Society recommends clarifying clause 408(1)(f). Currently, it refers to setting the maximum fine for offences prescribed pursuant to either clause 408(1)(b) or (c). It is not clear that reference to clause 408(1)(c) is intended. As currently drafted, clause 408(1)(f) could be seen to contemplate the same maximum fines for breaches of the regulations or rules, whether they constitute offences against the Act or infringement offences (the latter having lower prescribed infringement fees under clause 408(1)(g)).

Frazer Barton
Vice President
1 December 2021

[17] 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.