

29 July 2021

Hon David Parker, Attorney-General

Consistency with the New Zealand Bill of Rights Act 1990: Civil Aviation Bill

Purpose

1. We have considered whether the Civil Aviation Bill (the Bill) is consistent with the rights and freedoms affirmed in the New Zealand Bill of Rights Act 1990 (the Bill of Rights Act).
2. We have not yet received a final version of the Bill. This advice has been prepared in relation to the latest version of the Bill (PCO 18744/28.5). We will provide you with further advice if the final version includes amendments that affect the conclusions in this advice.
3. We have concluded that the Bill appears to be consistent with the rights and freedoms affirmed in the Bill of Rights Act. In reaching that conclusion, we have considered the consistency of the Bill with s 11 (right to refuse to undergo medical treatment), s 14 (freedom of expression), s 21 (freedom from unreasonable search and seizure) and s 25(c) (presumption of innocence until proven guilty). Our analysis is set out below.

Summary

4. The Civil Aviation Bill repeals and replaces New Zealand's main pieces of primary civil aviation legislation.
5. The Bill enacts and re-enacts significant search and seizure provisions to support the operation of civil aviation security regimes. These regimes allow for searches and seizures that have broad application and high levels of intrusion into personal privacy. However, we consider that the high importance of the objective of securing aviation safety, as well as the strong constraints and safeguards surrounding the use of the powers, render them proportionate and reasonable in the context.
6. The Bill also engages rights in its provisions enabling regulatory searches and seizures, the compelling of information, compelled medical testing regimes for pilots and safety-sensitive staff and a wide range of offences and penalties for conduct prohibited by the Bill. However, we consider that the limits on rights are reasonable and necessary in the context.

The Bill

7. The Bill repeals and replaces New Zealand's main pieces of primary civil aviation legislation:
 - a. the Civil Aviation Act 1990, which governs the civil aviation system in New Zealand and sets the overall framework for aviation safety, security and economic regulation in New Zealand, and

- b. the Airport Authorities Act 1966, which provides for local authorities and other persons (e.g. airport companies) to be authorised as airport authorities with functions and powers to operate airports.
8. The main purpose of the Bill is to provide for the regulation of a safe and secure civil aviation system. The Bill also has the following additional purposes:
- a. to maintain, enhance, and promote a transport system that contributes to environmental sustainability, economic prosperity, inclusive access, healthy and safe people, and resilience and security;
 - b. to promote innovation, effectiveness, and efficiency in civil aviation;
 - c. to ensure that New Zealand's obligations under international civil aviation conventions, agreements, and understandings are implemented;
 - d. to preserve New Zealand's national security and national interests;
 - e. to take into account the interests of people, property interests, and interests of the environment from adverse effects of civil aviation.

Consistency of the Bill with the Bill of Rights Act

Section 11 – right to refuse to undergo medical treatment

9. Section 11 of the Bill of Rights Act affirms that everyone has the right to refuse to undergo medical treatment. The right protects the concept of personal autonomy and bodily integrity, specifically the idea that individuals have the right to determine for themselves what they do or do not do to their own body, free from restraint or coercion.¹
10. Clause 3 of Schedule 2 of the Bill gives the Director of Civil Aviation the power to require an applicant for a pilot's licence to undertake any test, examination or re-examination, or to provide any medical information that the Director considers necessary to assess the applicant. Clauses 110 - 112 in Part 4 of the Bill contain offences for acting as a pilot without the required medical certificate, for making fraudulent or misleading statements to obtain a medical certificate, or for failing to disclose relevant medical information. These provisions limit the right of a person to refuse medical treatment.
11. A limit on a right may nevertheless be consistent with the Bill of Rights Act if the limit is justified under s 5 of the Act. The s 5 inquiry asks:
- a. does the provision serve an objective sufficiently important to justify some limitation on the right or freedom?
 - b. if so, then:
 - i. is the limit rationally connected with the objective?
 - ii. does the limit impair the right or freedom no more than is reasonably necessary to sufficiently achieve the objective?

¹ *New Health New Zealand Inc v South Taranaki District Council* [2014] NZHC 395 at [52].

iii. is the limit in due proportion to the importance of the objective?²

12. We consider that the requirements for medical testing set out within the Bill are justifiable under s 5 of the Bill of Rights Act. Requiring applicants for aviation documents (such as pilot's licences) to be proven to be medically fit is rationally connected to the important objective of ensuring aviation safety. It is minimally impairing and proportionate to the risk posed by unsafe aviation document holders to require them to undergo testing as requested by the Director. Applicants voluntarily opt into medical testing as a consequence of the decision to apply for an aviation document and therefore will be aware of potential testing requirements.
13. Further, the penalties that apply to those who are convicted of an offence under cls 110-112 are proportionate to the seriousness of the potential safety risks. On conviction, a person is liable for a fine not exceeding \$30,000 or to imprisonment for a term not exceeding 12 months, or both. The offences require an element of intent, with the general defence of reasonable excuse for failing to disclose medical information.
14. On this basis, we consider that any limits within the Bill on the right to refuse to undergo medical treatment are justified in terms of s 5 of the Bill of Rights Act,

Section 14 – freedom of expression

15. Section 14 of the Bill of Rights Act affirms that everyone has the right to freedom of expression, including the freedom to seek, receive, and impart information and opinions of any kind in any form. It has also been interpreted as including the right not to be compelled to say certain things or to provide certain information.³
16. Clauses within the Bill which engage the right to freedom of expression can be categorised into those that require speech or provision of information, and those which constrain or restrict speech.

Required speech within the Bill

17. A large number of clauses within the Bill require speech and/or the provision of information.
18. Firstly the Bill contains a large number of clauses which require aviation participants (people who operate, maintain, and/or service an aircraft or aviation service or product) to provide information in the course of the normal regulatory regime that monitors civil aviation.⁴ The information able to be required under these clauses is regulatory in nature and supports administration and monitoring of the sector.
19. The Bill also requires information from aviation participants in the form of incident and emergency reporting. Clauses 15-16 and 49 of the Bill require participants to provide information related to breaches of the civil aviation code as a result of an emergency arising and to report accidents and incidents to the Civil Aviation Authority.
20. Aviation participants may also be required to provide information to support an investigation into a breach of the civil aviation code in an emergency (cl 18) or as part

² *Hansen v R* [2007] NZSC 7.

³ See, for example, *Slaight Communications v Davidson* 59 DLR (4th) 416; *Wooley v Maynard* 430 US 705 (1977).

⁴ See cl 37, 55, 124, 176, 205, 207, 212, 219, 409-411

of entering into an enforceable undertaking.

21. Clause 403 also allows the Director, or someone they authorise, to require a passenger to provide their details if the Director or authorised person has reasonable grounds to believe that the passenger has committed an unruly passenger offence.
22. All of these clauses engage aviation participants' and passengers' right to freedom of expression under s 14 of the Bill of Rights Act. However, we consider each to be justifiable in terms of s 5 of the Bill of Rights Act.
23. Information requirements relating to monitoring and administration of the civil aviation sector are rationally connected to the purpose of supporting the safe and efficient functioning of the civil aviation sector. The information required to be provided is only that which relates to the aviation participant's activities while carrying out their job and duties (and therefore can be reasonably expected to be provided).
24. Civil aviation is a highly regulated industry, and aviation products and activities have a high risk associated with their operation and service. Those who engage in the sector as aviation participants do so in the knowledge that a minimum standard of regulation and information provision will be required of them. Offences for failing to provide information are proportionate to the importance of receiving this information.
25. Information requirements related to incident and emergency reporting, and those which support investigations of breaches of the civil aviation code or offences, are rationally connected to the important objectives of ensuring aviation safety and protecting the rule of law. The information that may be obtained under these clauses is only that information which would support enforcement or prosecution of a breach or offence.

Restricted speech within the Bill

26. Clause 197 allows the Minister of Transport to prohibit the publication or disclosure of any information, document or evidence involved in a decision concerning international air carriage applications. This prohibition may be maintained until 20 working days after the date that the Minister makes a final determination on the application. This restriction *prima facie* limits the freedom of expression of parties to these decisions.
27. However, we consider this restriction can be justified in terms of s 5 of the Bill of Rights Act.
28. Restricting the publication or disclosure of sensitive commercial information in the course of decisionmaking serves the important objective of providing decision makers with the opportunity to make decisions free from external influence or pressure.
29. The information that may be restricted is only that which the Minister considers would prejudice decisionmaking on the application, and the information is subject to the Official Information Act 1982 following the expiry of the restriction.
30. For these reasons we consider that any limits within the Bill on the right to freedom of expression caused either by required or restricted speech are justified in terms of s 5 of the Bill of Rights Act.

Section 21 – freedom from unreasonable search and seizure

31. Section 21 of the Bill of Rights Act affirms that everyone has the right to be secure against unreasonable search or seizure, whether of the person, property, correspondence or otherwise. The right protects values including personal privacy, dignity, and property. The touchstone of this section is a reasonable expectation of privacy.⁵
32. A search can be considered in its ordinary sense of consciously looking for something or someone, whether or not assisted by technology.⁶ For example, examining the contents of a bag, including by way of x-ray, has been found to be a search.⁷
33. In order for a statutory power to be consistent with s 21, the intrusion into the values noted must be justified by a sufficiently compelling public interest. The intrusion must be proportional to that interest and must be accompanied by adequate safeguards to ensure it will not be exercised unreasonably. The Supreme Court has held that, logically, an unreasonable search or seizure cannot be demonstrably justified with reference to s 5 of the Bill of Rights Act.⁸ Rather, the assessment to be undertaken is first, whether what occurs is a search or seizure and, if so, whether that search or seizure is reasonable.
34. The Bill contains three separate groups of search powers and two separate groups of seizure powers. These are:
 - Search powers at aerodromes and navigation installations (cls 142-159);
 - Powers of entry and inspection for monitoring, inspection and enforcement (cls 283-297);
 - Searches involved in drug and alcohol testing processes within the Bill (cls. 113-119)
 - Seizure powers at aerodromes and navigation installations (cls 149-151); and,
 - Detention and seizure provisions in relation to aircraft, aerodrome or aeronautical products (cls 313-321)

Search powers at aerodromes and navigation installations under clauses 142 – 159 of the Bill

35. Clauses 142-159 of the Bill provide search powers of aviation security officers at aerodromes and navigation installations⁹ and sets out the consequences for persons

⁵ See, for example, *Hamed v R* [2011] NZSC 101, [2012] 2 NZLR 305 at [161] per Blanchard J.

⁶ *Hamed v R* [2011] NZSC 101, [2012] 2 NZLR 305 at [220].

⁷ *R v Truong* (2002) 168 CCC (3D) 132 (BCCA), *R v Fry* (1999) 70 CRR (2d) 78 (Nfld CA).

⁸ *Cropp v Judicial Committee* [2008] 3 NZLR 744 at [33]; *Hamed v R* [2012] 2 NZLR 305 at [162].

⁹ An aerodrome is an area of land or water intended or designed to be used either wholly or partly for the landing, departure, surface movement, or servicing of aircraft. It includes any other areas, building, installations, and equipment that are on or adjacent to this area of land or water that are used in connection with that area or its administration. A navigation installation is any building, facility, work, apparatus, equipment, or place that is intended to assist in the control of air traffic or as an aid to air navigation and includes land adjacent to, and used in connection with, that building, facility, work, apparatus, equipment, or place (s 5 of the Bill).

travelling on aircraft, and others present at aerodromes or installations, for failure to comply with aviation security requirements.

What or who could be searched?

36. Aviation security officers have broad powers to search people, places, items, substances and vehicles for the purpose of detecting a relevant item or substance (which includes a substance or article capable of posing a risk to health, safety, property or the environment and includes firearms and explosive substances or ammunition (cl 161(1)). In relation to an electronic device, the search power does not, however, authorise access to data (cl 142(2)).

Where could a search take place?

37. Under these powers, a crew member or passenger can be searched anywhere within the aerodrome or installation. If the individual is not a crew member or passenger, where they can be searched is more limited. They can only be searched at a screening point immediately before entering a landside security area, a sterile area or a security enhanced area, or if they are present in one of those areas.
38. A landside or airside security area is an area of a security designated aerodrome or security designated navigation installation that has been designated as such by the Director of Civil Aviation and is identified by a sign or signs affixed to the area's perimeter (cl 122). A security enhanced area is an area within an airside security area that has been declared as such by the Director by an appropriate notification (cl 122). A sterile area means the area at an aerodrome between the passenger inspection and screening station and the aircraft, into which access is strictly controlled (cl 134).

What would a search involve?

39. A search can involve the removal of outer clothing, except where the person has no other clothing on, or only underclothing, the removal of footwear and head coverings and a pat down search (cl 142). A pat down search can include the searcher running or patting their hand over the body of the person being searched, whether inside or outside clothing (other than underclothing) and the searcher can require the person being searched to open their mouth, display the palms of their hands or soles of their feet, or lift or rub their hair (cl 134).
40. A search could be conducted by way of an aid or device, including a dog, chemical substance, or x-ray or imaging equipment, or some other mechanical, electrical or electronic device (cls 157 - 158). A search conducted by means other than a security dog or electronic device must be carried out by a security officer of the same sex as the person being searched or, if the person being searched reasonably requests, a person of a different sex (cl 143(3)).

Is consent required?

41. Clauses 143 and 144 set out the consent requirements for searching. Consent is always required to conduct a search of a person. If a person presents at a screening point, they are taken for all purposes to consent to a search of themselves involving little or no physical contact and a search of their baggage. A person can withdraw consent at any time during the search and will be taken as having refused to consent to the search. If a person has handed over luggage to an airline operator for transportation, that person is also taken as having consented to their luggage being searched.

42. Consent to search an item is not needed where that item has been left unattended. Consent is also not needed in respect of the search of anything other than a person if an aviation security officer has reasonable grounds to suspect that there is an imminent risk to aviation safety and security and the risk requires an immediate response.

What are the consequences of refusing a search?

43. If a person refuses to be searched or is present in a designated security area without having been searched, they can be denied entry into the area or requested to leave the area. The individual can be detained in some circumstances, including where there are reasonable grounds to suspect a crime against the Aviation Crimes Act 1972 has been committed (cls 147 – 148).
44. The refusal of a person to consent to a search of the person or anything in their possession does not itself constitute reasonable grounds for suspecting that an offence against the Aviation Crimes Act has been, is being or will be committed (cl 148(2)).
45. If a person is in an area which requires them to have been searched but they have not been, the person commits an infringement offence and is liable to a fee of \$1,000 or a fine imposed by the court not exceeding \$2,500 (cl 165).

The power to search a person is not an unreasonable search

46. We first consider the cl 142 power in relation to the search of a person.
47. Expectations of privacy are highest in relation to physical searches of persons and because of the high expectation, such searches will generally be unreasonable unless strict requirements under legislation are met.¹⁰ In the absence of a warrant, there is authority for conducting a search where routine inspections are undertaken by officials, including searches at the border.¹¹
48. As we have set out above, the search power extends beyond passengers and crew in some circumstances.
49. In respect of whether the power to search a person is reasonable, we have considered the reasons for the search, the location of the search, the level of intrusiveness of the search, the consequences for refusing to be searched and the safeguards present to prevent unreasonable use of search powers.

The location of the search justifies the use of search powers

50. The powers in respect of aviation security reflect the ever-evolving nature and scale of security risks in the sector. The Ministry of Transport has said that it is essential that regulatory settings allow for a measured and proportionate approach to changing security threats, and that the settings need to be flexible enough to respond to shifts in the national terrorism threat level.

¹⁰ Forrest v Attorney-General [2012] NZCA 125, [2012] NZAR 798; Taunoa v Attorney-General [2007] NZSC 70, [2008] 1 NZLR 429, (2007) 9 HRNZ 104; R v Williams [2007] NZCA 52, [2007] 3 NZLR 207, (2007) 23 CRNZ 1.

¹¹ R v Simmons [1988] 2 SCR 495 (SCC); US v Ramsey 431 US 606 (1977) (USSC).

51. The power is limited to aerodromes and installations for the purpose of detecting a relevant item or substance. The search power is broad, in that it permits the search of any person (not just crew or passenger) and could be used in the landside – or public – areas of an airport, or to gain entry into those areas, where they have been designated landside security areas. However, we understand that search use in a landside security area would be temporary and in response to changed threat levels.
52. We consider that there is a sufficiently important public policy objective to justify the use of some search and seizure powers in this context: a search is necessary to protect the health and safety of those in the immediate area and property from damage, and to prevent prohibited items from being taken onto aircrafts.¹²

Reasonable expectations of privacy are lower in public places

53. The Court of Appeal has observed that “reasonable expectations of privacy are lower in public places than on private property.”¹³ In the specific context of air travel, it is suggested that individuals have a lowered expectation of privacy at an international border.¹⁴

The level of intrusiveness of the search is proportionate

54. At its most intrusive, a search could involve the removal of outer clothing, a head covering, and/or a pat down. Although a search of this type is further along the continuum of intrusiveness, we consider the intrusion into privacy is logically connected to the purpose of the search and the power does not go beyond that which is necessary to identify relevant items or substances.
55. The requirement for the searcher to be of the same sex as the person being searched (or the ability for the person being searched to request to be searched by someone of the opposite sex) may also lessen the intrusiveness of the search for some.
56. Further, a search of the most intrusive type will not occur in every situation. A search involving no physical contact may be sufficient for security purposes and we understand that, as the power is limited to a reasonable search, the least intrusive search would be conducted in each circumstance. We consider that it is incumbent on those exercising the power to use the less intrusive means.¹⁵

There are safeguards present

57. The consent of the individual being searched is always required to conduct a search of the person. This safeguard ensures the power is not exercised unreasonably. We do not consider the assumption of consent where a person is at a screening point erodes this

¹² *R v Simmons* [1988] 2 SCR 495.

¹³ *R v Grayson & Taylor* [1997] 1 NZLR 399, (1996) 3 HRNZ 250 (CA) at 407, 260.

¹⁴ See Andrew Butler and Petra Butler, *The New Zealand Bill of Rights Act: A Commentary* (2nd ed, LexisNexis, Wellington, 2015) at 18.30.10 and *R v B-P* [2002] NZAR 157 (CA) at 166-167, *R v Boateng* (1999) 5 HRNZ 450 (HC) and *Udompun v Attorney-General* (2003) 7 HRNZ 238 (HC).

¹⁵ See Andrew Butler and Petra Butler, *The New Zealand Bill of Rights Act: A Commentary* (2nd ed, LexisNexis, Wellington, 2015) at 18.24.17.

safeguard such that we would consider the search unreasonable. In the context of aviation security, a person presenting at a screening point can reasonably expect to be searched, it is practical for authorities to assume consent, and the individual can withdraw consent at any time.

58. A wider range of people may be searched at landside security areas (i.e. more than passengers and crew), however there are safeguards to ensure that landside security declarations are only used to address unusually high threat levels. A landside security area declaration would be in place for 30 days before the declaration lapses. A fresh decision would have to be made if the situation required landside security areas to be in place any longer. The time limited nature of the more expansive search power guards against the designation being in place for longer than is required.
59. The fact that refusal to be searched cannot of itself constitute reasonable grounds for suspecting that an offence against the Aviation Crimes Act 1972 has been committed is another safeguard to ensuring searches are not unreasonable.

The consequences for refusing to be searched are reasonable

60. The consequences for a person who has not been searched or refuses to be searched as required include being denied entry into certain areas of an aerodrome, being detained and/or committing an infringement offence. We consider that the heightened risk of the aviation setting and need to ensure aviation security justify these consequences and do not undermine the reasonableness of the limit on the right.
61. For these reasons, we consider that the cl 142 power in respect of the search of a person is not unreasonable for the purposes of s 21 of the Bill of Rights Act.

The power to search a thing is not an unreasonable search

62. When considering the reasonableness of the power in respect of property, we have taken into consideration an individual's lower expectation of privacy because of what is being searched and the location of the search.
63. In our view, the definition of thing is broad, as it permits the search of any item. However, the search power does not authorise access to data. We consider this limits the power to that which is necessary to achieve the objective.
64. The need for consent provides a safeguard against an unreasonable search. The circumstances in which consent is not needed (an unattended item or where there are reasonable grounds to suspect an imminent risk to safety and security which requires an immediate response) are reasonable. Obtaining consent in these circumstances would undermine the objective of the search power and could limit the authorities' ability to protect aviation safety and security. We also consider that it is justified in the context of airline travel to assume consent to a search is given by a person when they hand over their baggage to an airline for its transportation.
65. For these reasons, we consider that the powers to search property within aerodromes and navigation installations in the Bill are not unreasonable for the purposes of s 21 of the Bill of Rights.

Powers of entry and inspection for monitoring, inspection and enforcement (cls 283-297):

66. Clauses 283-291 give powers to inspectors appointed under the Bill related to monitoring, investigation and enforcement.
67. Clause 283 enables an inspector to enter any aviation place and conduct examinations, tests, inquiries and inspections, as necessary to carry out the inspector's functions. This may include taking photographs and measurements, making sketches or recordings, requiring an aviation participant to produce information and permit the inspector to make copies of this information, and requiring the aviation participant to make statements.
68. Clause 286 also gives the inspector the power to take or remove a sample of any material or substance for the purpose of carrying out their monitoring or investigation functions.
69. Further, as already discussed in our analysis of the right to freedom of expression, cl 18 allows inspectors to require information from aviation participants in the course of an investigation.
70. The exercise of these powers by an inspector clearly constitutes a search for the purpose of s 21 of the Bill of Rights Act.
71. In considering the reasonableness of these searches we have considered the location of the searches authorised, the level of intrusion into personal privacy and the safeguards attached to the search powers.
72. Searches largely take place in a commercial environment, where inspection is an expected feature of regulation and monitoring. This limits the intrusiveness of the search. Where an inspector is to enter an aviation place that is, or is within, a home, marae or building associated with a marae, or where access to the aviation place is through one of these spaces, the inspector must have a warrant or receive the consent of the occupier to enter.
73. Similarly, the material which may be obtained during a search is commercial and regulatory in nature and is unlikely to be of high personal privacy value. Clause 286(2) specifically exempts a person's body from the things that an inspector may take samples or gather evidence from.
74. Finally, there are sufficient safeguards to ensure that no inspections authorised under this part of the Bill are unreasonable. For example:
 - The inspection may only be carried out at a reasonable time (cl 283);
 - If the inspector is unable to find the person in charge of the aviation space in the course of their inspection, they must leave a written notice stating their contact details, the date and time of entry and their reasons for entry (cl 285); and,
 - If an inspector removes or takes samples from any thing, they must provide written notice of what has been removed (cl 286(3)).
75. On this basis, we consider that searches undertaken under cls 283 – 297 are reasonable for the purposes of s 21 of the Bill of Rights Act.

Drug and alcohol testing of safety-sensitive workers within the Bill

76. Clauses 113 – 119 set out provisions relating to drug and alcohol testing. Clause 116 allows the Director of Civil Aviation to appoint an inspector to carry out drug or alcohol testing of safety-sensitive workers (i.e. people whose work activities could significantly affect the health and safety of people on board an aircraft). Clause 115 requires a person

registered as a drug and alcohol management plan (DAMP) registered operator to carry out random testing of employees who engage in safety-sensitive activities. These tests clearly constitute searches for the purpose of s 21 of the Bill of Rights Act.

77. The reasonableness of these searches will turn on the objective of the search, the intrusiveness of the search and the safeguards attached to the search.
78. Alcohol and drug testing of safety-sensitive workers within the aviation industry is clearly rationally connected to ensuring aviation safety. Both random testing and compelled testing where usage is reasonably suspected hold a rational connection to this objective.
79. Testing may hold a high level of intrusiveness, but this is in proportion to the importance of the objective. Section 113 allows a test to be a test of a person's bodily sample, which may include biological fluid, biological tissue or breath.
80. There are a range of safeguards attached to testing. Both cls 115 and 116 require tests to occur only with the consent of the person being tested. Under cl 116, an inspector must also provide the worker with a statement setting out the purpose of the test, a description of how the test will be carried out and an explanation of the consequences of refusing consent for a test. The need for consent to be given, expressly or in advance, to testing, supports the reasonableness of the testing.
81. The consequences of refusing consent are the same as for returning a non-negative test for alcohol or drugs. Possible consequences are for the worker to be prohibited from performing safety-sensitive work until they are safely able to perform those activities, and for an operator or the Director to implement a response plan. We consider that these consequences are in proportion to the risk posed by the possibility of impaired workers carrying out safety-sensitive work. In addition, cl 119 provides that test results may not be used in criminal proceedings except for in the case of prosecutions under the Civil Aviation Act or the Health and Safety at Work Act 2015.
82. On this basis, we consider that the drug and alcohol test provisions in the Bill are reasonable and not in conflict with s 21 of the Bill of Rights Act.

Seizures within the Bill

83. The Bill also contains powers to allow for the seizure and disposal of property.
84. Clauses 149-151 allow for an aviation security officer to seize an item or substance in controlled aviation areas where the officer believes that there is no lawful authority or reasonable excuse for a person to have the item or substance in a sterile area, a landside security area or a security enhanced area, or where the officer has reasonable grounds to believe that the item or substance may pose an imminent risk to aviation safety and security.
85. Clause 314 allows the director of the Civil Aviation Authority to seize or detain an aerodrome, aircraft or aeronautical product on the basis that their operation or use may endanger people or property, and that prompt action is necessary to prevent the danger. Clause 316 allows a constable or a response officer to exercise the same powers on an unmanned aircraft, or to destroy the aircraft, on the basis that the aircraft is involved in the commission of an imprisonable offence, or is about to be used in a way that may endanger people or property.

86. These clauses engage the right to be free from unreasonable search and seizure. As with searches, an unreasonable seizure cannot be found to be reasonably justified in terms of s 5 of the Bill of Rights Act. Therefore, the question to be answered is whether the seizures authorised by the Bill are reasonable.
87. We consider that the seizures authorised by the Bill are reasonable. In making this assessment we have considered the importance of the objective motivating seizures, and the recourse for owners of seized property.
88. Seizures authorised under cls 149-151 support the highly important objective of ensuring aviation safety. Where an aviation security officer is correct in believing that there is no lawful authority or reasonable excuse for a person to have an item in a controlled area, then the seizure is obviously justified. Where the assessment of the officer proves incorrect, the officer is mandated to return the item or substance to the person from whom it was seized if that is practicable or, if impracticable, to return the item to another party (for example an airline) who has processes for returning the item to its original owner. The process for returning items erroneously seized mitigates the impact of the seizure powers.
89. Seizures made under cls 314 and 316 of the Bill support the important objectives of protecting the safety of people and property or preventing criminal offences being carried out.
90. Recourse against seizures under cls 314 and 316 likewise mitigates the potential harm from these seizures. Clauses 315 and 320 set out that seizures by the Director, constables and response officers may only be maintained for the time period considered necessary to prevent danger to people or property, or to prevent the commission of an offence, unless they are retained as evidence of an offence being carried out. Under these clauses, the owner of the seized property has the right to request that reasons are provided for the seizure of their property. Finally, owners have the right to appeal against any seizure under cls 314 or 316 to the District Court.
91. On this basis, we consider all seizures authorised by the Bill to be reasonable and not in conflict with s 21 of the Bill of Rights Act.

Section 25(c) – presumption of innocence until proven guilty

92. Section 25(c) affirms the right to be presumed innocent until proven guilty. This means that an individual must not be convicted where reasonable doubt as to his or her guilt exists. The prosecution must therefore prove, beyond reasonable doubt, that the accused is guilty.
93. The Bill contains strict liability offences.¹⁶ Strict liability offences create a prima facie inconsistency with s 25(c) of the Bill of Rights Act because the offence may be proved by a finding that certain facts occurred without proof of *mens rea*. The accused is required to prove a defence (on the balance of probabilities) or disprove a presumption to avoid liability.
94. The prima facie inconsistency with s 25(c) of the Bill of Rights may nevertheless be consistent with the Bill of Rights Act if the limits can be demonstrably justified in a free and democratic society, as per s 5 of the Bill of Rights Act. Relevant considerations to

¹⁶ E.g. cls 19, 95, 108, 110(a), 110(c), 299.

this assessment are the nature and context of the conduct being regulated, the ability of the defendants to exonerate themselves, and the penalty levels.

95. The strict liability offences in this Bill cover two groups of people: people who are regulated by the civil aviation industry as aviation participants, and non-regulated persons in the industry, such as passengers and the general public.

Strict liability offences relating to regulated persons

96. The strict liability offences that apply to regulated persons largely relate to failures to follow regulatory requirements set out in the Bill.¹⁷

97. We consider that the prima facie limits on regulated persons in the Bill are justified. We have taken into account that:

- a. the offences relate to the important objective of a safe and secure civil aviation system.
- b. strict liability offences are considered more justifiable where they arise in relation to activities that are regulated. They may be an appropriate way to incentivise compliance and hold people accountable for their failure to comply. The limit on the right to be presumed innocent until proven guilty is rationally connected to the objective of ensuring compliance with this heavily regulated industry.
- c. the defendant, as a specially regulated person in the industry, is in the best position to justify their apparent failure to comply with the law, rather than requiring the Crown to prove the opposite.

98. We note, however, that some of the strict liability offences have high penalties.

99. Under cl 41(2) (dangerous activity involving an aircraft, aeronautical product, or aviation related service) an individual is liable on conviction to a maximum fine of \$150,000 and any other person is liable on conviction to a fine not exceeding \$1,500,000. We consider these fines high.

100. We understand that the Ministry of Transport considers cl 41(2) to be the most important safety offence in the civil aviation system. We also understand that the high penalties are intended to reflect the fact that civil aviation regime demands a high standard of care due to the risks inherent in aviation (hence aviation safety is closely regulated) and that people in the industry are expected to take responsibility to be aware of and follow safety rules. The high penalties also reflect that relevant activities will often be undertaken in a commercial context. In these circumstances, we do not consider that the high level of penalty undermines our conclusion that the limits are justified.

101. For the above reasons, we consider the strict liability offences relating to regulated persons to be justified in terms of s 25(c) of the Bill of Rights Act.

Strict liability offences relating to non-regulated persons

¹⁷ E.g. cls 19, 95, 108, 110(a), 110(c), 299.

102. The strict liability offences that apply to non-regulated persons include cl 394(1)(a), (b) or (c) (disruptive conduct towards crew member) and cl 395 (interference with aircraft). These offences are aimed at ensuring the safety onboard airplanes.
103. We consider the prima facie limits on non-regulated persons proposed appear to be justified. The offences are still aimed at a safe and secure civil aviation system. Even though they do not apply to regulated persons within that industry, they arise in the context of minimising harm. This is a sufficiently important objective and the limit is rationally connected to the objective.
104. The defendant is in the best position to justify their apparent failure to comply with the law. The general defence of total absence of fault would apply to both offences. The defence of 'reasonable excuse' is also available to a charge against cl 395.
105. The penalty levels (a fine not exceeding \$5,000 for committing an offence against cl 392(1)(a), (b) or (c) and a fine not exceeding \$10,000 for committing an offence against cl 395) are proportionate to the importance of the Bill's objective.
106. We are satisfied that the strict liability offences that apply to non-regulated persons are justified in terms of s 25(c) of the Bill of Rights Act.

Conclusion

107. We have concluded that the Bill appears to be consistent with the rights and freedoms affirmed in the Bill of Rights Act.



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