

THE "RIGHT TO SILENCE" - MARITIME NZ

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When interviewed by a prosecuting body (such as Maritime New Zealand) an individual has a right to silence. That is a right based on the accepted principle that a person is entitled not to give any statement that might tend to incriminate him/herself. This principle and right is recognised by MNZ when it reads its "right to silence" caution at the commencement of its incident investigations.

Prior to any investigation however, the Master (and potentially other individuals) are required to report the incident or accident to MNZ^[1]. No caution is given at that point.

Particularly in the light of recent experiences, this paper seeks to give some practical guidance on the "*right to silence*" in relation to incidents and accidents. At the end of this paper are some FAQs.

The situation with TAIC is quite different – in that any statements made are entirely confidential, and cannot be used against you in any subsequent Court action^[2].

Summary

(a) INCIDENT REPORTING

The Maritime Transport Act 1994 s31 requires that:

- the Master must report any accident, incident or mishap;
- that must be reported "as soon as practicable" (in other words speedily); and
- the report must be to MNZ, rather than to the employer (although it can and usually should be copied to the employer).

The Act does not itself detail the form in which that report must occur, or the content of the report^[3].

The report can itself be produced as evidence against you in Court.

The Master has a duty to **report the incident**, but the **content of the report must be carefully considered**.

(b) INCIDENT INVESTIGATION

Following receipt of an incident report, MNZ can interview you. You can be required (summonsed) to attend at interview, although that is unusual. "Voluntary" attendance is the norm.

Almost invariably, a caution (along classic TV show lines of "*you do not have to say anything, but anything that you do say may be used in evidence against you*") will be given at the outset of any interview.

You are entitled to legal representation at any such interview. There are issues about that representation being provided by the employer, as a conflict of interest may develop.

Invariably, an MNZ investigator will seek to record the interview. The legal basis for doing that (in the absence of agreement) is open to some argument.

What you say in that interview can be used against you in Court – and if a prosecution is brought, it will be used.

Any statements in the interview which tend to suggest any human factors (human causes or contributing factors) in the accident or incident must be very carefully considered **before they are made**. Those are precisely the matters for which the caution is given.

If in any doubt about a question or the direction of the interview you should immediately call a halt to the interview and seek advice.

Why a right to silence?

No single "right to silence"

There is in fact no single "*right to silence*"^[4]. Instead, there is a bundle of rights and immunities which potentially come into play where comments made can or could subsequently be used to incriminate the speaker (or in certain circumstances, potentially third parties).

The New Zealand Bill of Rights Act 1990 s23(4) provides that every person who is "*arrested or detained under an enactment*" has a right to silence, and a right to be advised of that.

Generally, where applicable, the "*right to silence*" allows you to refrain from answering any question or from providing information which may incriminate you (and should prevent the questioner from taking a negative view of your reliance on that right).

However, it is important to note that the right to silence should not usually be exercised where you have a completely innocent explanation for the events. To first offer such an explanation months or years later will tend to result in an inference that the explanation is one formulated after the event. You do however need to

recognise that what you might see as an innocent explanation might be seen quite differently by an MNZ investigator.

Application of the "right to silence" to MNZ

For the purposes of this paper, the "right to silence" in respect of MNZ potentially arises in two distinct situations:

- The obligation on the Master to report an incident/accident to MNZ as soon as practicable^[5]; and
- In MNZ interviews following reporting.

Reporting an incident

It is unlikely that a person making an incident report will be "arrested or detained under an enactment" in terms of the NZ Bill of Rights Act. The Bill of Rights Act caution about the right to silence will not generally apply. Rather, the duty to report is essentially administrative in nature. You should not therefore expect any caution before making an incident report.

Once made, the content of the incident report will be admissible as evidence in Court against you. The content of any incident report must be very carefully considered by the person making that before the report is made.

MNZ Interviews

Once MNZ commences investigating, including when interviewing, it is clear that the "right to silence" is available^[7]. A caution (sometimes referred to as "the blue card") will^[8] be issued to the interviewee. That includes words to the effect that he or she need not say anything, but that any evidence given may later be used against him or her^[9].

That caution is, and ought to be regarded seriously and interviewees need to be conscious of MNZ's dual powers. This is not solely a safety investigation but also an investigation to determine whether there is any criminal liability!

While there will no doubt be some desire to justify one's actions, any justification can then be scrutinised by MNZ and its advisers – and the outcome of that scrutiny will not necessarily accord with your own views in the circumstances and at the time that the events arose.

A practical guide

What then should you do if faced with an incident?

The first thing to remember is that what you say to MNZ (either in an incident report, or when later interviewed) will form the basis of (or part of) any decision to charge you with any offence under the Maritime Transport Act 1994 (i.e. a criminal offence). You therefore need to be very careful about what you say. This, however, should not be taken to suggest being untruthful: that will inevitably create its own serious problems.

It is suggested that, both when completing an initial incident report, and when attending any subsequent interview, if faced with the possibility of making any statement that **might tend to incriminate** oneself (or others), you should **refrain from making any statement/comment whatsoever** without first seeking (at the very least) professional advice. This could be as simple as a quick telephone call to a union or lawyer. In the writers' experience, there is never any issue with taking a break in the course of an MNZ interview to seek and obtain that advice. In writing an incident report, there is also some limited flexibility as to timing^[10]. Again, if you are not sure, advice should be sought before making a statement.

It must be borne in mind that a statement that at a surface level might appear innocuous, if not entirely innocent, may in fact tend to incriminate you. By way of example, matters as elementary as presence at a particular time or duties/responsibilities might, in some circumstances, 'tend to incriminate' based on what is later believed to be the cause of an incident and responsibility for that incident.

It is not possible to advise you in this paper on preparing a report on any particular incident or accident. As a general rule however it is suggested that caution is exercised in saying anything with a human element/human factors attached. In other words, "*pointing the finger*" at any person (including yourself) as contributing to what happened is most unwise. It must also be recognised that knowledge gained in hindsight is 20:20. General comment on what happened may be less difficult^[11].

Generally, in making an incident report immediately following an incident, **least said is best said**.

In respect of an interview with MNZ, the human element issue also applies (subject to the innocent explanation point referred to above).

It is also suggested that the scheduling of any interview should allow sufficient time for you to obtain suitable advice. That can (and in most circumstances should) include representation attending the meeting with you.

Particularly where there are any possible human factors, it will usually be unwise for you to use your employer's lawyers to attend meetings with you. Whose interests are such lawyers really there for? If matters are disclosed in the course of the interview that your employer might take a dim view of, will the lawyer report those back to your employer? This can be a fundamental conflict of interest – although one often not recognised by the employer/lawyer^[12].

In terms of process, all MNZ interviews are recorded using a digital recorder (or similar device). There is room for doubt about MNZ's legal right to record such interviews, in the absence of your agreement^[13]. Conversely however a recording and resulting transcript can ensure that there is an accurate record of what was

said. Statements made both by investigators and by you can then be scrutinised later.

If during the course of such an interview you are unsure how to answer a question, you are able to adjourn the meeting to discuss that with your representative. Any recording will be stopped, and advice can be obtained without fear of that advice forming part of the official record.

Following the interview, care is also required in reviewing and confirming the accuracy of the transcript produced.

The "*right to silence*" is an important right, as it allows you not to answer a question or to include detail that would tend to incriminate you. However, whether or not that right applies, it is suggested that you obtain advice before commenting to MNZ^[14].

[1] These matters also feature in separate paper on the Guild's website: "*A Pilot's Perspective – a Legal Commentary*". This paper is intended to be read in conjunction with that.

[2] Transport Accident Investigation Commission Act 1990, and for example s14N. TAIC is solely investigating for transport safety purposes. TAIC has no power to prosecute and will not provide information (except possibly hard data – eg GPS information) to any other entity that might give rise to a prosecution.

[3] Although MNZ's website includes a link to the form(s) it suggests are appropriate. Note, however, the suggestions below as to what to/what not to report (even if using MNZ forms).

[4] "*A Pilot's Perspective*", above.

[5] Refer Maritime Transport Act 1994, s.31.

[6] Refer Bill of Rights Act 1990, s.27.

[7] Including under the NZ Bill of Rights Act 1990, at common law, and under the Maritime Transport Act 1994 itself: refer s.58.

[8] Depending on the class/type of investigation being undertaken, some of which do not involve a caution.

[9] If no such caution is provided, MNZ should not be able to rely on what was said, as it should be inadmissible for having been obtained in breach of, for example, the interviewee's rights under the Bill of Rights Act 1990.

[10] MNZ itself recognises that this time span will vary from incident to incident: refer www.mnz.govt.nz/accidents.why_report.asp (last accessed 3/4/07).

[11] For example, MNZ's reporting forms include questions such as: "*What, in your opinion, contributed to the accident?*", and "*what is being done to prevent a re-occurrence and what are the lessons learned?*". It is suggested that responding to these questions may be straying into dangerous territory.

[12] TAIC note this very point on its website.

[13] MNZ has no express power to record interviews; some other statutory bodies do have that power. Whether or not a power to record can be implied is open to argument.

[14] This of course differs in respect of TAIC interviews, the confidentiality of which is protected by law.

FAQs

Q When must I report an incident?

A: The Master must report an incident, accident etc to MNZ "as soon as practicable": section 31 Maritime Transport Act. That means speedily – or without any unreasonable delay.

Q I am a pilot, not a Master. Must I report any incident?

A: No. The duty to report is on the Master. The definition of Master specifically excludes pilots.

Q How must I report an incident?

A: The Act does not specify how the advice is to be given. Telephoned advice or advice in writing can therefore satisfy the Act.

Q What must I say in an incident report?

A: The fact that there has been an incident must be reported. Beyond that, the Act makes no requirement as to any details (although MNZ can later seek more details).

Q What shouldn't I say in an incident report?

A: You should not say anything that does suggest, or could suggest, that there is any element of human fault (particularly your own human fault) in what occurred.

Q Must I attend an interview with MNZ?

A: Unless issued with a summons, your attendance is not mandatory. Given that a summons can be issued to you, there is probably little point in refusing to attend an interview.

Q Must I accept the interview being recorded by MNZ?

A: Perhaps not, however a tape recording can be of benefit to you as well as MNZ – in that it will tend to ensure accuracy.

Q What should I say in an interview?

A: Subject to the right to silence, you should answer questions that you are asked. You should stick to hard facts of what occurred and when.

Q What shouldn't I say in an interview?

A: You should not speculate, or make comment with hindsight. You should not say anything that does suggest, or could suggest, that there is any element of human fault (particularly your own human fault) in what occurred.

Q Should I have representation in an interview?

A: It is strongly recommended that you have representation in any interview, and that ordinarily the representation is not your employer's lawyer.

Q When should I end an interview?

A: If, from the questions asked or the tone of the interview, you form the view that it is not in your interests for the interview to continue.

Q If at any stage I am unsure, what should I do

A: Before making any statement, seek advice.