

Regulatory Impact Statement

Amendments to the Civil Aviation Act 1990: Aviation Security

Agency Disclosure Statement

1. The Ministry of Transport has prepared this Regulatory Impact Statement (RIS). It analyses options to improve the legislative framework for civil aviation security in New Zealand. This RIS accompanies the Cabinet paper entitled *Review of the Civil Aviation Act and Airport Authorities Act: Key Policy Decisions*.
2. The proposals contained in this RIS are the result of a review of the Civil Aviation Act 1990 (the Review), undertaken by the Ministry of Transport in 2014.
3. The Review canvassed a wide range of aviation issues. In addition, industry raised additional matters during consultation. Further analysis post consultation determined that legislative changes were not necessary for many of these issues, as they were best remedied through other non-legislative mechanisms.
4. There are a number of other amendments proposed to the Civil Aviation Act that are considered to have minor impacts and have therefore not been included in this RIS.
5. The preferred options in this RIS aim to ensure Zealand's aviation legislation can continue to support an effective, efficient, safe, secure and resilient aviation system, which supports the growth of the economy in order to deliver greater prosperity, security and opportunities for all New Zealanders.
6. Changes to provide for alternative terminal configurations, and who can provide aviation security services, will future-proof the legislation to ensure that it can accommodate changes to the aviation regulatory environment in the future. These changes do not have an immediate impact, however we acknowledge that considerable secondary policy work would be necessary before any changes to current practice.
7. Several issues arose following consultation, therefore we do not know stakeholders views. Consultation on these issues will take place through the Select Committee process.
8. The Ministry of Transport is satisfied that the cost impacts in the RIS are reasonable.


Senior Adviser
Ministry of Transport
Date: July 2016

Withheld to protect privacy

The aviation environment

9. In the past 25 years since the enactment of the Civil Aviation Act (CA Act), significant change has occurred throughout the aviation industry and in government regulatory reform. Aviation safety and security, and New Zealand's international civil aviation obligations continue to be fundamental drivers. In addition, aviation is a key contributor to New Zealand's economic growth.
10. Since the introduction of the CA Act in 1990, New Zealand's aviation sector has flourished. Air passenger transport contributed approximately \$4.3 billion (14 percent) to New Zealand's \$29.8 billion tourism revenue in the year to March 2015.¹ 17 percent of New Zealand exports and imports by value are carried by air. The aviation industry annually exports \$3.8 billion of products and services and contributes 6.9 percent of New Zealand's GDP. We expect the aviation industry to continue to be a major contributor to economic growth.
11. Other factors that have influenced the aviation system over the past 25 years include:
 - 11.1. the Government's expectations of the transport sector as a contributor to economic growth
 - 11.2. the Government's priority to improve the quality of regulation
 - 11.3. the move by the CAA to a more proactive, risk-based approach to aviation regulation, and its change programme to improve regulatory quality, service delivery, efficiency and effectiveness
 - 11.4. ongoing and rapid change within the international aviation industry relating to an increased demand for services and improved technology.
12. Against this background, the Ministry of Transport undertook a review of the CA Act (the Review). The purpose of the Review was to ensure that New Zealand's aviation legislation could continue to support an effective, efficient, safe, secure and resilient aviation system, which supports the growth of the economy in order to deliver greater prosperity, security and opportunities for all New Zealanders.

What does the CA Act cover?

13. Amongst other things, the CA Act sets out the safety and security framework for the civil aviation system. The CA Act:
 - 13.1. establishes the Civil Aviation Authority (CAA) and the Aviation Security Service (Avsec)
 - 13.2. establishes the framework to participate in the civil aviation system
 - 13.3. confers functions, duties and powers on those operating in the civil aviation system, including the CAA and Avsec

¹ Tourism Satellite Account: 2015

- 13.4. empowers the Minister of Transport to make Civil Aviation Rules for a range of matters
- 13.5. empowers the Director of Civil Aviation (the Director) to regulate entry into the civil aviation system, and monitor and enforce compliance with the CA Act and Civil Aviation Rules
- 13.6. ensures New Zealand's obligations under international civil aviation agreements are implemented

Executive summary

- 14. The aviation industry and the government regulatory environment have changed significantly in the past 25 years since the enactment of the CA Act. In this time, New Zealand's aviation sector has flourished. Air passenger transport contributed approximately \$4.3 billion (14 percent) to New Zealand's \$29.8 billion tourism revenue in the year to March 2015.²
- 15. Against this background, the Ministry of Transport undertook a review of the CA Act (the Review). The purpose of the Review was to ensure that New Zealand's aviation legislation could continue to support an effective, efficient, safe, secure and resilient aviation system, which supports the growth of the economy in order to deliver greater prosperity, security and opportunities for all New Zealanders.
- 16. The Review identified a number of legislative changes that will contribute to achieving this outcome. These changes will:
 - 16.1. improve the safety and security of the aviation system
 - 16.2. improve the efficiency and effectiveness of regulatory decision-making to facilitate a growing industry
 - 16.3. clarify expectations placed on participants in the aviation system
 - 16.4. improve the usability of the legislation.
- 17. The Ministry of Transport formally consulted with industry in late 2014. Industry provided comment on a wide range of issues, and was generally supportive of the proposed changes.
- 18. Most changes are unlikely to be contentious.
- 19. *Table 1* below summarises the key changes and rationale for change.

² Tourism Satellite Account: 2015

Table 1: Summary of key changes

Security	
Clarifying Avsec's search powers in the landside part of security designated aerodromes ³	The Aviation Security Service (Avsec) has authority to act within security designated aerodromes. The CA Act gives Avsec specific authority in security areas (called the airside), but its authority in the rest of the aerodrome (landside) is set out in more general terms. To ensure there is no doubt as to Avsec's existing authority to act landside, we propose amendments to address any uncertainty relating to Avsec's search and seizure powers in the landside part of security designated aerodromes. This will mean Avsec will be subject to similar requirements about the exercise of its landside powers, as it is airside.
Providing for alternative aerodrome terminal configurations and implications for security screening	Airport operators must balance international security requirements (space for security screening and segregating screened passengers from non-screened passengers), the rights of all users to be free from unreasonable search and seizure, with the efficient facilitation of people and commerce. The security arrangements in the CA Act have a significant impact on the layout of terminals at security designated aerodromes, potentially constraining Airport operators from using terminal space more efficiently. We recommend amending the CA Act to enable Airport operators to design terminals in a way that better facilitates the movement of people through the terminal, without compromising necessary security requirements. For example, this may mean Airport operators seek approval to move security screening closer to the check-in or the terminal entrance. Both passengers and non-passengers may be security screened. The screening of non-passengers may raise some Bill of Rights issues. However, concerns can be mitigated because consent is a feature of security screening arrangements in New Zealand, and people will have the option not to proceed through screening if they do not want to.

³ Security designated aerodromes are the aerodromes where security screening takes place. 'Airside' is the area of a security designated aerodrome where access is controlled. 'Landside' at a security designated aerodrome is the area of an aerodrome, adjacent terrain and buildings or portion of building, which is not part of airside—also described as the public area of an aerodrome.

Hold (checked) baggage screening	Avsec has the power to screen⁴ all checked passenger baggage at international aerodromes for items that may present a risk to aviation safety or security. As part of this process, Avsec routinely deals with items that present a safety or security concern and therefore need closer inspection. The CA Act is not clear that Avsec has power to search items that trigger a safety or security concern, without the consent of the passenger. We propose an amendment to the CA Act to be explicit that Avsec can conduct hold stow baggage searches without the consent of the passenger for both domestic and international travel, where there is a risk to aviation safety or security that requires an immediate response.
Avsec's institutional arrangements	Avsec has existed as an operational division within the CAA since 1993. This arrangement means that the CAA is regulating and auditing part of its own organisation. This creates an inherent conflict of interest. We recommend amending the CA Act and associated Civil Aviation Rules to remove the requirement for Avsec to hold an aviation document.⁵ The effect of this will be to remove the Director's independent statutory role as the regulator of Avsec, thereby removing the inherent conflict of interest. The CA Act allows for Airport operators (as well as Avsec) to provide aviation security services at security designated aerodromes. However, Avsec is currently the only organisation permitted to provide aviation security services (as enacted through a <i>Gazette</i> notice in 1997). We do not propose removing Avsec's statutory monopoly. However, we consider there is an opportunity to amend the CA Act to ensure the legislation allows for others (e.g. airlines and private security firms) to be able to offer security services, if in the future that was considered desirable, as long as they are able to meet the certification requirements under Civil Aviation Rules.

Overall objectives of the Review

20. The overall objectives of the Review is to assess and design changes necessary to ensure that the Acts are fit for purpose, including that they:

20.1. provide capable and effective governance, operational and regulatory frameworks

⁴ Refer to definition in the appendix.

⁵ To operate within the civil aviation system, an individual or organisation must be granted an aviation document. The Director grants aviation documents – such as a pilot licence, operating certificate, aircraft registration, engineer licence, air traffic control licence, or aerodrome certificate – only after applicants have demonstrated that they meet the standards set in the Civil Aviation Rules.

20.2. address identified safety, security and economic issues where appropriate

20.3. provide clear, concise and accessible legislation.

Background and context of New Zealand's aviation security regulatory framework

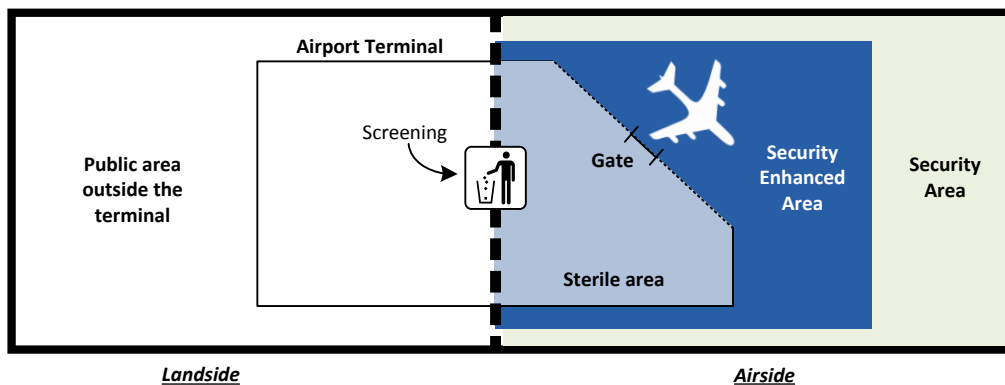
21. Section 82 of the CA Act allows the Minister of Transport to designate an aerodrome as a security designated aerodrome by Gazette notice. Section 76 of the CA Act makes Avsec jointly responsible with the New Zealand Police for preventing aviation crime at security designated aerodromes.
22. Security designated aerodromes are, in broad terms, separated into landside areas and airside areas. Access to landside areas is generally unrestricted. Access to airside areas is restricted, depending on whether you are a screened passenger or an authorised person.
23. Security designated aerodromes are subject to comprehensive security measures to help manage the risks posed by unlawful interference with civil aviation. Consistent with New Zealand's obligations under a number of international conventions⁶, the focus was originally on protecting international air passenger services. Since 2001, this has expanded to include larger domestic passenger services. Internationally, and in New Zealand, we recognise that these air services require a higher level of security than other services carrying smaller numbers of passengers.
24. The CA Act confers functions and duties on Avsec to support this. These include screening international air passenger services, domestic air passenger services using aircraft with more than 90 passenger seats⁷, and persons, items, substances, or vehicles entering or within 'security areas'.
25. [REDACTED]
26. Figure 1 below shows the geography of a security designated aerodrome. The appendix defines the key terms in Figure 1, along with other key terms including patrol, screening and searching.

Withheld, as release of this information is likely to prejudice the security of New Zealand.

⁶ For example, the Hague Convention for the Suppression of Unlawful Seizure of Aircraft, the Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, the Montreal Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, and the Tokyo Convention on Offences and Certain Other Acts Committed on Board Aircraft.

⁷ In 2011, the Director of Civil Aviation re-issued the domestic screening direction for crew, passenger and baggage screening on aircraft of more than 90 passenger seats. This Direction was issued under Section 77B of the Civil Aviation Act 1990 which provides powers and duties of the Director to require screening, searching and seizing in specified circumstances. The Minister of Transport has similar power under Section 77A of the Act.

Figure 1; Security Designated Aerodrome



Evolution of the international security environment

27. While New Zealand's risk environment is relatively low, internationally landside security concerns are heightened due to a number of high profile security-related events, as perpetrators attempt to identify and exploit vulnerabilities within the wider aviation environment. The most high-profile incidents were the recent terrorist attack on Istanbul's Ataturk Airport and Brussels Airport. Also in 2007, a vehicle loaded with propane canisters was driven into the front of a terminal at Glasgow International Airport—setting the terminal ablaze.
28. ICAO has noted that aerodrome landside areas continue to be an attractive target for terrorists and present a major security challenge. ICAO has proposed Recommended Practices⁸ in relation to landside security measures, involving greater coordination between agencies and organisations working in the aerodrome environment.

Issue 1: Clarification of Avsec's landside search powers

Status quo

Avsec's work

29. The CA Act provides Avsec with a general power to search at security designated aerodromes (section 80(ab)) and to carry out security patrols (section 80(b)). Avsec fulfils its patrol function by undertaking random foot and mobile patrols both in the airside and landside parts of the aerodrome. Avsec use EDD to assist with this function. The purpose of these patrols is to detect and deter unlawful interference with civil aviation.

⁸ An ICAO Recommended Practice is an aviation measure that ICAO has agreed is *desirable* for member states to adopt. It has a lesser status to an ICAO Standard, which is a *necessary* measure for international air navigation.

30. Civil Aviation Rule Part 140 elaborates further on Avsec's patrol function, to detect and deter threats to the security of an aerodrome operation.

Problem definition

31. The requirements for searches under section 80(ab) are limited to those searches being reasonable and necessary. The CA Act does not prescribe what Avsec must do, or is permitted to do, in relation to the person or any item/substance discovered in the course of a search undertaken in the landside part of the aerodrome (e.g. powers to seize, detain, dispose, destroy or deliver an item to the Police).
32. This contrasts with the Avsec's search powers in the airside area of an aerodrome, which are very detailed. For example, the CA Act requires a passenger's consent before a search is permitted. Avsec officers can seize, retain and dispose of prohibited items.
33. The general nature of these powers creates a lack of clarity about the extent and nature of Avsec's landside search and seizure powers. The problem is most noticeable in relation to how and what an Avsec officer can do to deal with unattended items and vehicles in the landside part of the aerodrome, and the use of EDD as a means to assist Avsec officers in their patrol function and to help rule out whether an unattended item poses a security risk.
- Unattended items: By definition, an unattended item poses a security risk until it is cleared. In addition, until Avsec can clear the item, there is the potential for major disruption to aerodrome operations. Around 80% of unattended items are found in the landside part of the aerodrome. The CA Act is not explicit about Avsec's authority to search these items if they are found in the landside parts of the aerodrome.
 - Vehicles: Similar to unattended items, the CA Act is not explicit about Avsec's authority to search vehicles in the landside parts of the aerodrome. Vehicles may pose a security risk, depending on the particular circumstances—for example, a vehicle left unattended at the terminal entrance compared to one parked several hundred metres away in the terminal carpark. The vehicle could come to Avsec's (or Police's) attention in multiple ways or for multiple reasons.
 - Use of EDD: Unlike a human Avsec officer, an EDD is always 'searching' and does not make the assessment of whether that search is necessary and reasonable. Avsec use EDD as part of its patrol function, as they are a highly effective way to clear an area. If an EDD 'indicates' (i.e., identifies) an item or person of interest, Avsec determines the appropriate response. At present, the CA Act is silent on the use of EDD by Avsec.
34. Searches of vehicles and unattended items are intrusive actions and need to be considered in light of the Bill of Rights Act—in particular, a person's right to be secure against unreasonable search and seizure. The use of EDD is considered to be a search, albeit a non-intrusive search.

35. From a Bill of Rights perspective, the CA Act should be clear about what Avsec officers can or cannot do when exercising any search or seizure powers. This is the case for Avsec's search powers airside, but not so for Avsec's landside search powers.
36. In addition, it is critical that Avsec officers have certainty about their authority to act in certain situations. In a security environment, officers must be able to act quickly and decisively to resolve potential security threats. It is also important from a facilitation perspective, to help manage the smooth running of aerodromes.

Objectives

37. The objective is to ensure a secure civil aviation system that appropriately balances security imperatives, personal rights and facilitation, in particular by ensuring that Avsec's powers under the CA Act are sufficiently clear, including when and how they can be exercised.

Options and impact analysis

38. The following options were considered to address this problem:
 - 38.1. Status quo
 - 38.2. Preferred option: amend CA Act to clarify Avsec's authority to:
 - search vehicles and unattended items (landside)
 - use EDD
 - conduct landside searches including requirements on:
 - (a) when searches are permitted
 - (b) how searches are conducted
 - (c) what happens to anything that is found.
39. The status quo does not meet the policy objectives. Avsec's landside powers as currently expressed in the CA Act are unclear. From a Bill of Rights and security perspective, the CA Act should be clear about what Avsec officers can and cannot do when exercising any search or seizure powers in the landside parts of security designated aerodromes.
40. The preferred option addresses any uncertainty about Avsec's powers, enabling Avsec to more effectively fulfil its statutory functions and duties, thereby improving aviation security. It has a minimal impact on Avsec, as the proposal simply clarifies existing powers. Similarly, there is no impact on the aviation industry or general public.
41. The option would not affect Avsec's funding arrangements.
42. Providing greater detail around the thresholds and protections around how and when these powers can be exercised, will ensure greater alignment with Bill of Rights considerations. It also acknowledges resource constraints at busy aerodromes.

Consultation on issue 1

43. Many of the submitters supported the preferred option, noting it improves clarity and is practical.
44. Two submitters supported an option to limit Avsec's powers to airside only and to rely on Airport operators and the Police to provide security services in the landside area of the aerodrome. We do not support this option.

45. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

Withheld, as release of this information is likely to prejudice the security of New Zealand.

- 45.1. [REDACTED]
[REDACTED] Airport operators would need to develop or contract a security capability. This would be different depending on size and type of operations at each aerodrome.

- 45.2. Avsec's EDD are the most efficient and effective means to determine the credibility of a security threat. The EDD team (handler and dog) require comprehensive training, certification and auditing, to meet strict international standards. If Avsec did not operate landside, Airport operators would need to have appropriate methods to assess the credibility of a threat. It would be difficult to deal with potential security issues as quickly as EDD can.

Issue 2: Allowing for alternative terminal configurations

Status quo

46. The security requirements in the CA Act have a significant impact on the layout of terminals. For example, the terminal must have space for security screening and space for screened passengers to be segregated from non-screened passengers and non-passengers.
47. In the past, Airport operators have approached the Ministry of Transport to discuss whether it is possible to configure the terminal in a way that allows people (segregated under existing requirements) to mix in common areas. In some cases, this is prompted by physical space constraints within the aerodrome environment.
48. One example of this is a Common Departure Terminal (CDT). Adelaide Airport operates this model where people intending to greet or farewell passengers are permitted access into the security area in the domestic terminal but only after passing through security screening.
49. Section 84(2) of the CA Act states that no one other than a member of the Police or an Avsec officer may enter or remain in any security area or security enhanced area unless the person is wearing an airport identity card issued and worn in accordance with the rules.

- 49.1. Subsection (7) provides that passengers are exempt from this requirement if they are embarking or disembarking directly through a gateway or thoroughfare.
- 49.2. Subsection (8) permits persons allowed under the rules to pass through a security area without an AIC. Those permitted to enter security areas are airport identity card holders, passengers and specific people e.g. international aircrew and certain government officials.

Problem definition

- 50. It is not clear that the CA Act permits non-passengers (such as someone wishing to greet or farewell a passenger) to enter security areas. This may inhibit Airport operators from developing potentially more efficient terminal designs that could improve facilitation and provide cost savings.

Objective

- 51. The objective is to ensure the CA Act and rules enable Airport operators to adopt more flexible terminal configurations, without compromising aviation security.

Options and impact analysis

- 52. The following options were considered to address this problem:
 - 52.1. Status quo
 - 52.2. Preferred option: amend the CA Act to give the Director, on application by an aerodrome operator, the power to allow any specified group of persons or member of the public to enter or remain in any security area.
- 53. The status quo does not meet the policy objectives. It is not clear that the CA Act permits non-passengers such as those who wish to greet or farewell a passenger, to enter security areas. This inhibits Airport operators from considering potentially more efficient terminal configurations.
- 54. While we are not aware of any Airport operators that are currently looking to change their terminal layout in a way that would be inconsistent with the current CA Act requirements, the preferred option would ensure the regulatory environment was future-proofed to enable Airport operators to consider alternative designs.
- 55. Amendments to the CA Act would need to provide a process for Airport operators to seek approval before implementing a terminal configuration where specified groups of people e.g. members of the public, could access the security enhanced area. This approval process would allow the secondary policy issues outlined below, to be resolved prior to an approval being granted. The Director would still need to be assured that an alternative design meets all the security outcomes as required under the CA Act and Civil Aviation Rules.

56. Potential benefits to Airport operators include:
- 56.1. a more efficient use of space and infrastructure, particularly at small (regional) aerodromes
 - 56.2. potential savings from not needing to build additional infrastructure
 - 56.3. a reduction in the need for duplicate facilities, including security facilities
 - 56.4. possible security enhancements for all aerodrome users
 - 56.5. a single amenity zone post-security and improved retail performance by increasing dwell-time in one retail zone.
57. Any negative impacts associated with this proposal would not be realised until an Airport operator wanted to implement an alternative terminal configuration. Secondary policy issues that would need to be resolved if an aerodrome wanted to put in place an alternate configuration are highlighted below.
- 57.1. How would the screening of non-passengers be funded? A passenger security charge funds Avsec's services, that is averaged across the aerodrome network. This may not be appropriate given the advantages gained by Airport operators. It may be necessary to change this funding mechanism.
 - 57.2. What standard security screening would be conducted to?
 - 57.3. What would be the impact on Avsec resources?
 - 57.4. What impact would there be on other border agencies?

Consultation on issue 2

58. Many submitters supported allowing alternative configurations if security was maintained, but noted concerns with funding and specific configurations. Some do not support configurations that allow non-passengers into security areas of the terminal. Some support for configurations that allow domestic and international passengers to mix. Many submitters believe it should be user pays, with Airport operators and retailers meeting the cost of screening non-passengers.

Issue 3: Hold (checked) baggage screening

Status quo and problem definition

59. Avsec has the power to screen⁹ all checked passenger baggage at international aerodromes for items that may present a risk to aviation safety or security. As part of this process, Avsec routinely deals with items that present a safety or security concern and therefore need closer inspection. The CA Act is not clear that Avsec has power to search items that trigger a safety or security concern, without the consent of the passenger.
60. Avsec generally tries to locate the passenger, or seek authorisation from the airline operator before searching the bag. However, it may not be appropriate to contact the passenger if significant security concerns exist. In addition, if a passenger or airline representative cannot be located quickly (which is often the case) the risk cannot be resolved, which in turn risks delays to flights or bags not travelling on the passenger's flight.

Objectives

61. The objective is to ensure Avsec have the appropriate authority to efficiently and effectively resolve aviation safety or security risks presented by hold (checked) baggage.

Options and impact analysis

62. The following options were considered to address the problem:
 - 62.1. Status quo
 - 62.2. Preferred option: amend the CA Act to be explicit that Avsec can conduct hold stow baggage searches without the consent of the passenger for both domestic and international travel, where there is a risk to aviation safety or security that requires an immediate response.
63. The status quo is not a viable option. It does not provide the clarity to allow Avsec to quickly resolve any safety or security concerns that they may face when inspecting a piece of hold stow baggage. This compromises Avsec's ability to act quickly when faced with safety or security risks.
64. The preferred option best meets the policy objectives. From a safety and security perspective, it is important for Avsec to quickly resolve any concerns identified through screening processes, by clearing the item/bag or sectioning off the item/bag promptly to protect people and property.
65. The proposed amendment provides a clear legislated mandate for Avsec to act when there are safety or security concerns that arise after screening a checked bag. This ability to act quickly means items can be dealt with more efficiently. It reduces the possibility of a negative impact on the airline, which may face delays if a bag cannot be quickly assessed.

⁹ Refer to definition in the appendix.

66. Balanced against this ability is an individual's right to privacy – i.e. the rights relating to unreasonable search and seizure. Ensuring that Avsec only search a checked-in bag if it triggers a safety or security concern (as opposed to any item of hold stow baggage) provides an appropriate balance. This is consistent with how Avsec deals with carry-on items.
67. The preferred option has minimal impact on Avsec, as it is a clarification of an existing power.
68. We also expect that the impact on passengers will be minimal. Avsec will only have the authority to open passenger bags without consent once a specific risk has been identified, and an immediate response is necessary. This is not a general power to be able to search all hold baggage without getting consent of the passenger.

Consultation on issue 3

69. This issue was raised post consultation, so we are unaware of views on this issue.

Issue 4: Avsec institutional arrangements

Background

70. Since 1993, Avsec has existed as an operational division within the CAA. Appropriate legislative amendments were made to ensure that a transparent separation was maintained between the Authority's regulatory and operational roles in aviation security. The focus on separation was a reflection not only of the need to manage issues arising from the regulator and the regulated service being part of the same Crown entity, but also to meet ICAO obligations to maintain a degree of separation between the regulator and aviation security service provider.
71. Avsec's separation in organisational terms was carried through to its governance structure until the current Chair and Board were appointed. The Board separated its governance function of the regulator (the CAA) and the service provider (Avsec) by holding two separate board meetings in two different locations.
72. 








73. 


74. ICAO now recognises that the following arrangements provide the level of separation sought:

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maintain the
effective conduct of
public affairs
through the free and
frank expression of
opinions

74.1. the independence granted to the Director under section 72(4) of the CA Act

74.2. the clear separation between the regulatory oversight and service provider bodies and their separate operating and administrative functions.

Withheld to maintain the effective conduct of public affairs through the free and frank expression of opinions

75. [REDACTED]
76. Avsec's functions, duties and powers are set out in the CA Act. The CA Act also requires Avsec to hold an aviation document issued by the Director - even though there are other statutory provisions that enable Avsec to perform its activities.
77. The CA Act already contemplates competitive arrangements for aviation security services provision. The CA Act provides for aviation security services at security designated aerodromes to be provided by Avsec and Airport operators (Section 79 of the CA Act refers). However, Avsec is the only organisation currently permitted to provide aviation security services in New Zealand.
78. A Gazette Notice issued by the Minister of Transport (Hon Jenny Shipley) in 1997, enacted Avsec's statutory monopoly. The Gazette Notice was issued under Section 79A of the CA Act which provides that the Minister of Transport may from time to time by notice in the Gazette, specify that only Avsec may be granted an aviation document to provide aviation security services at any security designated aerodrome or security designated navigation installation. The Minister can amend or revoke any such notice.

Status quo and problems/opportunity

79. Two issues arise from Avsec's current institutional arrangements:
- 79.1. The institutional arrangements have the potential to create a conflict of interest.
- 79.2. There appears no basis to maintain in legislation the arrangement that only Avsec and Airport operators can provide security services at security designated aerodromes.
80. It appears to be the existence of the aviation document that creates the conflict of interest risk that had been of significant concern to the previous Board.
81. The Director issues an aviation document to the General Manager of Avsec, which is a division of the Authority and thus not a legal entity. In effect, the Director issues the document to the organisation that employed him, essentially to enable it to carry out the functions it is required to perform under the CA Act. On the face of it, these arrangements create a conflict of interest both at Board level and for the Director.

82. No one at the Authority management or Board level can conceive of a situation or circumstance where Avsec's aviation document could be actually revoked by the Director. If this is the case, there is a question as to the value of the aviation document as regards Avsec.
83. Even though the current Board and management do not consider this risk to be of particular significance at the present time in a practical sense, future Boards and management may have a different perspective. Retaining arrangements that do (at least theoretically) give rise to conflict of interest are not considered a sustainable option.

Permitting organisations other than just Avsec and Airport operators to provide security services at security designated aerodromes, should that be considered desirable in the future

84. As noted above, the CA Act contemplates competitive arrangements for aviation security services provision. However, Avsec is the only organisation currently permitted to provide aviation security services in New Zealand. We do not propose removing Avsec's monopoly to provide aviation security services.
85. Any future decision to provide a contestable model would require significantly more analysis around the impacts. For example there would need to be a restriction on the type of services a private security provider could provide (e.g. they would not have the power to arrest as Avsec officers do). [REDACTED]
[REDACTED]
[REDACTED] Appendix 2 outlines some issues that would need to be considered if a fully contestable model was contemplated.
86. There is not a strong case to open aviation security services to competition at present, given the lack of demonstrable problems with the existing model. In addition, there is a risk that the benefits of competition could be eroded from increased costs associated with regulating multiple service providers, [REDACTED]
[REDACTED]
87. However, there appears to be no basis to maintain in legislation that only Avsec and Airport operators can provide aviation security services at security designated aerodromes, if other organisations (such as airlines or private security firms) could meet the standards set out in Civil Aviation Rules.
88. We consider that there is an opportunity to amend the CA Act to allow for a wider set of players to offer security services, if in the future that was considered desirable.

Objectives

89. The objective is to ensure that Avsec's institutional arrangements are fit for purpose. In particular, clear avenues of accountability effectively address any potential for conflicts of interest, in a way that preserves New Zealand's international aviation security reputation.
90. In addition that the CA Act appropriately caters for the potential for a fully contestable aviation security services model, if in the future this is considered desirable.

Withheld, as release of this information is likely to prejudice the security of New Zealand.

Options and impact analysis

91. The following options were considered to address the problem.

Option one: alternative institutional arrangement

92. One option would be to establish Avsec as an independent Crown Entity with the CAA as its regulator. This option would be contrary to the Government's objective of reducing the number of Government agencies. This option would also incur significant transactional costs, and would result in higher overheads as Avsec would need to re-employ its own back-office staff and a separate board would need to be appointed. In our view, it is unlikely that the benefits of this option would outweigh the transactional costs.
93. Other alternatives considered include attaching Avsec to the Police, the New Zealand Customs Service, or the Airways Corporation.
94. All of these options would increase the independence of the regulator but would also result in significant transactional costs.

Option two: amendment to the CA Act (Preferred)

95. Given that Avsec is operating successfully as part of the CAA, the simplest and most cost-effective way to rationalise the organisational structure is to remove the requirement for Avsec to hold an aviation document.
96. This would effectively remove the Director's independent statutory role as the regulator of Avsec. Effectively, Avsec would no longer be a regulated service provider. Avsec would be part of a government agency providing a service, with its functions, duties and powers set out in legislation, operating in order to meet New Zealand's international obligations, (just as the New Zealand Customs Service does, for example).
97. The CA Act already provides the mandate for Avsec to conduct its business irrespective of it holding an aviation document.
98. In our view, this would not materially affect Avsec's accountability. Avsec would be accountable to the CAA Board, which is in turn accountable to the Minister of Transport. To ensure quality, we would amend the CA Act to specify that Avsec is required to meet standards commensurate with those in Civil Aviation Rules. The CAA could continue to audit Avsec to ensure that it continues to meet the standards set out in the Civil Aviation Rules, but this auditing function would effectively be a form of internal quality assurance.
99. The preferred option presents low transition costs.

100. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED] Provided there is robust oversight by the State - in the New Zealand context this would include Ministerial and Select Committee oversight - and ICAO can be assured that the Minister can hold someone to account for the delivery of aviation security, it is considered likely that ICAO would be supportive of such arrangements. Implementing periodic external audits of Avsec could in considered.

Withheld to maintain the effective conduct of public affairs through the free and frank expression of opinions

101. We therefore, perceive this to be a low risk provided suitable oversight mechanisms are established, such as including in the CA Act a requirement for Avsec to meet the requirements and standards commensurate with those provided in Civil Aviation Rules.
102. Under this option, Avsec and the CAA would continue to maintain separate accounting systems. Passenger security charges, paid by airline passengers would continue to be fully fund Avsec.
103. The CA Act could be improved by stating that aviation security services can be provided by Avsec or any other organisation certified under Civil Aviation Rule Part 140. This would make it possible for a range of different organisations to compete for contracts to provide aviation security services (not just Airport operators). However, in practice this would not be a real option as long as the Gazette notice remains in place.
104. The proposed change to the CA Act would mean that the legislative settings would no longer provide an opportunity to Airport operators that is not available to other organisations. It may also incentivise the CAA board to ensure that Avsec is operating efficiently, as the removal of Avsec's statutory monopoly could occur at any time with relative ease. The Minister of Transport could communicate this message in his annual letter of expectations to the CAA Board.

Consultation on issue 4

105. This issue was not formally consulted on during the Review; however, stakeholders raised the issue of contestability of aviation security services during consultation on the CA Act Review and as part of an early review of funding arrangements for Avsec. Some stakeholders would like some aspects of the service provided by Avsec to be contestable.
106. We are not aware of industry views on the preferred option.
107. .

Summary of impacts

Issue	Avsec/CAA	Aviation industry	Public
Issue 1: Clarification of Avsec's landside search powers	The proposed change has minimal impact on Avsec's day-to-day activities because it is simply a clarification of existing powers. The proposal provides Avsec with greater certainty about when landside searches are permitted, how they should be conducted and what happens to anything that is found in a search. This has a positive impact on aviation security.	No impact. The proposed change simply clarifies Avsec's existing landside search and seizure powers. Funding arrangements are not impacted.	No impact. The proposed change simply clarifies Avsec's existing landside search and seizure powers. Funding arrangements are not impacted.
Issue 2: Allowing for alternative terminal configurations	There is no immediate impact on Avsec. Any impacts would only eventuate if an airport operator wished to implement an alternative terminal configuration. The impact would be dependent on the proposed terminal design.	There will be a positive impact for airport operators who wish to consider alternative terminal configurations. Benefits include efficiency gains and potential cost savings (refer paragraph 56).	There is no immediate impact on the general public. If an airport operator sought to implement an alternative terminal configuration, it is possible that non-passengers would be screened. However screening would be by consent—non-passengers would have the option not to proceed through security screening.
Issue 3: Hold (checked) baggage screening	There is a positive impact on aviation security as Avsec will have certainty about how it can act when inspecting a piece of hold stow baggage that presents a safety or security risk.	There is a positive impact on airports and airlines as Avsec will be able to more quickly deal with suspicious items, reducing the possibility of flight delays.	There is a positive impact on the general public with improved aviation security. In general terms the impact is minimal, as Avsec will only be able to open bags without consent once a specific risk has been identified and an immediate response is necessary.
Issue 4: Avsec institutional arrangements	There is a positive impact from removing a perceived conflict of interest. Low transaction costs.	No immediate impact. If Avsec's statutory monopoly was removed at some point in the future, other private sector operators would benefit from the potential to provide security services at security designated airports.	No impact.

Consultation

108. On 1 August 2014, the Ministry of Transport began a period of formal consultation that ran until 31 October 2014. This included formal stakeholders meetings in around the country and two specific issue-based focus group sessions. The Ministry received 31 written submissions on a wide range of issues in response to the consultation. Submitters were largely supportive of the proposed changes to the security regime. Some additional issues were raised during or after consultation.

Conclusions and recommendations

109. Maintaining a secure aviation environment will continue to be a fundamental driver within New Zealand's civil aviation regulatory regime. The social cost and reputational impacts of an aviation security incident are significant, particularly for public air transport and New Zealand's tourism market.
110. As well as the intrinsic safety benefits for passengers and other users, safe flight leads to public confidence in New Zealand's civil aviation system. A loss of confidence in the system could have significant economic and social impacts.
111. It is vital that Avsec's powers in the CA Act provide certainty about their authority to act in certain circumstances. In a security environment, officers must be able to act quickly and decisively to resolve potential security threats. This is also important from a facilitation perspective, to help manage the smooth running of aerodromes. Many of the proposals in this section provide this clarity about Avsec's authority to act, and what an Avsec officer can and can't do when exercising any search or seizure powers.
112. There are two areas where the CA Act can be future-proofed to accommodate potential changes to the aviation security environment in the future. These changes do not have an immediate impact, however, further policy work would be necessary before recommending changes to current practices.

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

Implementation plan

113. The legislative changes proposed in this RIS (subject to Cabinet approval) will be progressed as part of a Civil Aviation Reform Bill [REDACTED]. The Bill will also include a number of consequential changes to various Civil Aviation Rules to support the Act amendments.
114. A programme will be developed to implement Act changes that affect operational arrangements. The CAA will be responsible for developing any changes to processes and procedures. Avsec will be responsible for putting into operation any changes associated with changes to security arrangements.
115. The Ministry of Transport will develop a communications and stakeholder engagement plan to ensure that the aviation industry understands the changes made to the CA Act.
116. Not all proposed Act amendments have an implementation aspect.

Monitoring evaluation and review

117. The Ministry of Transport and CAA will monitor the effectiveness of the legislative changes through on-going data about the performance of the system and through review processes. The CAA will monitor case law to determine whether the Court perceives the changes clarify the regime.

Appendix 1

Definition of aviation security terms

Airside	The movement area of an aerodrome, adjacent terrain and buildings or portions of where access is controlled - comprising the security, security enhanced area and sterile area.
Landside	The area of an airport, adjacent terrain and buildings or a portion of which is not part of the airside. Landside also described as the public area of an airport.
Security designated aerodrome	A security designated aerodrome refers to the total area usually referred to as 'the airport'. It is comprised of the secure areas (airside) and the public areas (landside).
Security Area	The area known as the airside part of an airport where aircraft and supporting vehicles normally move about, together with the adjacent terrain and buildings or portions thereof, for which access is controlled.
Security enhanced area	Those areas of the airside of an aerodrome identified as priority risk areas where, in addition to access control, other security controls are applied.
Sterile area	The sterile area comprises the area after people, items and baggage have passed through screening and includes the departure lounges through to the gate to the aircraft. Access to this area is limited to authorised personnel, passengers and crew.
Patrol	An Avsec officer may 'patrol' anywhere within an aerodrome — that is, both airside and landside. The purpose of a patrol is to detect and deter activity that poses a threat to civil aviation.
Screen	An Avsec officer is required to 'screen' any persons, items, substances and vehicles going airside — that is, before being permitted to go airside. The purpose of screening is to detect the presence of any item or substance specified in a Direction ¹⁰ — that is, any items or substances that pose a threat to civil aviation. If Avsec find something during a screening process, the Avsec officer has different options depending on the circumstances. These options include powers relating to search and seizure.
Search	A search refers to a (typically) more intrusive examination of a particular person, vehicle or item to determine whether they pose a threat to civil aviation. Searches by Avsec can occur during patrol, at the airside screening point, or if there has been an arrest. Any search must comply with the strict rules set out in both the Civil Aviation Act 1990 and the Aviation Crimes Act 1972.

¹⁰ Section 77A and 77B of the Civil Aviation Act 1990 refers, providing powers and duties of the Minister of Transport and Director to require screening, searching of persons, items or substances and the seizing of items and substances in specified circumstances.

Appendix 2

Globally, a wide range of entities provide aviation security services. In a number of other jurisdictions (such as Australia), core aviation security services are provided by the private sector. [REDACTED]

[REDACTED] The private security provider is usually (but not always) contracted by the airport company.

In theory, a private security provider may be able to provide aviation security services more efficiently and at lower cost than Avsec. Under a contestable model (where security firms compete for contracts to provide security services at airports), the provider would have a strong commercial incentive to reduce costs and maximise efficiency.

The CAA board has a strong focus on efficiency and Avsec's cost per passenger has been reducing over time. However, without the ability to retain profits or the threat of losing a contract, it is unlikely that Avsec will ever have the same incentives to reduce costs and improve efficiency as a commercial service provider would.

Some stakeholders (including Air New Zealand and the New Zealand Airports Association) have argued in their submissions on the CA Act review that aviation security services should be opened up to competition from the private sector. Air New Zealand and a number of airports have suggested on numerous occasions in the past that they could provide aviation security services themselves.

While a contestable model offers some potential efficiency gains, we would need to consider a number of significant issues before opening aviation security services to competition.

1. Avsec officers currently have the power to arrest and detain dangerous or unruly passengers. Vesting these powers in a private security provider is unlikely. [REDACTED]
[REDACTED]
[REDACTED]
2. The design of any contestable model would need to ensure that passengers are receiving the benefits of any efficiency gains. Under a model in which the airport company is responsible for contracting a private security provider, there is a risk that the airport company may simply retain any efficiency gains as profits.
3. While the system could incentivise a private security firm to maximise efficiency, it may be less focussed on security outcomes. Any provider of aviation security services would need to meet the minimum standards prescribed by the Act and the Civil Aviation Rules, but private security operators are less likely to adopt practices that go beyond those minimum standards. A contestable model with multiple service providers would also increase the complexity and cost of the CAA's regulatory function.

Avsec's prices are currently set on a network basis, and its costs aggregated across all airports and distributed equally among passengers. However, the actual cost of providing aviation security services differs significantly among the five security-designated airports. This means that passengers travelling through larger airports with economies of scale (such as Auckland) are effectively cross-subsidising passengers travelling through smaller airports (such as Dunedin) where the per-passenger costs are much higher. If charges were to be set on a location-specific basis, it is likely that the cost would be prohibitive to the point that it may no longer be economically viable for airlines to operate to smaller regional airports^[1]. It would be difficult to design a contestable model that retained the current network-pricing.

^[1] Currently, this applies primarily to Dunedin airport. However, location-specific charges are likely to act as a disincentive for airlines to re-establish international services at airports such as Hamilton, Palmerston North and Rotorua, which have previously served international flights.