

Regulatory Impact Assessment

Options to address national security risks in the civil aviation system

Agency Disclosure Statement

1. The Ministry of Transport (the Ministry) has prepared this Regulatory Impact Assessment (RIA). It analyses options to address risks to national security in the civil aviation system. This RIA accompanies the Cabinet paper entitled, "*Civil Aviation Bill: Confirmation of key policy decisions.*"
2. During the drafting process of the Outer Space and High-altitude Activities Bill (which established a regulatory regime to govern space launches and high-altitude activities, including both those launched from New Zealand and by New Zealand nationals operating overseas), and the Civil Aviation Bill (the Bill), the Ministry became aware that operations in New Zealand's civil aviation system could potentially pose a national security risk.
3. The civil aviation regulatory regime is only able to effectively manage a national security risk to the extent that the risk also represents an aviation safety or security risk. 'Security' in this context is not synonymous with 'national security.'
4. Analysis undertaken by the Ministry has confirmed the need for a regulatory response to address the identified policy problem. This RIS has identified two preferred options that are complementary. The first provides the option for an immediate response to individual national security risks in the civil aviation system, and the other a systemic response to categories of operation in the civil aviation system that could pose a potential national security risk. These two, complementary options are:
 - 4.1. empower the relevant Minister, on the basis of national security concerns, to issue a notice:
 - preventing entry of an operator/operation into the civil aviation system;
 - removing any operator/operation from the civil aviation system;
 - requiring the Director to impose conditions on the aviation document of any operator/operation in the civil aviation system;and;
 - 4.2. empower the relevant Minister to create civil aviation rules prescribing when an application for the issue or renewal of an aviation document is subject to a national security assessment.

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5. Consultation has been undertaken with interested government departments but not publicly. Consultation with the wider public and aviation sector will take place when an exposure draft of the Bill is released and during the Select Committee process.

Ministry of Transport RIA Panel Statement:

The Regulatory Quality Team at the Ministry of Transport has reviewed the Regulatory Impact Assessment (RIA) "Options to address national security risks in the civil aviation system" produced by the Ministry of Transport and dated 23 November 2018. The review team considers that it **partially meets** the Quality Assurance criteria.

The RIS clearly sets out criteria and these have been thoroughly applied to the options in a way that makes it clear why certain options have been recommended. However, the impact analysis is constrained by the fact that the costs for the various options (both for government agencies and the affected sector participants) have been described in relative terms, but have not been quantified. The panel understands that this information cannot be obtained because there is considerable uncertainty around whether and when any interventions will be applied, and if they are, their likely scale and impact.

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Adviser, Ministry of Transport
Date: 23 November 2018

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Status quo

The Outer Space and High-altitude Activities Act 2017

6. The Outer Space and High-altitude Activities Act 2017 (the OSHAA Act) was enacted in response to the commencement of the launch of vehicles from New Zealand that would operate in 'outer-space'.
7. The OSHAA Act establishes a regulatory regime to govern space launches, including both launch vehicles and payloads (e.g. satellites) from New Zealand and by New Zealand nationals operating overseas. It also provides a legal framework for high-altitude activities that originate from New Zealand. Any activities above 60,000 feet are covered by the OSHAA Act regime. The regulator for the OSHAA Act is the New Zealand Space Agency, which is part of the Ministry of Business Innovation and Employment.
8. The inclusion of high-altitude activities in the OSHAA Act was a result of identifying during the policy development phase that a wide range of technologies are being developed to operate at very high altitudes¹ and perform similar functions to satellites. These include earth observation, border surveillance, maritime control and internet connectivity technologies, which can have national security implications².
9. As a result, high altitude activities were included within the scope of the OSHAA Act. This future proofed the legislation for advances in technology and ensured that different technologies - that perform similar functions - can be treated consistently.
10. This legislation created a licensing regime that ensured proper consideration of a variety of possible concerns relating to a launch, including national security.

The Civil Aviation regulatory regime

11. The Civil Aviation Act 1990 (the CA Act) governs the civil aviation system in New Zealand and sets the overall framework for aviation safety, security and economic regulation in New Zealand.
12. Amongst other things, the CA Act:
 - 12.1. establishes the Civil Aviation Authority;
 - 12.2. establishes the framework for participation in the civil aviation system;
 - 12.3. confers functions, duties and powers on those operating in the civil aviation system, including the Civil Aviation Authority (the Authority) and the Aviation Security Service (Avsec);
 - 12.4. empowers the Minister of Transport to make Civil Aviation Rules for a range of matters;

¹ High altitude activities are those activities taking place above the upper limit of controlled airspace (i.e. above 60,000 feet or approximately 18km from the ground).

² The Department of the Prime Minister and Cabinet uses the following definition of national security: "*National security is the condition which permits the citizens of a state to go about their daily business confidently free from fear and able to make the most of opportunities to advance their way of life. It encompasses the preparedness, protection and preservation of people, and of property and information, both tangible and intangible*". Refer: <https://dpmc.govt.nz/our-programmes/national-security-and-intelligence/national-security>.

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- 12.5. empowers the Director of the Authority to regulate entry into the civil aviation system, and monitor and enforce compliance with the CA Act and Civil Aviation Rules; and
 - 12.6. ensures New Zealand's obligations under international civil aviation agreements are implemented.
13. The civil aviation regulatory regime, established under the CA Act and supported by civil aviation rules, regulates participants and aircraft operating in the civil aviation system. Operations *below* high altitude are subject to this civil aviation regulatory regime.
 14. As noted above, operations *above* high altitude are regulated by the OSHAA Act.
 15. It is important that there is consistency between both regulatory regimes because some technologies that operate at high altitude can also potentially operate in lower altitudes of New Zealand airspace. The potential exists for national security risks to arise with these technologies, regardless of whether they are operating at high or low altitude. Similarly, there are some technologies which may only operate at lower altitudes in New Zealand airspace, which could also raise potential national security risks.
 16. Consistent with the mandate under the CA Act, the civil aviation regulatory system can address risks that represent a civil aviation safety or security risk. In this context, security risks are not synonymous with national security risks. The civil aviation regulatory system can therefore only address a national security risk to the extent that the risk also represents an aviation safety or security risk.

The fit and proper test

17. The CA Act and rules require the Director of Civil Aviation (the Director) to exercise control over entry into the civil aviation system through the granting of aviation documents.³
18. Before a person or organisation may be issued with an aviation document, the Director must be satisfied that the applicant and any person who is to have, or is likely to have, control over the exercise of the privileges under the document is a fit and proper person. Whether a person is fit and proper is determined through assessment of criteria prescribed in the CA Act.
19. The purpose of the fit and proper assessment is to contribute to minimising the safety and security risks posed by participants operating in the civil aviation system.
20. It is a condition of any aviation document that the holder continues to be fit and proper. However, an individual's fit and proper status is not reviewed unless the person is in a senior position, or if the person applies to take on additional areas of responsibility in the system (e.g. from a private pilot to commercial pilot or a person takes on greater responsibilities within a certified organisation), or information comes to hand that warrants the Director undertaking a reassessment of an individual's status.

³ Note, there are exceptions to the requirement to hold an aviation document and therefore be subject to the fit and proper assessment, e.g. small, recreational drones.

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21. In 2016/17 there were 31,078 licensed individuals, 743 certificated organisations and 5,094 licensed aircraft in the aviation system.⁴ Approximately 2200 fit and proper assessments are carried out each year and the Authority has a business target of a maximum 5 working day turn around for each application.

Problem definition

22. In the past, agencies, including the Department of the Prime Minister and Cabinet (DPMC), the Ministry of Transport (the Ministry) and the Authority have become aware of potential national security risks in the civil aviation system. The nature of this information means it cannot be included here.
23. National security is the condition which permits the citizens of a state to go about their daily business confidently free from fear and able to make the most of opportunities to advance their way of life. It encompasses the preparedness, protection and preservation of people, and of property and information, both tangible and intangible.
24. The problem is that, civil aviation security may not encompass all of the broader national security considerations that relate to the operation and activities of aircraft. Therefore, where national security is the sole basis for concern, civil aviation regulation, and by extension the Authority and the Director, may be unable to constrain the identified operation to the extent necessary.
25. For example, an operator may be carrying out activities that represent a potential risk to New Zealand's national security interests, e.g. surveillance. However, if that national security risk does not also represent a civil aviation safety or security risk, the civil aviation regulatory system may not be equipped to mitigate that risk.
26. The nature of national security makes it difficult to define the risks. However, some potential risks include:
 - 26.1. the risk of New Zealand, or an aircraft operator's assets, becoming a target for foreign or state espionage activities;
 - 26.2. the possibility of aircraft operators, as commercial service providers, using technologies in a way that runs counter to New Zealand's interests. For example, a private company or state might use remote sensing technology to carry out surveillance of New Zealanders; and
 - 26.3. New Zealand airspace being used as a location for the development and testing of aircraft and technology in cases where the activity in question may not align with New Zealand's national interests or that of its partners.

⁴ Figures from Authority's Annual Report for 2016/17.

Objectives

27. The policy objective is to ensure the civil aviation regulatory regime is equipped to appropriately mitigate risks to New Zealand's national security arising within the civil aviation system.
28. The impetus for this objective is to remove a potential regulatory gap that has been identified that could cause problems in the future. The analysis in this RIS is not concerned with addressing a specific national security risk that has been identified.
29. [REDACTED]
30. National security is by necessity a broad concept because of the variety and complexity of New Zealand's national interests and the corresponding potential risks to those interests.
31. However, it is important that there are sufficient protections in place to ensure this broad scope does not lead to limitations on the rights of individuals that are not demonstrably justified in a free and democratic society. Potential rights affected by the options evaluated include section 18 – freedom of movement and section 27 – right to justice.

Criteria

32. We have assessed the identified options against the following criteria:
- Effectiveness – how effective is the option in addressing the problem identified?
 - Is the option effective in mitigating national security risks from individual operators as well as on a systemic basis?
 - Does the option provide the flexibility to mitigate a range of foreseeable and unforeseeable national security risks?
 - Consistency – how consistent is the option with established frameworks?
 - Is the option consistent with the regime established by the OSHAA Act?
 - Is the option consistent with the independence and established expertise of the Director and the Authority?
 - Resource impact – what is the relative resource impact of each option?

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- Does the option minimise the relative compliance costs for operators in the civil aviation system?
- Does the option minimise the relative implementation and operational costs for government?
- Proportionality – how proportionate is the proposed regulatory intervention?
 - Are any limits on rights and freedoms as a result of the option reasonable and demonstrably justified in a free and democratic society?

Consistency with the independence and established expertise of the Authority and the Director

33. It is important to provide further context to this aspect of the consistency criterion. An overriding concern in evaluating the available options is maintaining the independence and established expertise of the Director and the Authority in the performance of their aviation safety and security functions. The Authority and the Director have well established roles and expertise. It is not proposed to expand this role and expertise into national security, which is the function of other agencies and, in particular, is an evaluation best undertaken at the Ministerial level.

Options

34. The following options were considered to address the identified problem:
- 34.1. **(Status quo) Option 1:** utilise the general discretion of the Director to consider any other information relevant to aviation safety and security in carrying out the fit and proper person assessment.
 - 34.2. **Option 2:** require all applicants to undergo a national security check before being authorised to operate in the civil aviation system.
 - 34.3. **Option 3 (Preferred option Part A):** empower the relevant Minister, on the basis of national security concerns, to issue a notice:
 - preventing entry of an operator/operation into the civil aviation system;
 - removing any operator/operation from the civil aviation system; and/or
 - requiring the Director to impose conditions on the aviation document of any operator/operation in the civil aviation system.
 - 34.4. **Option 4 (Preferred option Part B):** empower the relevant Minister to make civil aviation rules prescribing when an application for the issue or renewal of an aviation document is subject to a national security assessment.
 - 34.5. **Option 5:** develop stand-alone national security legislation to address national security risks within the civil aviation system.

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- 34.6. **Option 6:** impose a duty on participants in the civil aviation system to mitigate national security risks and engage with the Director when they become aware, or are informed of, potential national security risks.

Option 5 has been ruled out

35. We have ruled out Option 5 on the basis that protecting New Zealand's national security is just one of a suite of objectives that are relevant to civil aviation activities and it is not efficient from a regulatory perspective to design a stand-alone regulatory tool to achieve this single objective.

Evaluation of remaining options

(Status quo) Option 1: utilise the general discretion of the Director to consider any other information relevant to aviation safety and security in carrying out the fit and proper person assessment

36. The CA Act requires the Director to control entry into the civil aviation system through the granting of aviation documents. Before issuing an aviation document, the Director must be satisfied that the applicant and any person who is to have, or is likely to have, control over the exercise of the privileges under the document is a fit and proper person to have such control or hold the document. It is an ongoing obligation on the person to continue to be fit and proper.
37. The CA Act sets out the matters that the Director *must* consider when conducting a fit and proper person assessment. The CA Act also states that the Director is not limited to the matters stipulated in the CA Act, and *may* take into account other matters and evidence that may be relevant. Option 1 would utilise this general discretion of the Director as part of the fit and proper process to consider national security risks related to the applicant to the extent that these are also aviation safety and security risks.

Effectiveness – how effective is the option in addressing the problem identified?

- a) Is the option effective in mitigating national security risks from individual operators as well as on a systemic basis?
- b) Does the option provide the flexibility to mitigate a range of foreseeable and unforeseeable national security risks?

38. The Director's discretion has to be read in light of the wider context of the CA Act. The definition of security in the civil aviation regulatory regime does not extend to include considerations of national security. It would therefore be inconsistent to interpret the Director's discretion as extending to national security and would open the Director's decision to judicial review.
39. For this reason, the Director's discretion would have to be confined to considering information about a national security risk only as far as that information was relevant to civil aviation safety or security. This represents a considerable problem in addressing the range of potential national security risks.

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- 40. Further, there are exceptions to the requirement to hold an aviation document and therefore be subject to the fit and proper assessment. Option 1 would not be an effective option in these circumstances.
- 41. Because Option 1 applies on a per operator basis, it is not readily scalable and would not be effective in responding to systemic civil aviation national security risks.

Consistency – how consistent is the option with established frameworks?

- a) Is the option consistent with the regime established by the OSHAA Act?
- b) Is the option consistent with the independence and established expertise of the Director and the Authority?

- 42. This option is inconsistent with the OSHAA Act because national security considerations will not be applied generally but only where the Director's discretion is utilised.
- 43. This option is also inconsistent with the OSHAA Act in that applicants are entitled to information relating to an adverse decision made by the Director to the effect that the applicant is not a fit and proper person for the purpose of the CA Act. That information would be subject to the same appeal and review rights as any other type of information, which would not be appropriate for classified information. This is in contrast to the process under the OSHAA Act where the Inspector-General of Intelligence and Security (the Inspector-General) reviews any information provided by the Intelligence Community. The Inspector-General provides the same protections that general appeal and review rights would, while maintaining the integrity of the classified information.
- 44. This option satisfies the consistency criterion in regards to maintaining the independence and expertise of the Authority and the Director, provided the Director's discretion is read in light of the wider context of the CA Act. In particular, a definition of security that does not extend to include consideration of national security, i.e. the Director's discretion is confined to considering information about a national security risk only as far as that information is relevant to civil aviation safety or security.

Resource impact – what is the relative resource impact of each option?

- a) Does the option minimise the relative compliance costs for operators in the civil aviation system?
- b) Does the option minimise the relative implementation and operational costs for government?

- 45. The discretionary nature of Option 1 means it will have a relatively smaller resource impact than Option 2, but coordination will still be required between the Authority and the Intelligence Community.

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46. The Ministry anticipates that invoking this discretion would be the exception and would overall have a limited resource impact on government. Information likely to trigger the use of the discretion would be expected to come from the Intelligence Community as part of their daily operations. The resource impact of communicating this information to the Director and invoking the discretion would also be limited.
47. This option would not require any ongoing compliance cost for the sector. However, an operator subject to the use of this discretion could be prevented from holding an aviation document that enables them to carry out their business. The impact would vary according to the nature of the business.

Proportionality – how proportionate is the proposed regulatory intervention?

- a) Are any limits on rights and freedoms as a result of the option reasonable and demonstrably justified in a free and democratic society?

48. This option satisfies the proportionality criterion because the Director's discretion will only be utilised where intelligence exists indicating a potential national security risk in relation to a specific operation/operator. The potential for misuse of this discretion is mitigated by the ability of the Inspector-General to review any information provided by the Intelligence Community as part of the national security assessment.

Option 2: require all applicants to undergo a national security check before being authorised to operate in the civil aviation system

49. This option would add national security as a factor that the Director must consider as part of the fit and proper person process. The Director would likely seek an assessment from the Intelligence Community as part of every fit and proper assessment. The Director would then need to weigh evidence relating to national security against safety and security considerations that indicated a person was fit and proper.

Effectiveness – how effective is the option in addressing the problem identified?

- a) Is the option effective in mitigating national security risks from individual operators as well as on a systemic basis?
- b) Does the option provide the flexibility to mitigate a range of foreseeable and unforeseeable national security risks?

50. While Option 2 would be effective in scrutinising the breadth of the civil aviation system for national security risks, the scale of the task would require the depth of investigations to be limited or the imposition of substantial delays in the issuing of an aviation document.

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51. A process that imposes substantial delays in the issuing of an aviation document does not meet the consistency and resource impact criterion. Limiting the depth of investigation does not meet the effectiveness criterion because a shallower investigation may fail to identify a national security risk posed by an operator/operation acting as an agent through, for example, indirect influence or an obscured ownership model.

Consistency – how consistent is the option with established frameworks?

- a) Is the option consistent with the regime established by the OSHAA Act?
- b) Is the option consistent with the independence and established expertise of the Director and the Authority?

52. This option is consistent with the OSHAA Act in relation to national security being a mandatory consideration for all civil aviation documents.
53. However, this option would be inconsistent with the OSHAA Act regime in respect to applicants being entitled to information relating to an adverse decision made by the Director to the effect that the applicant is not a fit and proper person for the purpose of the CA Act. That information would be subject to the same appeal and review rights as any other type of information, which would not be appropriate for classified information. This is contrast to the process under the OSHAA Act where the Inspector-General reviews any information provided by the Intelligence Community.
54. This option does not satisfy the consistency criterion in regards to maintaining the independence and expertise of the Authority and the Director. The Director would be required to consider and weigh evidence relating to national security against aviation safety and security considerations that indicated a person was fit and proper. The Authority and the Director have well established roles and expertise and it is not proposed to expand this into national security, which is the function of other agencies and, in particular, is an evaluation best undertaken at the Ministerial level.
55. It is possible this could be mitigated by the Intelligence Community withholding the specifics of an identified national security risk from the Director, i.e. the Director would only be notified that an operator posed a national security risk, not the specifics of the risk. However, if the Director was obliged to accept such a notification without the ability to evaluate the specifics of the risk on the basis of aviation safety and security considerations, this would unduly fetter the Director's discretion and independence. This would not satisfy the consistency criterion.

Resource impact – what is the relative resource impact of each option?

- a) Does the option minimise the relative compliance costs for operators in the civil aviation system?
- b) Does the option minimise the relative implementation and operational costs for government?

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56. This option would have the highest relative resource impact for the government and the sector. There could be provision for the Director to create exemptions for those operations unlikely to ever pose a risk to national security. However, requiring a majority of licensed and certified people, organisations and aircraft owners to undergo a national security check would be disproportionate to the anticipated risk in the sector and the limited potential for most operators to ever be in a position to compromise national security interests.
57. The resource impact on both operators and government is compounded by the need to incorporate some level of continuing assessment of those in the sector. Otherwise the system is vulnerable to a national security risk developing after the initial assessment.
58. The Authority would also need to establish appropriate processes and skills to handle and evaluate the national security information received. Appropriate clearances would also need to be obtained by a wide range of Authority staff to handle the classified information.

Proportionality – how proportionate is the proposed regulatory intervention?

- a) Are any limits on rights and freedoms as a result of the option reasonable and demonstrably justified in a free and democratic society?

59. This option does not satisfy the proportionality criterion because national security would become a mandatory consideration for all civil aviation documents. This is unlikely to be a proportionate application of national security provisions.
60. National security provisions apply to every application under the OSHAA Act regime. Despite this, proportionality is achieved because the regime applies to the niche area of space launch vehicles and high altitude activities, which represent a high potential for national security risks and has very few applicants.
61. The civil aviation system, in contrast, is a vastly larger sector where particular activities or persons could represent a high potential for national security risks, but a majority will not. Our assessment is that subjecting every application to a national security assessment would not be proportionate to the risk.

(Preferred option - Part A) Option 3: empower the relevant Minister, on the basis of national security concerns, to issue a notice:

- preventing entry of an operator/operation into the civil aviation system;
- removing any operator/operation from the civil aviation system; and/or
- requiring the Director to impose conditions on the aviation document of any operator/operation in the civil aviation system.

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62. This option anticipates that information identifying a national security risk would come to the attention of the Minister through one of various available channels. The Minister would then issue a notice to mitigate that national security risk, either by removing the operator/operation from the civil aviation system (which may include the removal of an aviation document), preventing that operator/operation from entering into the civil aviation regulatory system or requiring the Director to impose conditions on the operator's/operation's aviation document. The Director would be required to comply with the effect of that notice, and if necessary, impose conditions on the operator's aviation document.

Effectiveness – how effective is the option in addressing the problem identified?

- a) Is the option effective in mitigating national security risks from individual operators as well as on a systemic basis?
- b) Does the option provide the flexibility to mitigate a range of foreseeable and unforeseeable national security risks?

63. Option 3 provides a regulatory tool that can respond immediately to a range of national security risks. This option allows an effective response to a national security risk, regardless of whether the operator/operation is entering or already in the system.

64. Because Option 3 (like Option 1) applies on a per operator basis, it has limited scalability and would not be an effective tool for responding to systemic national security risks. Consideration was given to whether the scope of a notice could be expanded beyond individual operators/operations to a type or category of operator/operation. Given the scope of the proposed power, and the broad nature of the concept of 'national security', it was considered necessary to limit the power to a per operator/operation basis.

Consistency – how consistent is the option with established frameworks?

- a) Is the option consistent with the regime established by the OSHAA Act?
- b) Is the option consistent with the independence and established expertise of the Director and the Authority?

65. This option is consistent with the OSHAA Act in respect to recognition of the jurisdiction of the Inspector-General. However, it is partially inconsistent with the OSHAA Act because national security considerations will only apply when intelligence exists indicating a potential national security risk in relation to a specific operation/operator, rather than being of general application.

66. This option satisfies the consistency criterion in regards to maintaining the expertise of the Authority and the Director by elevating the consideration of national security risks to the Ministerial level. The Director is not required to evaluate evidence relating to national security risks, which avoids a challenge with Options 1 and 2.

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67. It is acknowledged that Option 3 has important ramifications for the independence of the Director given the potential impact a notice issued by the Minister has on the status of an aviation document. However, this option maintains the independence of the Director because the Minister is making a determination in an area for which the Authority and the Director have no responsibility nor expertise. Further, the Director is never a participant in this decision-making process and must comply with the Minister's notice.

Resource impact – what is the relative resource impact of each option?

- a) Does the option minimise the relative compliance costs for operators in the civil aviation system?
- b) Does the option minimise the relative implementation and operational costs for government?

68. The discretionary nature of Option 3 means it will have a relatively smaller resource impact than Option 2, noting however, that coordination will still be required between the Authority and the Intelligence Community.
69. This option would have a limited resource impact on government. Information likely to trigger the use of the power would be expected to come from the Intelligence Community as part of their daily operations. The resource impact of communicating this information to the Minister and invoking the power would also be limited. Further, the Ministry anticipates that invoking the Minister's power would be the exception and likely a last resort given the public profile it creates.
70. This option would not require any ongoing compliance cost for the sector. However, an operator subject to the use of this discretion could be prevented from holding an aviation document that enables it to carry out its business. The impact would vary according to the nature of the business.

Proportionality – how proportionate is the proposed regulatory intervention?

- a) Are any limits on rights and freedoms as a result of the option reasonable and demonstrably justified in a free and democratic society?

71. This option satisfies the proportionality criterion because the Minister's powers will only be utilised where intelligence exists indicating a potential national security risk in relation to a specific operation/operator. The potential for misuse is mitigated by the ability to require the Inspector-General to review any information provided by the Intelligence Community as part of the national security assessment.

(Preferred option - Part B) Option 4: empower the relevant Minister to make civil aviation rules prescribing when an application for the issue or renewal of an aviation document is subject to a national security assessment

72. The Minister can make civil aviation rules relating to matters specific to civil aviation. Option 4 would empower the Minister to make civil aviation rules prescribing the categories of aviation document, (e.g. on the basis of the activity, privilege or category of aviation document) that are subject to a national security assessment.

73. [REDACTED]

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

74. The national security assessment required by the rule would likely be carried out by the Intelligence Community who would report to the Minister their conclusions.

Effectiveness – how effective is the option in addressing the problem identified?

- b) Is the option effective in mitigating national security risks from individual operators as well as on a systemic basis?
- c) Does the option provide the flexibility to mitigate a range of foreseeable and unforeseeable national security risks?

75. Rather than addressing potential national security risks on a per operator/operation basis (e.g. Options 1 and 3), this option provides a scalable tool to scrutinise a collective area of civil aviation. It will enable a response to potential systemic national security risks to New Zealand at any point in the future.

76. However, in the event that a national security risk is identified through a national security assessment, Option 4 by itself (i.e. not complemented by the powers proposed under Option 3) will not address that identified national security risk. Without a complementary tool like that proposed in Option 3, the only tool that can be used to mitigate that risk is the fit and proper process. Under this process, the Director would be confined to consideration of the national security risk only so far as it also represented an aviation safety or security risk.

77. Option 4 would also not be effective in areas outside the type of operation that the rules make subject to a national security assessment. For example, if an operator/operation is not subject to a rule requiring a national security assessment, any national security risk relating to that operator/operation would only be identified if raised independent of a rule process.

78. Further, due to the time required to make a civil aviation rule, Option 4 would not be effective in responding to an immediate concern.

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Consistency – how consistent is the option with established frameworks?

- a) Is the option consistent with the regime established by the OSHAA Act?
- b) Is the option consistent with the independence and established expertise of the Director and the Authority?

79. This option is consistent with the OSHAA Act in respect to recognition of the jurisdiction of the Inspector-General. However, this option is partially inconsistent with the OSHAA Act because any rule created under Option 4 would only apply national security considerations to specific areas of civil aviation and not to civil aviation generally.
80. Option 4 maintains the independence and expertise of the Authority and the Director because the civil aviation rule would only require the Authority and the Director to refer certain types of application to the Intelligence Community who would carry out the national security assessment. The conclusions of that assessment would then be provided to the Minister.

Resource impact – what is the relative resource impact of each option?

- a) Does the option minimise the relative compliance costs for operators in the civil aviation system?
- b) Does the option minimise the relative implementation and operational costs for government?

81. This option could have a relatively high resource impact. The Ministry expects the rule is likely to apply to niche and technical areas of civil aviation. This is consistent with the OSHAA Act applying to the small and unique area of launches to outer-space.
82. Option 4 could have a relatively high resource impact on the Intelligence Community if security assessments proved to be more frequently required than is currently anticipated. The impact on government and the sector is dependent on the type of activity, privilege or aviation document identified by the civil aviation rule. These impacts will be assessed as part of the normal rule making process.

Proportionality – how proportionate is the proposed regulatory intervention?

- a) Are any limits on rights and freedoms as a result of the option reasonable and demonstrably justified in a free and democratic society?

83. This option satisfies the proportionality criterion because national security will only apply to specific areas of civil aviation that represent a high potential for national security risks. The potential for misuse is mitigated by the ability of the Inspector-General to review any information provided by the Intelligence Community as part of the national security assessment.

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Option 5: develop stand-alone national security legislation to address national security risks within the civil aviation system.

84. As noted on page 5, Option 5 has been ruled out and has not been evaluated.

Option 6: impose a duty on participants in the civil aviation system to mitigate national security concerns and engage with the Director when they become aware, or are informed of, a potential national security risk

85. The Telecommunications (Interception Capability and Security) Act 2013 addresses national security concerns by placing a reporting onus on particular participants in the telecommunications sector when they are aware of, or receive information, relevant to national security.

86. Option 6 contemplates placing a similar onus on participants in the civil aviation system. The operator would be required to notify the Director when they become aware of, or are informed about, information relevant to a national security risk.

Effectiveness – how effective is the option in addressing the problem identified?

- a) Is the option effective in mitigating national security risks from individual operators as well as on a systemic basis?
- b) Does the option provide the flexibility to mitigate a range of foreseeable and unforeseeable national security risks?

87. This option does not satisfy the effectiveness criterion because participants in the civil aviation system are unlikely to possess the knowledge or expertise to be able to fulfil this requirement. Further, such an onus would rely on operators being aware of the activities of other operators, as those who have an intention to engage in activities that are detrimental to New Zealand's national security are unlikely to inform the Director of this fact.

Consistency – how consistent is the option with established frameworks?

- a) Is the option consistent with the regime established by the OSHAA Act?
- b) Is the option consistent with the independence and established expertise of the Director and the Authority?

88. This option is consistent with the OSHAA Act because national security would become a mandatory consideration for all civil aviation. This option is also consistent with the OSHAA Act in respect to recognition of the jurisdiction of the Inspector-General.

89. Option 6 does not satisfy the consistency criterion in regards to maintaining the independence and expertise of the Authority and the Director as it would require an expansion of the Authority's and Director's function to incorporate national security.

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Resource impact – what is the relative resource impact of each option?

- a) Does the option minimise the relative compliance costs for operators in the civil aviation system?
- b) Does the option minimise the relative implementation and operational costs for government?

90. The relative resource impact on government and the sector would be similar to that imposed by Option 2, depending on how the onus was placed on the sector. Any undue onus could encourage excessive caution and the over-reporting of information. Conversely, if operators perceived that no consequences would attach to non-compliance, notification-related activity could be minimal.

Proportionality – how proportionate is the proposed regulatory intervention?

- a) Are any limits on rights and freedoms as a result of the option reasonable and demonstrably justified in a free and democratic society?

91. This option does not satisfy the proportionality criterion because national security would become a mandatory consideration for all civil aviation documents. This is unlikely to be a proportionate application of national security provisions.

Impacts

Government

92. In order to enact a civil aviation rule under Option 4, appropriate analysis will need to be undertaken to establish the scope and design of the rule.
93. If a rule is made under Option 4, the Intelligence Community will need to make assessments, and provide advice, on whether an operation has national security risks. Close collaboration between the Ministry, the Authority and the Intelligence Community, will be required.
94. If the Minister elects to issue a notice under Option 3, the Minister will need to be provided with appropriate advice and support from the Ministry, DPMC, the Intelligence Community and the Authority.

Aviation participants

95. The majority of operators/operations will not be impacted by the preferred options. An operation or operator will only be affected where the Intelligence Community has provided advice to the Minister that the operator/operation represents a national security risk and the Minister issues a notice.

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

96. [Redacted]

97. [Redacted]

98. The impact will depend on the specific situation. It may mean that conditions are imposed on an operator/operation or, if the risk is considered unmanageable, an operator/operation will be prohibited from operating in the civil aviation system.

99. Consistent with the OSHAA Act, information provided by the Intelligence Community to the Minister will be subject to the review of the Inspector-General of Intelligence and Security.

Consultation

100. The Ministry has discussed this issue with DPMC, the Ministry for Business, Innovation and Employment and the Intelligence Community and they agree with the proposed approach – i.e. a combination of Option 3 and 4.

101. Consultation with the wider public and the aviation sector will take place through public consultation on an exposure draft of the Civil Aviation Bill and the Select Committee process.

Conclusions and recommendation

102. The current civil aviation safety and security regulatory regime does not enable the effective management of potential national security risks within the civil aviation system.

103. The Ministry recommends a complementary approach of implementing both Option 3 and Option 4 to address this policy problem.

Effectiveness

104. Option 4 would be effective in responding to potential systemic national security risks by scrutinising an area of civil aviation through national security risk assessments.

105. However, in the event that a national security risk is identified through a national security assessment, Option 4 by itself (i.e. not complemented by the powers proposed under Option 3) offers no subsequent tool to mitigate that identified national security risk.

106. Option 3 provides such a tool by empowering the Minister to respond immediately to an identified national security risk and control an operator’s activity within the civil aviation system on national security grounds.

Consistency with existing frameworks and proportionality

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107. Option 3 and 4 are partially inconsistent with the OSHAA Act because national security considerations will only apply when the Minister's powers are utilised or only to specific areas of civil aviation identified by a rule made under Option 4. This is in contrast to the OSHAA Act where national security considerations apply to all activities regulated under that regime.
108. Option 3 and 4 are consistent with the OSHAA Act in respect to recognition of the jurisdiction of the Inspector-General.
109. Option 4 maintains the independence and expertise of the Authority and the Director because the civil aviation rule would only require the Authority and the Director to refer certain types of application to the Intelligence Community. The Director would not be required to evaluate evidence relating to national security risks. The national security assessment would be carried out by the Intelligence Community with a final decision as to an appropriate response made by the Minister.
110. While the Director would be required to comply with any decision made under the powers afforded to the Minister under Option 3, the Minister is making such a determination in an area that the Authority and the Director have no responsibility nor expertise.

Resource impact

111. The discretionary nature of the powers afforded to the Minister under Option 3 means the resource impact on the government should be minimal. However, coordination will still be required between the Authority and the Intelligence Community.
112. If a rule is created under Option 4 that requires national security assessments for areas of civil aviation operation, this could have a relatively high resource impact on the government and the sector. However, the Ministry expects any such rule to apply to niche and technical areas of civil aviation. Similarly, the Ministry anticipates that invoking the Minister's powers under Option 3 would be the exception and likely a last resort given the public profile it creates.

Proportionality

113. Options 3 and 4 both satisfy the proportionality criterion because the Minister's powers under Option 3, and the power to create a rule under Option 4, will only be invoked where intelligence exists indicating a potential national security risk justifying the particular action. The potential for misuse of these powers is mitigated by the ability of the Inspector-General to review any information provided by the Intelligence Community that informs either decision.
114. It was noted above that both Option 3 and 4 were inconsistent with the OSHAA Act because each option will limit the application of national security considerations. This partial inconsistency is necessary to ensure the proposal meets the proportionality criteria, having regard to the difference and scale of the activities between the two regimes. In other words, the assessment prefers proportionality over consistency.

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Recommendation

115. In order to ensure the civil aviation regulatory regime can respond effectively to a potential national security risks in the civil aviation system, this RIS recommends a combination of Option 3 and 4 as the preferred approach.
- 115.1. **Option 3 (Preferred option Part A):** empower the relevant Minister, on the basis of national security concerns, to issue a notice:
- preventing entry of an operator/operation into the civil aviation system;
 - removing any operator/operation from the civil aviation system; and/or
 - requiring the Director to impose conditions on the aviation document of any operator/operation in the civil aviation system.
- 115.2. **Option 4 (Preferred option Part B):** empower the relevant Minister to make civil aviation rules prescribing when an application for the issue or renewal of an aviation document is subject to a national security assessment.
116. The preferred options will provide an effective and consistent regulatory solution to this problem that minimises as far as reasonably possible the potential implementation and compliance costs for the sector and government. These options also only impose reasonable limitations on the rights of individuals which can be demonstrably justified in a free and democratic society.

Implementation

117. The legislative changes proposed in this RIS (subject to Cabinet approval) will be progressed as part of the Civil Aviation Bill.
118. Officials from the Ministry, the Authority, the Ministry for Business, Innovation and Employment, the Department of the Prime Minister and Cabinet and the Intelligence Community, will continue to engage to resolve any outstanding policy issues, and issues of legislative design.

Monitoring, evaluation and review

119. There will be a review of the OSHAA Act three years after its enactment. This will provide an opportunity to evaluate harmonisation between the OSHAA Act and the civil aviation regulatory regime.