

EXPLANATORY STATEMENT

Issued by authority of the Secretary of the Department of Home Affairs

Aviation Transport Security Act 2004

Aviation Transport Security (Screening Officer Requirements) Determination 2021

The *Aviation Transport Security Act 2004* (the Aviation Act) establishes a regulatory framework to safeguard against unlawful interference with aviation. To achieve this purpose, the Aviation Act establishes minimum security requirements for civil aviation in Australia by imposing obligations on persons engaged in civil aviation related activities.

Consistent with this purpose, the *Aviation Transport Security (Screening Officer Requirements) Determination 2021* (the Determination) determines training, qualification, use of identity card and uniform requirements for specified screening officers.

Legislative authority

The Determination is made under section 94A of the Aviation Act. Paragraph 94A(a) of the Aviation Act provides that the Secretary of the Department of Home Affairs (the Secretary) may determine, by a legislative instrument, the training and qualification requirements, and any other requirements, for specified screening officers. Paragraph 94A(b) of the Aviation Act provides that the Secretary may, by legislative instrument, determine for specified screening officers the requirements in relation to use of identity cards or requirements in relation to uniforms.

Purpose

The *Transport Security Amendment (Testing and Training) Act 2020* (the Testing and Training Act), at Schedule 2:

- repealed the regulation making provision that provided for screening officer requirements to be prescribed in the *Aviation Transport Security Regulations 2005* (the Aviation Regulations); and
- amended the Aviation Act to provide that the Secretary may by legislative instrument determine certain requirements for specified screening officers.

The Determination was made as a result of the amendments made by the Testing and Training Act.

The purpose of the Determination is to determine certain requirements for specified screening officers, thereby standardising the competency levels of specified screening officers. The effect of the Determination is that specified screening officers are required to have completed relevant training and to hold relevant qualifications, and meet other requirements, prior to exercising powers or performing screening functions.

The training, qualification and other requirements of screening officers in the Determination establishes a national standard of competency for specified screening officers, which will strengthen the performance of security screening activities undertaken at Australian security controlled airports and help ensure all screeners in Australia are equipped to respond to current and emerging threats.

The Determination determines requirements for two classes of screening officers: new screening officers and existing screening officers. The purpose of this is to enable the current screening workforce (existing screening officers) to continue in their role as a screening officer by meeting requirements which more closely align with the requirements for screening officers prior to the commencement of this Determination than the requirements determined for new screening officers.

Broadly, the following has been determined in relation to requirements for specified screening officers:

- a new screening officer is required to hold a Certificate II in Transport Security Protection or a qualification the Secretary is satisfied will enable the holder to carry out the duties of a screening officer; cannot make independent screening decisions until a supervisor has assessed them as competent as a screening officer; must display a valid Aviation Security Identification Card (ASIC) while on duty; and wear a distinctive and recognisable uniform.
- an existing screening officer is required to hold a Certificate II in Transport Security Protection, or Certificate II in Security Operations or a qualification the Secretary is satisfied is equivalent; cannot make independent screening decisions unless a supervisor has assessed them as competent as a screening officer; must display a valid ASIC while on duty; and wear a distinctive and recognisable uniform.

The Department of Home Affairs (the Department) consulted with transport industry stakeholders on the development and implementation of the Testing and Training Act and the Determination. An exposure draft of the Determination was provided to targeted industry stakeholders for their review and comment. Following the exposure draft minor amendments were made to the determination in response to industry feedback. Transport industry stakeholders were supportive of the Determination being made with the amendments made following the consultation period.

The Office of Best Practice Regulation (OBPR) was consulted prior to making the Regulations. OBPR noted that the Determination was unlikely to have more than a minor regulatory impact and that a Regulation Impact Statement for this Determination was not required (OBPR: 22344).

A Statement of Compatibility with Human Rights in accordance with the *Human Rights (Parliamentary Scrutiny) Act 2011* is included at Attachment A. The overall assessment is that the Determination is compatible with human rights.

Details of the Determination are set out in Attachment B.

The Determination is a legislative instrument for the purposes of the *Legislation Act 2003*.

The whole of the Determination commences immediately after the commencement of Schedule 2 to the Testing and Training Act.

Statement of Compatibility with Human Rights

Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011

Aviation Transport Security (Screening Officer Requirements) Determination 2021

This Disallowable Legislative Instrument is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview of the Disallowable Legislative Instrument

The *Aviation Transport Security Act 2004* (the Act) establishes a regulatory framework to safeguard against unlawful interference with aviation. To achieve this purpose, the Act establishes minimum security requirements for civil aviation in Australia by imposing obligations on persons engaged in civil aviation related activities.

Consistent with this purpose, the *Aviation Transport Security (Screening Officer Requirements) Determination 2021* (the Determination) determines training, qualification, use of identity card and uniform requirements for specified screening officers.

The Determination relates to Schedule 2 to the *Transport Security Amendment (Testing and Training) Act 2020* (the Testing and Training Act). The Testing and Training Act at Schedule 2:

- repealed the regulation making provision that provided for screening officer requirements to be prescribed in the *Aviation Transport Security Regulations 2005* (the Regulations); and
- amended the Act to provide that the Secretary may, by legislative instrument, determine certain requirements for specified screening officers.

Broadly the following is determined in relation to requirements for specified screening officers:

- a new screening officer is required to hold a Certificate II in Transport Security Protection or a qualification the Secretary is satisfied will enable the holder to carry out the duties of a screening officer; cannot make independent screening decisions until a supervisor has assessed them as competent as a screening officer; must display a valid Aviation Security Identification Card (ASIC) while on duty; and wear a distinctive and recognisable uniform.
- an existing screening officer is required to hold a Certificate II in Transport Security Protection, or Certificate II in Security Operations or a qualification the Secretary is satisfied is equivalent; cannot make independent screening decisions until a supervisor has assessed them as competent as a screening

officer; must display a valid ASIC while on duty; and wear a distinctive and recognisable uniform.

Human rights implications

This Disallowable Legislative Instrument will engage the following human rights:

- the right to freedom from discrimination under Article 2(2) of the *International Covenant on Economic, Social and Cultural Rights* (ICESCR) and Article 26 of the *International Covenant on Civil and Political Rights* (ICCPR)
- the right to work under Article 6 of ICESCR

The right to work and non-discrimination

Article 6(1) of the ICESCR provides that:

The States Parties to the present Covenant recognize the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right.

Article 6 of the ICESCR is a right to the opportunity for a person to gain work of their choosing. The right to work does not equate to a guarantee to particular employment. The United Nations Committee on Economic Social and Cultural Rights has stated that this protection includes the right to not be unfairly deprived of work. Any limitations need to be reasonable, necessary and proportionate to the legitimate objective sought to be achieved.

Article 2(2) of the ICESCR provides:

The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Article 26 of the ICCPR provides:

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee, to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

In its General Comment 18, the UN Human Rights Committee stated that:

The Committee observes that not every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant.

Similarly, in its General Comment on Article 2 of the ICESCR (E/C.12/GC/20), UNCESCR has stated (at 13) that:

Differential treatment based on prohibited grounds will be viewed as discriminatory unless the justification for differentiation is reasonable and objective. This will include an assessment as to whether the aim and effects of the measures or omissions are legitimate, compatible with the nature of the Covenant rights and solely for the purpose of promoting the general welfare in a democratic society. In addition, there must be a clear and reasonable relationship of proportionality between the aim sought to be realized and the measures or omissions and their effects.

The Disallowable Legislative Instrument may limit the right to work in Article 6 of the ICESCR and the right to non-discrimination in Article 2 of the ICESCR and Article 26 of the ICCPR by imposing requirements on persons seeking employment as aviation screening officers. However this limitation is reasonable, necessary and proportionate in achieving the legitimate aim of safeguarding against interference with aviation. The Australian aviation security environment is a highly sensitive environment, the consequences of unlawful interference with aviation are significant, and it is reasonable to impose necessary qualifications on persons wishing to work in this environment. The new requirements also align Australia with international aviation security standards, and implement recommendations of the Inspector of Transport Security's *Inquiry into Aviation and Maritime Transport Security Education and Training in Australia*. To the extent that the measure limits the opportunity for an individual to gain employment of their choosing, the measure is proportionate and least rights restrictive, as the level of qualification required for employment as a screening officer is appropriately directed to the role and is an objective, nationally accredited qualification. The right to work in Article 6 of ICESCR may be engaged where a person seeking employment as an aviation screening officer is unable to obtain the relevant qualification and is therefore unable to obtain employment as a screening officer, however Article 6 does not guarantee an individual employment in a particular position and it is reasonable and necessary to impose qualification requirements to safeguard against interference with the aviation industry.

To the extent that the Disallowable Legislative Instrument limits the right to non-discrimination and the right to work, the limitations are reasonable, necessary and proportionate in achieving a legitimate objective.

Conclusion

The Disallowable Legislative Instrument is compatible with human rights because it will assist to maintain the integrity of Australia's aviation security. To the extent that the Disallowable Legislative Instrument may limit human rights, those limitations are reasonable, necessary and proportionate.

Details of the Aviation Transport Security (Screening Officer Requirements) Determination 2021

Section 1 – Name

This section provides that the title of this instrument is *Aviation Transport Security (Screening Officer Requirements) Determination 2021* (the Determination).

Section 2 – Commencement

This section provides for the commencement of the Determination. The Determination commences immediately after the commencement of Schedule 2 to the *Transport Security Amendment (Testing and Training) Act 2020*.

Section 3 – Definitions

Section 3 provides various definitions for the purpose of the Determination.

Note 1

Note 1 to section three notes that certain terms used within the Determination have already been defined in the *Aviation Transport Security Act 2004* (the Aviation Act). Those terms include:

- ***baggage*** means any article or possession of a passenger of an aircraft, or crew member of an aircraft, that is to be carried on board that aircraft (see section 9 of the Aviation Act);
- ***screening authority*** means a body corporate that is authorised or required to conduct screening by or under regulations made for the purposes of paragraph 44(2)(a) (see section 9 of the Aviation Act); and
- ***screening officer*** is a person who is authorised or required to conduct screening (see section 94 of the Aviation Act).

Note 2

This notes that certain terms used in the Determination, have already been defined in the *Aviation Transport Security Regulations 2005* (the Aviation Regulations). Those terms being:

- ***ASIC*** means an Aviation Security Identification Card (see regulation 1.03 of the Aviation Regulations);
- ***properly displaying*** is defined in reference to the wearing of an ASIC, Visitor Identification Card or a Temporary Aircrew Card. Someone is properly displaying their card only if the card is attached to their outer clothing, is above waist height, is at the front or side of their body and with the whole front of the card clearly visible.

Act

For the purposes of the Determination means the *Aviation Transport Security Act 2004*.

existing screening officer

Different requirements have been determined for those screening officers that are employed prior to the Determination commencing, and those that are employed following commencement. As such it is necessary to include definitions differentiating between those two groups of screening officers. ‘Existing screening officer’ means a person who:

- has been employed or engaged by a screening authority as a screening officer at any time in the 12 months before the Determination commences; and (paragraph (a))
- since this instrument has commenced, has not ceased engagement or employment as a screening officer for any period of at least 24 months. (paragraph (b)).

independent screening decision

This means a decision whether to allow a person, personal effects, carry-on baggage, goods or a vehicle to pass through a screening point, without prompting or guidance from a supervising officer. This definition is relevant to the training requirements determined in section 6 of the Determination.

new screening officer

This means a person who is not an existing screening officer, as defined above, and is engaged or employed by a screening authority as a screening officer after the Determination commences.

Regulations

This definition is clarifying that references to Regulations are references to the *Aviation Transport Security Regulations 2005*.

Section 4 – Application

Section 4 provides that the Determination determines requirements, under section 94A of the Aviation Act, for screening officers. Section 94A of the Aviation Act provides that the Secretary may, by legislative instrument, determine training and qualification requirements, and any other requirements, for specified screening officers. It also provides that the Secretary may determine for specified screening officers requirements in relation to the use of identity cards and requirements in relation to uniforms.

Section 5 – Qualifications

Section 5 of the Determination provides the qualification requirements for screening officers. Subsection 5(1) provides that a new screening officer must have either a Certification II in Transport Security Protection or a qualification that the Secretary is satisfied will enable them to carry out the duties of a screening officer under the Aviation Act.

Subsection 5(2) provides that an existing screening officer must hold either a Certificate II in Security Operations, a qualification that the Secretary is satisfied is equivalent to a Certificate II in Security Operations, or a Certification II in Transport Security protection.

Subsection 5(3) provides that the qualifications mentioned in section 5, for a screening officer who is an existing screening officer or a new screening officer, are required for the screening officer to carry out each power and function mentioned in Division 5 of Part 5 of the Aviation Act.

Prior to this Determination commencing the standard qualification obtained by screening officers was a Certificate II in Security Operations. The intention is that existing screening officers will be able to continue to rely on that qualification. They are not required to obtain a new qualification to continue to perform their role.

The purpose of these requirements is to provide a consistent standard of qualification for specified screening officers to meet. The effect is that if the screening officer does not meet the requirement for their cohort (either existing or new screening officer) then they are unable to perform the role of a screening officer.

The note to section 5 provides that the Secretary can, under section 94B of the Aviation Act, exempt a class of screening officers from any of the requirements. Section 94B provides that the Secretary may, in writing, exempt a class of screening officers from one or more of the requirements determined under paragraph 94A(1)(a), if the Secretary is satisfied that there are exceptional circumstances.

Section 6 – Training

Section 6 determines the training requirements for both new and existing screening officers. It provides that until a supervisor is satisfied that they are competent as a screening officer, a person who is a new screening officer or a person who is an existing screening officer must:

- be supervised by someone who is capable of making an independent screening decision; and
- must not themselves make an independent screening decision.

The purpose of this requirement is to ensure that screening officers are appropriately supervised until they are capable of making an independent screening decision. The effect is that until a supervisor is satisfied that they are capable of doing so, a screening officer will not be able to make an independent screening decision.

The note to section 6 is the same as that note to section 5. It provides that the Secretary may, under section 94B of the Aviation Act, exempt a class of screening officers from this requirement.

Section 7 – Aviation Security Identification Cards

Section 7 provides that that a screening officer must at all times properly display a valid Aviation Security Identification Card (ASIC) while on duty.

Obtaining an ASIC involves the applicant for the ASIC undergoing identity confirmation, a criminal history check and a security assessment, and if applicable a check to ensure they have the right to work in Australia.

Screening officers perform a vital role in relation to aviation security. The effect of the requirement is that screening officers are required to display a valid ASIC while on duty, demonstrating that they have undergone an appropriate background checking and obtained an ASIC prior to working as a screening officer.

The note to section 7 outlines that a screening officer must also properly display an ASIC when otherwise required by the Aviation Regulations.

Section 8 – Uniforms

Section 8 provides that a screening officer must wear a distinctive and recognisable uniform. The phrase ‘distinctive and recognisable’ is not defined in the Determination the Aviation Act or the Aviation Regulations and should be given its ordinary meaning.

The purpose of this requirement is to ensure that persons performing screening functions are in a distinct and recognisable uniform making them easily identifiable to the public. The effect of the requirement is that in order to perform the role of a screening officer, a person must wear a uniform.