



Republic of Namibia

EXPLANATORY MEMORANDUM REGARDING THE BILL ON CIVIL AVIATION June 2015

(Memorandum Prepared by the Ministry of Works and Transport- Directorate of Civil Aviation)

1. Purpose and background

- 1.1 The purpose of this memorandum is to explain the proposed Bill. These notes should be read in conjunction with the Bill.
- 1.2 The main intention of this Bill is to replace the current Civil Aviation Act of 1962 which, despite amendments in 1991 and 1998, is now very outdated. It comes from a past age and it is overdue for retirement. This Bill accordingly brings Namibia's aviation law into the 21st century and in addition to introducing modern safety measures it establishes a standalone Civil Aviation Authority for Namibia in place of the current Directorate.
- 1.3 This Bill is a revision of an earlier Bill submitted to the Cabinet Committee on Legislation in 2001, 2007 and 2013 when it was approved in principle and then forwarded to the legal drafters. Various changes were made to the draft Bill to ensure compliance with international law and other policy directives (for example, it was necessary to ensure compliance with the State-owned Enterprises Governance Act of 2006. The opportunity was taken to improve key aviation areas such as aviation security and aircraft accidents and incidents investigations.
- 1.4 The new Bill also provides the Director with a comprehensive and up to date set of powers for the regulation of the industry to improve public safety. Because the Bill makes provision for a greatly expanded range of regulatory duties and

responsibilities as well as the establishment of the NCAA it is inevitably larger and more complex than either the old 1962 Act or the 2007 Bill. At the same time it is comparable in content, size and detail with primary legislation regulating civil aviation found in other parts of the world today.

- 1.5 A significant feature is the use of a “life cycle” model for the entry of participants into the Namibian civil aviation system and their eventual exit from it. This is primarily controlled by the Director through the issue, suspension or revocation of “aviation documents”, a generic term covering licenses, certificates and approvals necessary to conduct aviation activities which must be controlled in the interests of public safety.
- 1.6 The Bill makes express provision for the delivery of Air Navigation Services by a separate unit within the NCAA. Suitable safeguards with regard to separation of reporting lines and accounts are provided for. This provision follows research on the suitability of this approach for Namibia at the present stage of Namibia’s development of aviation infrastructure. That research suggests that while there may in future years be a case for setting up a separate ANS service provider there is a strong logic in Namibia commencing at this point with the proposed model. It will be noted that in so doing Namibia will be in the company of most ICAO member states today including the United States which has achieved the best flight safety record in the world.
- 1.7 Part of the reason for greater complexity in the Bill is that aviation itself has become much more complex over the past 50 years. Safety and security needs imposed by international standards are much more demanding today. The unruly passenger provisions respond to a problem that has only emerged in recent years.
- 1.8 An underlying objective throughout the drafting of this Bill was the need to ensure that all the regulatory provisions are clear to users and legally robust – that is to say they do not have holes or gaps which might cause doubt or confusion or by which safety standards may be easily circumvented. Further, where the Director needs to take enforcement steps against an offender, the intention is for the legal tests for each offence to be clear and able to stand up to legal scrutiny in a court of law.
- 1.9 While the Bill is substantial and of a technical nature the aim has been to make it an accessible and usable “working” document. Therefore it has been structured into a number of Parts each dealing with particular areas of aviation activity to assist in locating areas of relevance and interest when the need to consulting the legislation arises.

The Parts are:

- Part I Introductory Provisions .

- Part 2 Powers and Functions of the Minister
- Part 3 Namibia Civil Aviation Authority
- Part 4 Delegation
- Part 5 Director and Staff of Authority
- Part 6 Air Navigation Services
- Part 7 Registries, Recordation of Interests and Information Services
- Part 8 Regulations
- Part 9 Fees, Charges and Levies
- Part 10 Namibia Civil Aviation System
- Part 11 Aircraft Accident and Incident Investigations
- Part 12 Aviation Security
- Part 13 General Offences
- Part 14 Safety Offences
- Part 15 Security Offences
- Part 16 Unruly Passenger Offences
- Part 17 Rights of Appeal
- Part 18 General Provisions

These Parts are discussed in more detail in paragraph 1.12 below.

- 1.10** The Bill is based on known and tested legislative models and precedents scaled for a country like Namibia which, although geographically large, has a relatively small population. As a consequence Namibia has a civil aviation administration centralized in Windhoek in contrast to one devolved into regional offices – as can be found for example in South Africa with its much larger population. In general terms the Bill addresses the guidelines set out in the SADC Model Act and adds content to make it a working document suitable for this country.
- 1.11** The Bill has been designed to be self contained and is not dependent for its functionality on completion of the current ongoing review of the 2001 Civil Aviation Regulations. In this way, while there are full empowerments for the making of new regulations as they become required the Bill has been prepared for immediate operation with the existing regulations, the NAMCARs of 2001, while the process of updating those regulations is completed.
- 1.12** A summary of the main points of content of the Parts now follows:

PART 1

INTRODUCTORY PROVISIONS

Sections 1 to 3

In this Part key terms and expressions utilized in the Bill are defined and where applicable, cross referenced with relevant legislation or sections in the Bill. The Part also has provisions covering the application of the Act. It makes it clear that it applies to all aircraft operating in or registered in Namibia (other than aircraft belonging to or used by the Namibian Defence Force). It gives general effect to the principal civil aviation treaties to which Namibia is a party including the Chicago Convention of 1944 which is the main international treaty setting out the obligation of States in the regulation of civil aviation worldwide.

PART 2

POWERS AND FUNCTIONS OF THE MINISTER

Sections 4 to 7

In this Part the Minister's functions and responsibilities are described. In essence these are directed at ensuring the achievement of an integrated, safe, secure, responsive and sustainable transport system and also the implementation of the obligations of Namibia under international civil aviation agreements on civil aviation

The functions and objectives of the Minister include:

- promoting safety and security in civil aviation
- administering the participation of Namibia in the international agreements to which Namibia is a party
- Establishing an aviation policy unit
- Ensuring aviation security services are provided at security designated aerodromes and navigation installations
- providing information and resources to the Director and to the Directorate of Air Accident Investigations to assist in the implementation of the Act and Regulations
- entering into technical or operational arrangements with civil aviation authorities of other countries
- carrying out functions imposed on the Minister by the Act and Regulations

The Minister is further charged with the duty to adopt all practicable measures to facilitate and expedite navigation by aircraft between Namibia and the territories of other States and to prevent unnecessary delays.

Finally this Part contains provisions to enable the Minister to require the removal of any building or tree or similar obstruction and make regulations restricting the use of land, airspace or water in the vicinity of airports.

PART 3

NAMIBIA CIVIL AVIATION AUTHORITY

Sections 8 to 31

The Bill provides for the establishment of the NCAA as an independent legal person. The specific objects of the Authority include:

- Promoting, controlling and regulating civil aviation safety and security
- Developing regulations required by the Act
- Monitoring and ensuring compliance with the Act and Regulations
- Issuing aviation documents
- Conducting comprehensive aviation industry surveillance
- Advising the Minister on specific matters
- Administering the new Act
- Establishing a service to be known as the Air Navigation Service (separately from other NCAA functions)

The NCAA must perform its functions in a manner consistent with the obligations of Namibia under international agreements and regional agreements including SADC protocols. It must have regard to the policy of the Government in relation to civil aviation and must comply with policy directions given by the Minister but the Minister must not give a direction that requires the NCAA to discharge its obligations in a particular way in respect of any particular person or persons:

The Bill provides for the appointment of a chief executive of the Civil Aviation Authority known as the Director of Civil Aviation and a Board of Directors responsible for the policy and control of the NCAA. The Board is constituted in accordance with the provisions of the State – owned Enterprises Governance Act of 2006.

Among other things NCAA Board members must disclose in writing any conflict of interest on any matter to both the Board and the Minister and that member may not be present during any deliberations or decisions on that matter.

A matter of critical importance in this Part is the provision of funding mechanisms for the NCAA. These include:

- money appropriated by Parliament
- fees, charges and civil penalties payable to the NCAA under the provisions of the Act and regulations
- money received as loans, or from grants or donations, or as interest on funds invested
- fees charges by the NCAA for licenses

- revenue for services provided
- fines and monetary sanctions imposed
- fuel and passenger levies
- airspace overflight and air traffic control revenue
- commercial activities including rental of NCAA premises
- any other source of funds approved by the Minister in consultation with the Minister of Finance

With all of these available funding mechanisms it is considered that the NCAA should be able to move progressively after its inception, from funding by the Government in the initial stages to partial and eventual complete self funding. As part of the establishment phase the Minister is required to transfer assets and liabilities to the NCAA relating to the performance of any task imposed on the NCAA as soon as possible after the date on which the Act comes into force.

The Director is required to produce an annual report and the Board must submit to the Minister a business and financial plan and a draft performance statement for his or her approval.

PART 4

DELEGATION

Sections 32 and 33

Delegations are essential to enable the performance of certain statutory obligations imposed by the Bill on the Minister and the Director to be undertaken by other parties. For example the Minister may delegate his or her functions and powers to the NCAA under certain conditions. In a similar way the Director may delegate any of his or her functions or powers under the Act or regulations to any employee of the NCAA on certain conditions and also to a person who is not an employee of the NCAA on certain conditions.

PART 5

DIRECTOR AND STAFF OF THE AUTHORITY

Sections 34 to 48

Part 5 of the Bill is an important one.. It sets out in detail the functions, powers, duties and responsibilities of the Director. As head of administration and management of the NCAA the Director is accountable solely and directly to the Civil Aviation Authority Board in respect of issues relating to civil aviation safety and security oversight the implementation of governance policies.

The Part also lists some of the responsibilities of the Director who:

- is responsible for the carrying out of the functions of the NCAA;
- may take any decision in the exercise by the NCAA of its powers
- performs functions and powers assigned to the Director in any performance agreement;
- must submit to the Board an annual report concerning the activities of the NCAA and a budget of estimated income and revenue
- is responsible to exercise all powers granted to and duties imposed on the Director in terms of the Bill.

Subject to directions of the Board the Director is responsible for:

- appointment, organisation and control of staff of the NCAA;
- formation and development of an efficient administration;
- establishment and maintenance of a register of inspectors, authorized officers and authorised persons;
- maintenance of discipline;
- effective deployment and utilisation of staff to achieve maximum operational results.

The Bill gives extensive powers to the Director to control the entry of participants into the Namibian civil aviation system by the grant or suspension of aviation documents (a generic term for a range of licenses, permits and certificates). This section empowers the Director to:

- grant, revoke and suspend aviation documents
- take actions appropriate in the public interest to enforce the Act and regulations
- monitor regulatory requirements relating to safety, security and other matters
- to issue an airworthiness directive where an unsafe condition exists
- undertake regular reviews of the civil aviation system and to promote improvement and development

An important provision in this section is that where the Director performs or exercises any functions relating to the grant, suspension or revocation of aviation documents he or she acts independently and without direction from the Minister or the NCAA.

When looking at this Part it is important to keep in mind that the Director's general NCAA functions as a regulator of safety are kept separate from the NCAA's management and operational control of the ANS (Air Navigation Services) unit within the NCAA. Under the following Part 6 the NCAA has an additional but separate function as a service provider of ANS services. These services, although technically provided from within the NCAA, are functionally separated from the NCAA to avoid a conflict of interest. The processes to ensure this functional separation are set out in Part 6.

The Director is further given a range of empowerments in order to regulate civil aviation in the interests of safety. This Part provides for the Director to do such things as:

- set and conduct examinations and tests
- require any person who holds an aviation document to undergo inspections or monitoring
- require an investigation where there are grounds to believe that there has been a failure to comply with the conditions of an aviation document.
- suspend an aviation document or impose conditions on it
- grant exemptions from regulations where to do so would not significantly increase any risk to safety.

Where the Director believes that the use of aircraft or aeronautical products may endanger persons or property he or she may:

- Detain the aircraft to prevent operation
- Seize a product to prevent use
- Prohibit operation or use or impose conditions
- Prohibit or impose conditions on the use of an aerodrome

There is a power to seize and detain any dangerous goods offered for carriage by air where there are grounds to believe that they may not be lawfully carried by air.

Finally there are rights of access to any person authorized by the Director to:

- Any aircraft, building or place
- Any relevant document or record
- Any other place, document or thing as may be specified in regulations.

PART 6

AIR NAVIGATION SERVICES

Section 49

This short Part provides for the establishment, within the NCAA, of a unit to be known as the Air Navigation Services unit. It is common practice in many ICAO member states to place the operation of a service provider within the Authority. In fact the majority still do this including highly competent and respected regulators such as the United States and Singapore.

There is a potential problem in any such arrangement in that a CAA is fundamentally a regulator of aviation services and therefore will have to regulate its own ANS unit impartially and free of compromise resulting from a conflict of interest.

This can be achieved by putting in place procedures to ensure that the NCAA performs its functions separately from its other functions. To that end Part 6 requires the setting up of separate bank accounts, establishing lines of management and operational authority and accountability mechanisms, amongst other things, to achieve what is known as “functional separation” – ie. they are effectively separate in practice.

It may happen that in the future the government of Namibia may determine to move to another step of having what is known as “structural separation” by the setting up of a standalone ANS organisation (as also happens in some ICAO member states) but at this point Cabinet has made it clear it does not want this to happen at this point.

PART 7

REGISTRIES, RECORDATION OF INTERESTS AND INFORMATION SERVICES

Sections 50 to 53

This short Part provides for a register of aircraft to be called the Namibia Register of Aircraft and prescribed particulars of every aircraft registered in Namibia must be entered. The Register of Aircraft is part of a wider Civil Aviation Registry which records a number of documents including aviation documents that have been issued. A new provision gives effect to the ability to record interests such as mortgages in aircraft as increasingly required by the industry including the overseas lessors of aircraft to Air Namibia.

The NCAA is charged with ensuring that an information service collects and disseminates aeronautical information and instructions relating to the safety, security, regularity and efficiency of air navigation. Such information and instructions must be available to any person on payment of a reasonable charge.

PART 8

REGULATIONS

Sections 54 to 61

This Part of the Bill provides for the making of general regulations (long term regulations for everyday use) and “emergency” regulations (short term regulations to cover an emergency and which must be able to be made very quickly). The Minister, on advice from the NCAA may make regulations to cover a complete range of specific requirements such as licensing of pilots, maintenance of aircraft, licensing of aerodromes regulation of

airspace and essentially all of the matters upon which the NCAA is charged to regulate in the interests of public safety.

PART9

FEES,CHARGES AND LEVIES

Sections 62 to 65

Part 8 contains specific provision to empower the NCAA to make fees and charges regulations, specifically for the purposes of:

- Fixing fees, charges and levies payable under this Act:
- Prescribing which fees or charges are to be payable under this Act, the amount of the fees or charges, and the persons liable to pay them:
- providing for refund or waiver of any fee or charge payable under this section in whole or in part, in specified cases:
- for other purposes necessary to give full effect to the provisions of this Act and its administration.

The objectives of such regulations are:

- to provide funds for the establishment, maintenance, and operation of works, facilities, and services under the Act:
- to defray the costs and expenses incurred by the Ministry or the Civil Aviation Authority or any of their employees in the exercise of functions, powers, and duties, and in providing services, under this Act:
- generally for the purposes of civil aviation.

There is also provision for allowing the rebate of fees and for the enforcement of payment of fees and charges where an organisation or person defaults in payment.

PART 10

NAMIBIA CIVIL AVIATION SYSTEM

Sections 66 to 71

The Namibia “civil aviation system” is a term to describe the system in Namibia under which civil aircraft are operated and regulated. Part 10 sets out a number of very important requirements imposed on any person or organisation which wishes to operate within the system.

All participants in the system must hold “aviation documents” which is a generic term for

licences, permits, certificates, or other documents issued in respect of any person, aircraft, aerodrome, aeronautical procedure, aeronautical product, or aviation related service.

Section 67 provides that regulations made under the Act may require aviation documents to be held for a wide range of aviation products and activities including (by way of a few examples):

- Namibian registered aircraft:
- Pilots
- Air navigation service personnel
- Aviation security services
- Aerodrome operators
- Maintenance personnel

and many other listed persons and activities covering the whole range of civil aviation activities.

The sections within this Part provide that every application for the grant or renewal of an aviation document shall be made to the Director.

It is a condition of every aviation document that the holder or other person exercising the privileges under the document will continue to satisfy the “fit and proper person test”. This is a key new provision widely used in other countries for the regulation of transport. It means that the Director must determine whether an applicant for an aviation document is a fit and proper person to hold it and exercise its privileges.

Within this Part is the requirement that every owner of an aircraft which flies to, from, within, or over Namibian territory must register that aircraft and hold a valid certificate of registration for that aircraft from;

- the Director or
- the appropriate aeronautical authorities of a contracting State of ICAO; or
- the appropriate aeronautical authorities of another State that is party to an agreement with the Government of Namibia which provides for the acceptance of each other's registrations.

Finally there is a section which establishes the primary responsibilities of the pilot in command for the safe operation of an aircraft in flight. Associated with that responsibility is a provision that in the circumstances of an emergency in flight a pilot may lawfully breach the provisions of the Act and regulations provided that the circumstances are notified in writing to the Director as soon as practicable after the emergency.

PART II

AIRCRAFT ACCIDENT AND INCIDENT INVESTIGATION

Sections 72 to 116

This Part is a comprehensive one. It provides a new format for the investigation of aircraft incidents and accidents largely similar to recent legislation on the same topic in South Africa and replaces the old Namibian regulations in use today.

A new Directorate

It provides for the establishment of a body within the Ministry (the Directorate of Aircraft Accident and Incident Investigations) to undertake functions of:

- * performing investigations of aircraft accidents and aircraft incidents.
- * reducing the risk of aviation accidents and incidents
- * advising the Director on any matter relating to the reduction of risk of aviation accidents or incidents.

The Minister may designate a Director of Investigations to perform the functions provided for in this Act and in regulations who may in turn designate persons as investigators to investigate accidents and incidents and who will be answerable and report directly to the Ministry.

The objects of the Directorate of Aircraft Accident and Incident Investigations.

are to, amongst other things,

- * conduct independent investigations, including, when necessary, public inquiries, into selected aircraft accidents and aircraft incidents in order to make findings as to their causes and contributing factors;
- * identify safety deficiencies as evidenced by aircraft accidents and aircraft incidents;
- * make recommendations designed to eliminate or reduce any such safety deficiencies;

Investigations objective

The sole objective of investigations conducted by the Directorate of Aircraft Accident and Incident Investigations is accident prevention and not to assign fault or determine civil or criminal liability. The Directorate must however fully report on the causes and contributing factors even where fault or liability might be inferred from the Directorate's findings.

The new Directorate has pre-eminence in conducting investigations over other bodies. Where government entities other than the Directorate of Aircraft Accident and Incident Investigations make their own investigations into an accident or incident the Directorate and any other investigating entity must take all reasonable measures to ensure that their activities are coordinated.

Other provisions deal with conflicts of interest that may arise and the required confidentiality of the employees of the Directorate of Aircraft Accident and Incident Investigations.

Policies

The provisions in this Part require the Directorate of Aircraft Accident and Incident Investigations to establish policies with regard to the classes of aircraft accidents and aircraft incidents to be investigated and other matters and to make such policies available to the public.

Public Enquiry

The Director of Investigations may conduct a public inquiry into an aircraft accident or incident and report to the Directorate of Aircraft Accident and Incident Investigations.

Notification

The pilot-in-command of any aircraft that is involved in an accident must notify the accident to the Director, the Directorate of Aircraft Accident and Incident Investigations and the Namibian Police Force as soon as practicable. Further, rules may require operators and service to notify the incident to the Director and the Directorate of Aircraft Accident and Incident Investigations as soon as practicable.

The Director of Civil Aviation and the Directorate of Aircraft Accident and Incident Investigations must notify the Minister of every notification received relating to an accident involving aircraft; or a serious incident.

There are provisions for persons to attend as observers at an investigation of an aircraft accident or aircraft incident conducted by the Directorate.

Reports

Before making public a report on investigation the Directorate must send a copy of the draft report on its findings and any safety deficiencies that it has identified to each department and any other person who, has a direct interest in the findings and give a

reasonable opportunity to make representations to the Directorate before the final report is prepared.

The Part also defines how representations (regarding accidents or incidents) to the Directorate should be received and recorded and the extent to which they are privileged. The Directorate of Aircraft Accident and Incident Investigations may make use of or act upon representations to the extent that it considers such use or action necessary in the interests of aviation safety.

Recordings

An “on-board recording” usually means a recording of voice communications originating from, or received on or in the flight deck of an aircraft. Every on-board recording is privileged and with a few exceptions no person may communicate an on-board recording or be required to produce an on-board recording or give evidence relating to it in any legal, disciplinary or other proceedings. However any on-board recording that relates to an aircraft accident or incident being investigated must be released to an investigator.

Another section deals with the obligations of courts or inquests or public enquiries in requesting the production and discovery of an on-board recording.

There is a prohibition against use of an on-board recording against:

- * air crew members;
- * airport vehicle operators;
- * flight service station specialists;
- * persons who relay messages respecting air traffic control, or related matters.

The Part provides that a “communication record” (communications in respect of air traffic control or related matters) must not be used against specified persons in any legal or disciplinary proceedings.

It is also provided that, with certain exceptions, “statements” are privileged and that the identity of the author is also privileged.

Evidence

This Part also contains requirements for admissibility of reports in evidence.

The appointed staff of the Directorate of Aircraft Accident and Incident Investigations or its accredited representatives, experts and advisers are not personally liable by virtue of any report, finding made or expressed in good faith or made known under the Act.

The Bill aims to preserve the integrity of aircraft and evidence following an accident or incident by providing that no person may without lawful authority remove, conceal or

withhold, or attempt to remove, conceal or withhold any part of an aircraft involved in an accident or incident, or any property on board an aircraft at the time of an accident or incident. Further, the owners or occupiers of land may not prevent any person from passing over that land in order to render assistance to a wrecked or damaged aircraft or it is occupants or to save lives where there is no public access equally convenient and provided damage is minimized. Where there is resultant direct injury or loss the owner or occupier will be entitled to compensation.

PART 12

AVIATION SECURITY

Sections 117 to 165

This Part, another comprehensive and very important one. It has been brought into line with ICAO directives and thus makes the principle features of the regulation of aviation security part of the primary legislation.

Role of the NCAA

The Bill makes it clear at the outset of this Part that the NCAA is responsible for development of national civil aviation security policies of the State and then sets out the responsibilities of the NCAA with regard to aviation security which include:

- the compilation, revision and development of the National Civil Aviation Security Program (NCASP) in compliance with Annex 17 to the Convention;
- the constant analysis of the level of threat to civil aviation based on information that it acquires either through its own resources or from specific government agencies charged with the safeguarding of public safety and security in Namibia and to initiate such action by airlines, airports, providers of security services and other organisations contributing to the national aviation security program as are sufficient to effectively counter the perceived level of threat;
- the collection of information on any threat or incident and information on the numbers and types of prohibited articles discovered or confiscated;
- the development and implementation of policy in respect of training materials that can be used in the training of persons concerned with the implementation of the NCASP;
- the coordination of security measures and procedures with appropriate

organisations, agencies and departments;

amongst others.

National Aviation Security Committee

The Bill requires the Minister to institute a National Aviation Security Committee composed of;

- the Director who is also be the chairperson of the Committee.
- One person designated by the Minister ;
- three staff members of the Authority designated by the Director one of whom is an employee of the Air Navigation Services;
- staff member of the Ministry designated by the Permanent Secretary;
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- a staff member of the Namibia Airports Company.
- a member of the Namibian Defence Force designated by the Chief of the Defence Force;
- a staff member of the Namibia Central Intelligence Service designated by the Head of the Service;
- a staff member of the Namibia Central Intelligence Service designated by the Head of the Service;
- a member of the Namibian Police Force designated by the Inspector – General of the Namibian Police Force,
- a staff member of the immigration division of the Ministry responsible for immigration designated by the Chief of Immigration;
- a staff member of the customs division of the Ministry responsible for customs designated by the Commissioner for Customs and Excise,; and any other person designated by the Director on the basis of relevant expertise from time to time.

Members of the National Aviation Security Committee must have a top secret security clearance.

Objects of National Aviation Security Committee

The objects of the National Aviation Security Committee are to:

- advise the Minister with regard to aviation security policy;
- review and make recommendations of the effectiveness of security measures and procedures; and
- provide for coordination to ensure the proper and diligent implementation of the National Aviation Security Program.
- Promote security in the design or modification of airports, air navigation installations and other aviation facilities.

Meetings of National Aviation Security Committee

The Committee must meet as often as directed by the Chairperson and whenever the Minister so requires..

Security program information confidential

All information concerning any program, personnel, equipment, system, agreement or special procedure regarding any matter concerning any security plan shall be confidential and shall not be made known except officially by a person empowered to do so to a person empowered to receive such information.

Aviation security program submitted to Minister for approval

The aviation security program must be submitted to the Minister for approval.

Responsibilities of Minister

The Minister must ensure that aviation security services are provided at all security designated aerodromes and security designated navigation installations.

It is also the responsibility of the Minister, after consulting with the NCAA and with the concurrence of the person in charge of a security designated aerodrome, to approve the appointment of the senior personnel of the aviation security provider.

Aviation participants required to have national aviation security program

The following aviation participants must have a national aviation security program—

- (a) the operator of a security designated aerodrome;
- (b) the Air Traffic Control division of the Civil Aviation Authority
- (c) any air carrier; and
- (d) any other aviation participant designated by the Minister from time to time in the *Gazette* or designated in the NCASP or security regulations.

Provision of aviation security at security designated aerodromes and navigation installations

The Namibian Police Force and any authorised provider of aviation security service at the aerodrome or installation are tasked to prevent the commission of any offence committed in contravention of this Act at any designated or security designated aerodrome or security designated navigation installation; and protect persons and properties from dangers arising

from the commission or attempted commission of offences. Authorised aviation security service providers

Aviation security services at any security designated aerodrome or security designated navigation installations are to be provided by the operator of the aerodrome or navigation installation. They and the persons employed by them to provide aviation security services, must hold a current aviation document issued by the Director – that is to say they must be certificated by the NCAA under the Act and they must then comply with the relevant prescribed requirements and standards.

Powers, functions and duties of aviation security services

Aviation security service providers must carry out crew, passenger, and baggage screening of all international aircraft passenger services; and associated reasonable searches, or seizures. Additionally they may be required to:

- undertake searches of crew, passengers, baggage, cargo, aircraft, aerodromes and navigation installations;
- carry out aerodrome security patrols and patrols of navigation installations;
- keep informed on security techniques, and systems related to the protection of civil aviation and persons employed in or using it;
- prepare for every security designated aerodrome, with the concurrence and approval of the Director and the Inspector-General of Police, an airport security program for the purpose of protecting the safety, regularity and efficiency of the aerodrome and the safety of persons using the aerodrome.
- co-operate with the Namibian Police Force, government departments, airport authorities, operators, and authorities administering the airport security services of other countries, and with any appropriate international organisation.

Security designated aerodromes and navigation installations

The Minister may designate any aerodrome or navigation installation as a security designated aerodrome or security designated navigation installation.

Security restricted areas

The Director may declare an area within any security designated aerodrome or security designated navigation installation to be a security restricted area. There are detailed

provisions regarding controls on access to such areas and security actions within such areas.

Right of access

The Bill gives rights of access for aviation security officers any security designated aerodrome or navigation installation, or any aircraft, vehicle, building, for the purpose of carrying out their functions, and duties under the Act.

Where the Namibian Police Force has taken command of any situation at an aerodrome or navigation installation, the rights of aviation security officers to enter is subject to limitations as the senior Police officer present may impose.

Powers and duties of Director to require screening, search and seizure

Section 137 creates the offence where a person refuses or fails to withdraw or revoke an authorization made by the Director in terms of sections 134 and 135 on security checks.

Powers and duties of aviation security officer relating to dangerous goods

Section 138 makes provision for aviation security officers to deal with dangerous goods to be carried by aircraft. This includes screening, seizure and destruction..

Section 141– Consent to be screened or searched

This section provides that the powers specified in the previous section may only be exercised with respect to:

- a person to be screened or searched *with the consent* of the person;
- an item, substance, or vehicle to be screened or searched *with the consent* of the person in possession of the item, substance, or vehicle.

However an item, substance, or vehicle may be screened or searched without consent if it is unattended.

Section 142 – Persons who refuse to consent to be screened or searched

This section covers situations where persons refuse to be screened or searched. There is a range of options given to an aviation security officer who may, amongst other things,

- deny that person entry into the security restricted area;
- require that person to leave the security restricted area;

- remove any item, substance, or vehicle in that person's possession from the security restricted area.

Section 143 – Searches of persons refusing consent to be searched

In certain circumstances the Police may search any person without their consent.

Section 144 – Searches of persons

This section sets out in detail the actual procedures and limitations on conducting searches of a person.

Section 145 Protection of aviation security officers

This section gives statutory protection to aviation security officers against personal liability if in good faith they exercise their powers in the performance of duties under this Act.

Section 146 - Powers of arrest and seizure of items or substances

The Bill sets out specific provisions for the arrest of persons where a serious offence is suspected.

Section 147 - Arrest of persons delivered to Police

This section deals with cooperative actions between the aviation security provider and the Police including the delivery of a person by an aviation security officer to the Police where he or she has reasonable grounds to suspect a specified serious offence against the Act.

Section 148 - Powers of Police

This section provides that every Police officer has and may exercise the powers conferred on an aviation security officer under the Act or regulations made under the Act.

Section 149 - Search of passengers and baggage

This section deals with the search of passengers and their baggage by aviation security officers.

Section 150 - Proportional screening and search of other persons and things

The Bill enables the Namibian security provider to introduce random but proportional screening in certain specified cases.

Section 151 - Search of persons declining to allow screening or search

The Bill deals further here with situations where persons refuse to be searched.

Section 152 – Screening, search and seizure of checked baggage, cargo and mail

This section deals with screening and search of checked baggage, cargo and mail.

Evidence of offences

Section 153 places limitations on the admissibility of evidence found in the course of screening, search or examination.

Section 154 – Powers of pilot in command

The Bill here sets out the extensive powers of the commander of a civil aircraft most of which derive from international treaties to which Namibia is a party. These include the power to search any person or baggage on board the aircraft, and to take possession of any article found which has been used or could be used to effect or facilitate the commission of a crime against the Act.

Sections 157 to 165 – In-flight security officers

A significant new feature of the Bill is contained in this Part being provision for the potential for the government to authorise use by airlines of in flight security officers. It is emphasized that this is a legal provision intended only to future proof the Bill – it is not expected that the Government of Namibia would wish to introduce such a security practice (which involves the carriage of firearms by security officers in an aircraft cabin) in the immediate future. However it is conceivable that at some time, in response to a terrorist event in say Europe, the European authorities would require that all aircraft, including Namibian aircraft, carry in flight security officers as a condition of entry into European airspace. This could happen at very short notice and Air Namibia would be seriously disadvantaged if it could not quickly comply. The provisions in this Bill mean that the legal empowerment is already in place if the Government were to determine that it would wish to meet such a requirement. Section 157 enables the Director to approve firearms, weapons, ammunition, and other equipment for carriage and use on board an aircraft by in-flight security officers (whose activities are dealt with in following sections of the Bill).

Section 158 – Foreign in-flight security officers

Although there are normally strict prohibitions on taking firearms and the like into aircraft and security restricted areas the Director may, in consultation with the Inspector-General of Police and other affected parties that the Director considers appropriate, authorise foreign in-flight security officers who are, accompanied by a Police officer and who are carrying firearms.

Section 159 – Inspector-General of Police may authorise members of police to be in-flight security officers

The Inspector-General of Police may authorise any Police officer to be an in-flight security officer having regard to the views of the Director who must in turn have regard to the views of representative groups in the aviation industry.

Section 160 – In-flight security officers may possess, carry, and use firearms, weapons, ammunition, and other equipment on board certain aircraft in certain circumstances

This section provides that an in-flight security officer may, on board an aircraft operated by an operator conducting commercial air transport operations in Namibia, possess, carry, and use a firearm, weapon, ammunition, or other equipment that the Director has approved under section 157 if the officer is on duty; and the aircraft is in flight

Sections 161 – In-flight security officers may take action or measures reasonably necessary to restore or preserve control of aircraft

In-flight security officer may take all measures reasonably necessary to restore control of an aircraft to the commander or to preserve the commander's control of the aircraft including the use of reasonable force; or assistance that is reasonably necessary in the circumstances.

Section 162 163 and 164 also gives certain powers of arrest, restraint and search to in-flight security officers and 165 protects a person assisting an in-flight security officer under sections 162, 163 or 164 where the person acts in good faith; and the force is reasonable.

PART 13

GENERAL OFFENCES

Sections 166 to 179

This Part sets out general offences against civil aviation which are not otherwise specified Parts 14, 15 and 16 following. These offences are standard regulatory offences and for the most part the purpose and content of them will be evident from the title. They are:

Section 166 – Applying for aviation document while disqualified

Section 167 – Communicating false information or failing to disclose information relevant to granting or holding of aviation document

Section 168 – Obstruction of persons duly authorised by Director**Section 169 – Failure or refusal to produce or surrender documents****Section 170 – Trespass**

This section makes it an offence leading to a fine or imprisonment to enter or remain within any aerodrome or any building or area in which are operated technical facilities or services for civil aviation, when directed not to enter or not to remain by a person duly authorised by the Director in writing for that purpose, a Police officer, or an aviation security officer, or by notice posted by one of those persons.

Section 171 – Failure to maintain accurate records

This section makes it an offence leading to a fine to contravene any provision of the Act or any regulation made under this Act that requires that person;

- to make accurate entries in a record; or
- to maintain an accurate record; or
- to produce to the Minister or the Director an accurate record.

Section 172 – Failure to notify emergency breach of Act or regulations**Section 173 – Failure to notify accident or incident****Section 174 – Offences relating to disclosure of protected information****Section 175 – Offences relating to production and discovery of on board recordings and statements —****Section 176 – Failure to provide identifying information**

This section makes it an offence leading to a fine for an operator of an aircraft or holder of a certificate of registration to fail to comply with section 246 (which relates to the identification of the pilot in command of an aircraft).

Section 177 – Contravention of emergency regulation, prohibition, or condition**Section 178 – Flight over foreign country without authority or for improper purpose****179. – Offences against accident and incident investigation under Part 10**

PART 14

SAFETY OFFENCES

Sections 180 to 194

This Part brings together so called “safety offences” – dangerous activities or omissions in the context of civil aviation. As in the previous Part the intent and content is mostly evident from the title. They are:

Section 180 – Endangerment caused by holder of aviation document

Section 181 – Operating aircraft in a negligent manner

Section 182 – Dangerous activity involving aircraft, aeronautical product, or aviation related service

Section 183 – Failure to comply with inspection or monitoring requirement

Section 184 – Court may disqualify holder of aviation document or impose conditions on holding of document in respect of certain offences

Section 185 – Acting without necessary aviation document

Section 190 – Acting without required medical certificate

Section 187 – Fraudulent, misleading, or intentionally false statements to obtain medical certificate

Section 188 – Failure to disclose information required by Director

Section 189 – Additional penalty for offences involving commercial gain

This section provides that in addition to any penalty the Court may impose under section 180 or section 182, or section 183 or section 185 of the Act, the Court may, on convicting any person of an offence specified in any of those sections, order that person to pay an amount not exceeding 3 times the value of any commercial gain (as assessed by the Court) resulting from the commission of that offence if the Court is satisfied that the offence was committed in the course of producing a commercial gain.

Section 190 – Effect of disqualification

Section 191 – Commencement of period of disqualification

Section 192 – Retention and custody of document

Where the Court disqualifies the holder of an aviation document from holding or obtaining a document, the holder must forthwith surrender the document to the Director .

Section 193 – Removal of disqualification

Section 194 – Particulars of disqualification orders, etc., to be sent to Director

PART 15

SECURITY OFFENCES

Sections 195 to 210

This Part brings together a number of offences against aviation security. As in the previous two Parts the intent and content is mostly evident from the title. They are:

Section 195 – Application

This opening contains some specific definitions of “airport” ,“at an airport” and “in an airport” .

Section 196 – Offences relating to the safety and security of airports

Section 197 – Offence against section 196 deemed to be included in extradition treaties

Section 198 – Acts contrary to public safety and order at an airport

Section 199 – Security area offences

Section 200 – Offence of impersonation or obstruction of authorized persons

Section 201 – Communicating false information affecting safety

Section 202 – Illegal practices in connection with cargo, baggage, mail or other goods

Section 203 – Prohibition of conveyance of firearms, drugs or animal products in aircraft

Section 204 – Taking firearms, explosives, etc., on to aircraft or into a security area

Section 205 Hijacking

Section 206 – Offences in connection with hijacking

Section 207 – Other offences relating to aircraft

Section 208 – Offences deemed to be included in extradition treaties

The intent of this section is to make the offence of hijacking and related offences those in respect of which hijackers can be extradited to face trial in Namibia under this country's extradition laws.

Section 209 – Application of sections 205 and 206

The intent of this section is to limit the application of the "hijacking" provisions to those where Namibia has a genuine connection with such offences and may wish to extradite and punish offenders.

210. Application of certain provisions relating to jurisdiction in respect of offences on aircraft beyond Namibia and relating to the Prevention and Combating of Terrorist and Proliferation Activities Act

The effect of this section is to ensure that nothing in the Act or the Prevention and Combating of Terrorist and Proliferation Activities Act or the criminal law of Namibia, which relates to hijacking, can limit the application of the provisions of the Act or the application of the criminal law of Namibia with regard to hijacking or to any of the offences described in section 207 of this Act or to any offence referred to in section 206 of this Act committed in connection with the offence of hijacking. This section also recognizes and aligns with the recent Prevention and Combating of Terrorist Activities Act No.12 of 2012.

PART 16

UNRULY PASSENGER OFFENCES

Sections 211 to 223

This Part contains all new material. The phenomenon of persons misbehaving on large passenger aircraft is a recent one but so well established now that it is essential to bring some control to the captain or crew in the interests of passenger safety. Again the intent and content is mostly evident from the title. They are:

Section 211 – Application of this Part

This Part deals with such offences and applies to any unruly passenger offence committed either on an aircraft in Namibia, regardless of the nationality of the aircraft or outside Namibia on an aircraft in flight, regardless of the nationality of the aircraft, where the next landing of the aircraft is in Namibia.

Subsection (4) makes it clear that the offences set out in this Part are deemed to be serious offences for the purposes of the Tokyo Convention. This means that certain remedies and steps against such passengers will be available under an international convention that requires a foreign state to accept and deal with offenders when an aircraft arrives in that state.

Section 212 – Liability for unruly passenger offences despite extraterritoriality

Most criminal offences of a given country are not enforceable where they are committed outside that country. In order to make unruly passenger offences effective and enforceable in Namibia this section provides that any person who commits an act or omission on an aircraft in flight outside Namibia that would be an offence against this Part if it occurred within Namibia is, subject to this Act, liable as if the act or omission had occurred in Namibia.

Section 213 – Liability for other offences despite extraterritoriality

This section continues the approach seen in the previous section to certain traditional offences which are not so called “unruly passenger” offences.

Subsection (1) provides that any person who commits an act or omission on an aircraft in flight outside Namibia that would, if it occurred in Namibia, be an offence of disorderly behaviour or fighting in a public place or common assault or willful damage or indecent exposure is liable as if the act or omission had occurred in Namibia. Further, subsection (2) makes it clear that for the purposes of any of those offences any reference to a “public place” includes an aircraft.

Section 214 – Acts endangering aircraft or persons in aircraft

This section makes it an offence punishable by fine or imprisonment for any person to act in a manner that endangers an aircraft or any person in an aircraft

Section 215 – Disruptive conduct towards crew member

Section 216 – Interference with aircraft

Section 217 – Intoxicated persons on aircraft

Section 218 – Non-compliance with commands given by pilot-in command

Section 219 – Offensive behaviour or words

Section 220 – Portable electronic devices not to be operated

Section 221 – Non-compliance with seating and seatbelt instructions

Section 222 – No smoking on board aircraft carrying passengers

Section 223 – Dangerous goods on aircraft

PART 17

RIGHTS OF APPEAL

Sections 224 to 226

The Bill inevitably provides regulatory powers that could seriously prejudice the rights of participants in the aviation industry. For example the Director has the powers to suspend or revoke all licenses and impose conditions. He or she may ground an aircraft or close an airport in the interests of safety. However in order to give fairness and a balance to these powers there are extensive rights of appeal contained in the Bill – that is to say that anyone aggrieved by an adverse decision of the Director may take up his, her or its cause outside the NCAA by way of appeal to Namibia's upper court systems or aggrieved by a lower court decision may appeal to a higher court.

The following rights of appeal are therefore included:

Section 224 - Appeals against disqualification

Subsection (1) provides that an order of a Court disqualifying any person from holding or obtaining an aviation document will be deemed to be a sentence or part of a sentence of punishment. This section provides rights of appeal against disqualification imposed by a court.

Section 225 - Appeal to High Court

This section provides, under subsection (1) that a person may appeal to the High Court against a specified decision made under the Act by the Director where another section of the Act gives that person a right of appeal under this section, and;

- the person is a person in respect of whom the decision was made; and is dissatisfied with the decision; or
- the person is the owner, operator, or person for the time being in charge of an aircraft or aeronautical product that is the subject of the decision.

Section 226 - Appeal to Supreme Court on question of law

This section provides, under subsection (1) that every party to an appeal under section 225

of this Act may, with the leave of the High Court, or (if that leave is declined) with special leave of the Supreme Court, appeal to the Supreme Court on a question of law.

PART 18

GENERAL PROVISIONS

Sections 227 to 237

It is usual in technical legislation of this type to include a Part to cover miscellaneous provisions that do not readily fit in other Parts devoted to specific subjects. It will be seen in this case that they cover some very important areas.

Section 227 - Technical standards for civil aviation

This section provides for the establishment and maintenance of detailed technical standards for civil aviation. Currently in Namibia these are known as the NAMCATS which will soon be updated and other standards and procedures in AIPs and other circulars.

Section 228 - Evidence and proof

This section sets out certain provisions relating to evidence and proof in proceedings taken by the NCAA. These typically relate to evidence contained in aviation documents (licenses and so on) or in the Namibian Register of Aircraft.

Section 229 - Evidence of air traffic services provider

This section provides that any document used in recording services in relation to the movement of any aircraft and purporting to have been initiated at the time of the movement by an employee of an air traffic services provider shall be admissible in every Court as prima facie evidence that the air traffic services described in such document were provided on the date and for the aircraft referred to in the document.

Section 230 - Obligation to identify pilot-in-command

Subsection (1) provides that where a pilot in command of an aircraft is alleged to have committed an offence under the Act or the regulations, the Director or a Police officer may require that person to give all information in that person's possession or reasonably obtainable by that person that may lead to the identification of the pilot.

Section 231 - Exemption of aircraft from seizure on patent claims

This section continues from previous legislation the protection of aircraft from patent claims.

Section 232 - Nuisance, trespass, and responsibility for damage

This is another “standard” provision in civil aviation legislation dealing with inevitable consequences of the operation of aircraft and based on treaty laws of long standing.

Section 233 - Penalties

This section makes a general provision that any person who commits an offence against this Act for which no penalty is specifically provided shall be liable on conviction to either a fine or to imprisonment or both such fine and imprisonment.

Section 234 - Act binds State

This section provides that the Act shall bind the State.

Section 235 – Repeal and amendment of laws.

This section provides that laws set out in Column 1 of Schedule 7 to the Act are repealed or amended to the extent set out in Column 3 of that Schedule.

Section 236 - Transitional

This section is intended to facilitate the transition to operation of the new Act while the existing Namibian Civil Aviation Regulations of 2001 and the Namibian Civil Aviation Technical Standards, Aviation Information Circulars and other documents made pursuant to the Aviation Act 1962 are still in force. It provides that these shall remain in force at the time of the commencement of the Act and thereafter references in any such regulations or technical standards to the “**Director**” and the “**Directorate**” shall be deemed respectively to refer to the “Director ” and the “Civil Aviation Authority.

Section 237 – Short title

Schedules 1 – 6 – Conventions and Protocols

Schedule 7 – Laws repealed and amended