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By E-mail

Attention: Mr Hlupheka Mtileni

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The Chairperson  
Select Committee on Transport, Public Service and Administration, Public Works and  
Infrastructure  
National Council of Provinces  
Parliament of South Africa.

Honourable Mr MK Mmoiemang, MP,

## **COMMENTS ON THE CIVIL AVIATION AMENDMENT BILL [B 44 - 2018].**

**(As amended by the Portfolio Committee on Transport (National Assembly))**

With reference to the call for comments dated 22 September 2021, may I herewith respectfully submit the following comments for considering by the Select Committee on Transport, Public Service and Administration, Public Works and Infrastructure.

My comments covered in this letter are additional to previous comments and relate to the current proposed amendments.

As previously I have co-ordinated my comments with Mr Herman Wildenboer, a retired Legal Officer both in the previous Department of Transport and the SACAA. We have worked together for many years, and we would like to see that the amendment submitted for your consideration results in an Act, as developed on your watch, that can serve the South African aviation industry well. The submitted comments are not to frustrate but to assist your committee to have a rational and workable Act that can be your legacy.

My comments for your consideration are as below:

### **1. BACKGROUND AND PURPOSE**

Paragraph 1.2 states “Most provisions of Chapter 4 of the Act were never promulgated due to various reasons, one of which was the practical difficulties in the establishment of the entity, the Aviation Safety Investigation Board, which is established by the Chapter 4.”

This I believe is incorrect as Article 10 already established the Aviation Safety Investigation Board (ASIB)

Article 10 of the Act as in force by Proclamation No 2 ,20102 clearly reads:

“Establishment of Aviation Safety Investigation Board

10. The Aviation Safety Investigation Board, which is a juristic person, is hereby established.”

What did happen is that the NDOT opted not to staff the Aviation Safety Investigation Board (ASIB) as the Treasury was not prepared to allocate additional funding for the staffing of the ASIB. To my knowledge the statement was that the NDOT should find the required funding by means of savings within their allocated budget.

The reference to practical difficulties is therefore misleading.

One can only hope that the NDOT will hereafter be able to find the funding required, otherwise it will be another exercise in futility.

## **2. OBJECTS OF THE BILL**

2.1 CLAUSE 1. The change of Director To that of Commissioner

Here I wish to repeat my comments.

This proposed change can at best be described as an ego boosting change without any real substance.

To be known as “Commissioner of Civil Aviation” is no different from that of for example “Commissioner of Oaths”. There is also many instances of the use of “Director or Director General” by CAAs worldwide. It does however have significant financial implication for the industry. A statement that all financial impacts will be for the Department of Transport is not correct and misleading. – Here it was noted with interest that the DOT comments in the previous hearing were that there would be no financial implications for the Dot, but they then remained silent of the financial implications for the industry. The DOT should provide an estimate of the costs to the industry.

Note as well that no transition arrangements appear to be in place to allow for the validity of a licence, certificate or approval until its due expiry date. It has to be kept in mind that all manuals currently in existence will need to be revised to change the wording from Director to Commissioner, a well as imply that any licence, certificate or approval as issued by the current Director requires re-issuance of such licence, certificate or approval with consequential financial impact on the civil aviation industry.

2.1 CLAUSE 1. The definition of an “air service”

This appears to be a new proposed definition which was not included on previous proposals.

There are serious consequences if the new definition is included. The reason why this had to be included at such a late stage is not clear.

Article 96 of the Convention defines an “air service” as

"Air service" means any scheduled air service performed by aircraft for the public transport of passengers, mail or cargo.

The deletion of the words “scheduled” and “public” as below implies that any general aviation of recreational flights where passengers are being carried will become an air service

‘**air service**’ means any service operated by means of an aircraft to transport passengers, freight or mail;’.

The other major concern is the deletion of the exclusions as included in the definition as contained in the AIR SERVICES LICENSING ACT, NO. 115 OF 1990 (ASL 115).

The definition of “air service” as now amended by the Portfolio Committee on Transport is in conflict with the definition of “air service” as contained in Article 96 of the Chicago Convention, 1944, as well as the definition of “air service” as contained in section 1 of the Air Services Licensing Act, 1990, (Act No. 115 of 1990).

This is a major conflict, and it is suggested that the original definition of the ASL 115 be retained.

## 2.1 CLAUSE 1. Creation of the ASIB

As to the creation of the ASIB, as discussed above in the background review, it might be advisable to have similar wording as to the existence of ASIB as is used in Section 77 relevant to the SACAA.

### “Establishment of Civil Aviation Authority

**71.** A juristic person [to be] known as the South African Civil Aviation Authority, established by section 2 of the South African Civil Aviation Authority Act, 1998 (Act No. 40 of 1998) [comprising of the Civil Aviation Authority Board, the Director and staff of the Civil Aviation Authority, is hereby established] shall be deemed to have been established by this Act.”.

As to proposed amendment of definitions of aerodrome and airport, there appears to be some confusion as to the difference between an aerodrome and an airport. If not correctly defined it can have significant impact and with the sequential use of the terms in other definitions.

In short, an aerodrome is a runway used for aircraft to take off and land. Many such aerodrome exist throughout South Africa. Once facilities such as terminal buildings to process passengers or cargo are added to the runway (aerodrome) it now becomes an airport.

To eliminate any confusion, it is recommended that the CA Act should be in line with the following definitions:

**Aerodrome.** A defined area on land or water (including any buildings, installations and equipment) intended to be used either wholly or in part for the arrival, departure and surface movement of aircraft. (ICAO Annex 14).

**Heliport.** An aerodrome or a defined area on a structure intended to be used wholly or in part for the arrival, departure and surface movement of helicopters. (ICAO Annex 14).

“**airport**” means a demarcated area on land or water or a building which is used or intended to be used, either wholly or in part, for the arrival or departure of aircraft and includes a building, installation or equipment within that area which is used or intended to be used in connection with the arrival, departure or movement of aircraft; (ACSA ACT)

This matter needs the attention of the relevant legal advisors to prevent confusion in the application of the new Act.

In summary, I am in agreement with the view of the legal adviser, Mr Wildenboer who stated:

### 1.1 THE DEFINITION OF “AIRPORT”.

1.1.1 The definition of “airport” appears in the principal Act. The said definition has been amended in the draft Bill and now reads basically the same as the definition of aerodrome’ which is also contained in the principal Act. The big difference lies in the fact that in the definition of

the word “airport” reference is made to the departure and arrival of “ aeroplanes “which are of a fixed- wing nature, while in the definition of “aerodrome” reference is made to “aircraft” ‘which also includes helicopters. From a perusal of the draft Bill, it is apparent that the word “aerodrome” is being used to replace the word “airport” in certain provisions which are have been amended. In light of the wide meaning of the word ‘aerodrome” it replaces the words “airport’ and “heliport” in the draft Bill.

1.1.2 However, the word ‘airport” still appears in section of the principal Act, which is are not subject to proposed amendments. It is unclear whether it is the intention to utilise the definition of the word “airport” (which relates to the arrival and departure of fixed-wing aircraft) in those sections of the principal Act). In this context the following is noted:

1.1.2.1 the words “airport” and heliport” appears in section 134 of the Act;

1.1.2.2 the words “airport”, “heliport” and ‘helistop” appear in section 139 of the Act;

1.1.2.3 the word ‘airports” appear in section 155(1)(vi) of the Act;

1.1.2.4 the words “airports” and “co-ordinated airports” appear in section 155(1)(xi) of the Act;

1.1.2.5 the words “airports” and ‘heliports” appear in section 155(1)(e) of the Act;

1.1.2.6 the words “designated airports” appear in section 155(1)(n)(x) of the Act;

1.1.2.7 the words “airport management” appear in section 155(10)(ff) of the Act;

1.1.2.8 the words” airports”,” heliport” and “helistops” appear in section 155(1) (gg)(i) of the Act;

1.1.2.9 the words “designated airport”, “airport” and “heliport” appear in section 155(1)(l) (gg) of the Act); and

1.1.2.10 the words “designated airports” and ‘heliports’ appear in section 155(2) of the Act.

#### 1.4 THE DEFINITION OF “HELIPORT”

1.4.1 As the word “heliport” is being included in the definition of “aerodrome “in the draft Bill, the said word can be deleted in the Principal

#### 2.1 CLAUSE 1. Section 1 (j) New definition of EXECUTIVE RESPONSIBLE FOR AIRCRAFT ACCIDENT AND INCIDENT INVESTIGATION’

If appointed by SACAA, a conflict of interest exists.

This type of conflict clearly came to the fore with the fatal accident involving the flight inspection aircraft of the SACAA in January 2020. This has now emphasised in the conflict between the SACAA DCA and the Executive Manager of the AIID when that Executive’s contract of employment was not renewed. It implied tit for tat action by the DCA.

Should the Executive not be appointed by the ASIB?

This indicates another conflict.

However, note has to be taken by comments of a previous legal advisor who pointed out that:

“1.5.1 This expression does not appear in the text of Chapter IV of the principal act. In Part 12 of the Civil Aviation regulations, 2011, there are a number of regulations in which the said expression appears. In this regard regulation 12 is relevant. The referred to Executive is entrusted with a number of functions, relating to inter alia designation (Subpart 1 of Part 12), notification (Subpart 2 of Part 12), the protection of accident and incident records (Subpart 3 of Part 12), reporting Regulation 12.05.3(1), and re-opening of an investigation (Regulation 12.05.3(3)). The functions and powers of the Aviation Safety investigation Board” (ASIB)” as set

out in clauses 29 and 30 of the draft Bill, basically corresponds to the functions and powers of the Executive responsible for Aircraft Accidents and Incident Investigation.

1.5.2 The only reference to an “Executive” is contained in the proposed amended section 28(1) (Clause 8) which is to the effect that investigators are to report to the ASIB “through an Executive designated for that purpose”. It would appear the appointment of accident and incident investigators is by implication being entrusted to the said Executive in terms of the relevant definition. In the Explanatory Memorandum it is stated that the appointment and management powers of investigators do not fall within the ASIB’s jurisdiction.

1.5.3 The said Executive, in view of his or her rank, would surely be entitled to provide advice, guidance and assistance to investigators during investigations. He or she would also be entitled to check and verify factors before the report is sent to the ASIB under his or her signature. I

1.5.4 It would, therefore, be necessary to indicate the powers, functions and duties of the said Executive in the Act as the words “responsible for the appointment and management of investigators are ambiguous. It should be expressly stated that the “management” function will include the designation of investigators to investigate do aircraft accidents and incidents. In clause 8 relating to section 33(1) of the draft Bill, ASIB is empowered to designate investigators-in-charge and investigators, which is not in line with the meaning of the word “management”.

1.5.5 The Executive’s role cannot be limited to non-operational issues.”

Further to 1.5.5 it should be noted that in case of major accidents the Executive may have to function as Investigator-in-Charge.

2.2 CLAUSE 2. Section 2: an aircraft belonging to the South African National Defence Force

What about Section 142 (2)

Will the Minister have to give provision for any armed SAAF or SAPS aircraft when a flight is planned for example from FABL?

This Section is still not clear.

2.8 CLAUSE 8. General comments with regard to following Sections:

Section 14 (1) (a) Reads:

“to ensure that the investigation procedures and practices are compatible with—

(a) any international agreements or Conventions to which the Republic is a party;”

With respect to the above requirements, it is necessary to review the independence of the investigation processes following the aircraft accident involving a Cessna Citation aircraft as operated by the South African civil Aviation Authority (SACAA) that occurred on 23 January 2020.

In this regard the ICAO recommendations clearly state that:

***The investigation authority should not report to the same Minister responsible for the regulation and/or safety oversight of civil aviation in the State or to a judicial authority.***

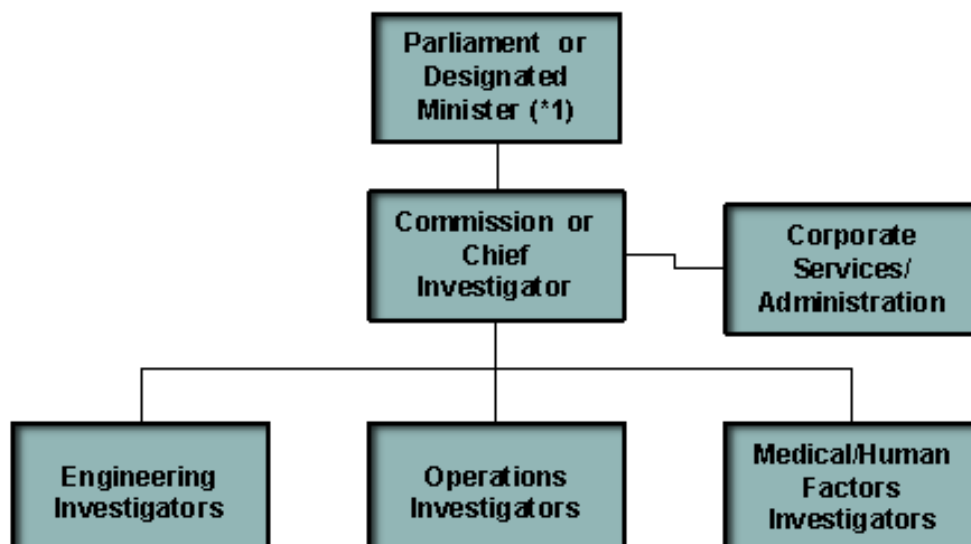
(refer to an extract from ICAO Doc 9756, Part 1, 2nd Edition)

### Extract from ICAO Doc 9756 Part 1 2nd Edition



### 2.3 LEGISLATION REGARDING THE CONDUCT OF INVESTIGATIONS

2.3.1 Appropriate legislation that defines the rights and responsibilities of the aircraft accident investigation authority is required. The accident investigation authority should, through legislation, have immediate and unrestricted access to all relevant evidence without requiring prior consent from judicial bodies or other authorities. Accident investigators should be aware that aircraft accidents may be subject not only to a technical investigation but also to some form of judicial, regulatory, labour, occupational health and safety, environmental protection, administrative and/or disciplinary inquiries. However, accident investigation procedures should not be constrained by these types of processes, and national legislation, regulations, and perhaps MOUs, should specify the procedures to be followed in order to keep the technical investigation separate from these other proceedings. The legislation shall make it clear that accident prevention is the sole objective of the investigation and shall emphasize that it is not the role of the accident investigation authority to apportion blame or liability.



## Figure I-2-2. Example of a streamlined organizational structure

### **Note**

**\*1 The investigation authority should not report to the same Minister responsible for the regulation and/or safety oversight of civil aviation in the State or to a judicial authority.**

The above is also applicable to Section 41.

### Section 15. APPOINTMENT OF MEMBERS OF ASIB

*The need for a Deputy Chairman was introduced by the portfolio committee when reviewed in 2009/2010.*

Deletion of the requirement for publication in the Gazette is in conflict with transparency.

Section 16: “other relevant expertise or qualifications”

How is this to be assessed and by whom?

Section 30 Powers of Aviation Safety Investigation Board

Section 30 (1) (d) & (i)

How are financial implications to be handled?

Section 34 Search and seizure by appointed investigators

Section 34. (1) Does this meet constitutional provisions?

Section 34. (5) Is the content of certificate of appointment prescribed?

Section 36 Return of seized property

If a part was damaged after seizure, is owner entitled to damages?

Section 41 Aircraft accident or incident investigation report

*Refer also comments Section 14 (1) (a)*

Section 41. (1) Please Note ICAO comments as quoted in Section 14 above.

Section 41 (5) Interim statement

An Interim Statement shall be issued every 12 months if investigation has not yet been completed. - This should be included

Reference is also made to a “coroner”. Is this the correct wording?

Section 63 Rules

Section 63 (1) (f) Should the Dept of Finance not be involved- check and balances, otherwise open to abuse. ASIB is a monopoly with no free market forces for check and balances?

## 2.0 AD CLAUSE 10 -AMENDMENT OF SECTION 71 OF THE PRINCIPAL ACT

2.1 It is submitted that the period of four months’ notice of an increase in fees, charges and levies is too long in view if the following: In the case of a proposed increase in fees and charges

the CARCoM process (as detailed in sections 156 to 161 of the Act and Subpart 3 of Part 11 of the Civil Aviation Regulations, 2011) has to be followed. This process includes the publishing of the proposal (which the said Committee has to approve for publishing for comment, and a consideration by CARCoM of the comments received before a recommendation is made to the Minister for consideration. It has to be borne in mind that CARCoM only convenes every two months. (Note has been taken of the proposed amendment of section 155(5) which is to the effect that an amendment of fees does not need to be determined in consultation with the Minister of Finance).

2.2 It is not clear why a distinction in the consultative process between charges and fees is being made.

2.3 It has also to be borne in mind that the recommendation as to a proposed increase in charges has to be furnished firstly to the Minister of Finance and then to the Minister of Transport, which from experience can take a period of up to three months.

2.4 In terms of section 2(3) of the Civil Aviation Authority Levies Act, (Act No. 41 of 1998), the Minister of Transport, in the event of receiving a notification from the SACAA in respect of a proposed increase in Levies, has to, within 60 days of the receipt of the relevant document, in consultation with the Minister of Finance, indicate if the proposal is accepted or not. There is no requirement that the process of an increase in fees has to follow the CARCoM route

2.5 In practical terms this means that in the case of an amendment of fees and levies, the period from initiating the process up to the publication in the Government Gazette, can take up to 8 months. The establishment of a Fees Committee as envisaged in section 155 (1) will not shorten the period, as is pointed out in paragraph 8 below that, a CARCoM Sub-Committee relating to fees (Section 159 of the principal Act and Subpart 2 of Part 11 of the Civil aviation Regulations, 2011), is already in place as part of the consultative forum and has been considered in determining the length of the period that stretches from the start of an amendment until it is published in the Government Gazette.

2.6 From the above-mentioned factors it appears that the minimum period of the running of the process, before publication of the proposed increase in fees, charges and levies is approved by the Minister of Transport can be 6 months, which means that from start to finish the process to publish an increase in fees, charges and levies may take a minimum period of 10 months.

#### CLAUSE 13 - SECTION 76 OF THE PRINCIPAL ACT

The amended clause intends to prevent the CAA Board to compromise or to obstruct the Commissioner in the execution of his or her duties. It is proposed that the words "or attempting to influence the Commissioner" be added to the text."

#### CLAUSE 24 - Section 99

The expansion of the limitation of liability is too wide.

This should remain restricted to that of the employees of the SACAA.

#### CLAUSE 32 - Section 113 (1)

What about conditions of Section 113 (4) & (5)?



## CLAUSE 48 - AMENDMENT OF SECTION 130 – Exemptions

This is not a practical proposal.

The Minister's office will be swamped by exemption requests and cause delays and major problems for the industry.

This must remain with Director unless provision is made for Director to grant exemptions in respect of the CARs.

However, note has to be taken by comments of a previous legal advisor who pointed out that:

“3.1 This provision relates to the granting of exemptions to the regulations issued by the Minister in terms of the Principal Act as well as for technical standards issued by the Director in terms of the Principal Act. In terms of the draft Bill the power in respect of the granting of exemptions from the regulations have now been transferred to the Minister of Transport. Based on previous experience as a legal advisor in the Department of Transport for a period of 12 years and as a legal advisor in the SACAA for almost 17 years, this amendment will lead to administrative hold-ups and delays in finalising the applications and should not be implemented.

3.2. In this context it has to be borne in mind that the administrative process currently involves the technical and operational divisions of the SACAA, before it goes to the legal division of the SACAA where it is allocated to a legal advisor who has to evaluate the application. Thereafter it has to go to the senior manager of the legal division and from there to the general manager of the legal division who then forwards it to the Director of Civil Aviation who has to consider the recommendation of the legal division. With the proposed amendment in place, the application would then have to be forwarded to the Department of Transport, where it would have to pass the scrutiny of a deputy director, a director, a chief director, the deputy director-general responsible for aviation, the director-general before it can be submitted to the Minister of Transport.

3.3 Even with the procedure currently involving only the SACAA, frequent delays are being experienced which results in applications not being finalised within SACAA determined timelines. This is especially true in the case of an exemptions which have to be finalised within three days, a higher fee being payable by the client for such a service. In a great number of instances, it was impossible to finalise the application, despite the technical and operational divisions of the SACAA being available on the same premises for consultations.

3.4 It has to be pointed out that the Department of transport does not possess technical and operational divisions, which will create further delays if the Minister requires further information from the technical and operational divisions concerned.

3.5 In the light of the proposal outlined above, it is further proposed that in the event of an application for an exemption from the Act itself (as distinct from the regulations and technical standards), or in the case involving an exemption involving the Commissioner him-or herself, that the minister handles such applications.

3.6 It is proposed that the same principles referred to in paragraphs 2.1 and 2.5above, have to be applicable to the recognition of an alternative means of compliance”

## 2.52-56      CLAUSES 52,56,57.58 AND 59      SECTIONS 140,145,146,147 AND 148

Functions of authorized officers and persons have distinct differences in functions. Authorizations need to be different. there should be a clear separation in authorizations for safety and security purposes.

There should be a clear separation in authorizations for safety and security purposes.

Functions of authorized officers and persons have distinct differences in functions; hence Authorizations need to be different.

The above is supported by the following comment by a previous DOT legal officer.

“3.1 In sections 140(Prohibition and control of restricted areas) ,145(Search, seizure and powers of Arrest),146(Seizure or retention of harmful Articles),147(Powers of Arrest),148 (all for Identification) the existing powers, functions and duties granted authorised persons have been extended to authorised officers and inspectors. Certain powers granted to members of the SAPS and SANDF who are authorised persons appointed by the DCA are statutory powers in terms of parliamentary legislation. These powers include inter alia the powers of search, seizure and arrest. It is trite law that members of the SAPS and the SANDF receive in respect of basic training as to issues relating to search, seizure and arrest.

3.2 In the principal Act the powers, functions and duties of authorised officers and inspectors have been limited to safety issues, while the powers, functions and duties of authorised persons were limited to security issues, with specific reference to activities regarding aircraft and aerodromes. This distinction has been blurred by extending the powers, functions and duties of authorised persons in the draft Bill to authorised officers and inspectors. This blurring is not justified. The explanatory memorandum does not provide cogent reasons for such a drastic step.”

#### 2.57 Clause 60 SECTION 155(1)

In this regard it has to be pointed out that with reference to the proposed establishment of a Fees Committee as per section 155(1) in the draft Bill, such a committee, which consists of members of the aviation industry already exists as one of six sub-committees of the CARCoM (Section 159 of the principal Act and Subpart 2 of Part 11 of the Civil aviation Regulations, 2011).It is therefore submitted that It would appear that the proposed Fees Committee is a duplicate of the existing Fees Sub-committee of CARCoM and is therefore not necessary.

#### CLAUSE 61 -DELETION OF SECTION 163(3) OF THE PRINCIPAL ACT.

It is submitted that the deletion of this particular sub-section is not justified for the following reasons:

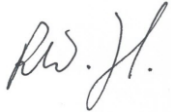
- The introduction of an international standard does not require a physical insertion in the appropriate CATS document
- This means the content of the inserted international aviation standard cannot be contained in the applicable CATS document. As the text of the various Annexes are not contained in legal textbooks or the SACAA website.it can be difficult to obtain such texts.
- The existing sub-section (2) has to remain as it indicates the process for the issuing of an international aviation standard.
- The proposed amendment in the draft Bill does not address the matter of how international aviation standards can be made part of the CATS documents. The proposed sub-section does not cover the aspects mentioned in the existing sub-section (2).

The above concludes the comment to be provided at this time.

Thank you for the opportunity to be able to submit comments for consideration by the Select Committee.

I also wish to confirm, that as mentioned in the invitation, I would like the opportunity to address the select Committee by means of a verbal Zoom presentation.

Yours sincerely.

A handwritten signature in black ink, appearing to read 'Rv. J.', with a stylized flourish at the end.

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