13 November 2019

analysis of the civil aviation amendment bill [b44-2018]

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# Introduction

The Civil Aviation Amendment Bill (“the Bill”) seeks to amend the Civil Aviation Act (No. 13 of 2009) (“the Act”) which provides for the establishment of the Safety Investigation Board. The Safety Investigation Board is a juristic body vested with the powers to investigate aircraft accidents and incidents in South Africa. In addition, the Act establishes the South African Civil Aviation Authority that is vested with the powers to promote civil aviation safety and security.

The Act was enacted in 2009 to consolidate the various pieces of legislation dealing with the regulation of civil aviation that existed at the time. Subsequent to the implementation of the Act, it became evident that certain provisions thereof were hampering the full operation of the Act. 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.[[1]](#footnote-1) Consequently, the full establishment of the Aviation Safety Investigation Board was never achieved.

This brief gives an analysis of the Civil Aviation Amendment Bill. It does so by looking at the objects of the Bill, as well as the clause-by-clause analysis of the Bill. Moreover, it highlights the Departments/bodies/persons that were consulted in the course of developing the Bill. Finally, the brief makes reference to the financial implications of the State for the implementation of the Bill.

# objeCTs of the bill

The Bill seeks to amend the Act in order to ensure the proper implementation of the legislation pertaining to safety, security and the investigation of aircraft incidents and aircraft accidents in civil aviation.

## 2.1 Clause-by-clause Analysis of the Bill

### 2.***1.1 Clause 1***

Clause 1 of the Bill seeks to amend and insert various definitions with a view to assisting with the interpretation of the Act. Definitions of “aircraft in flight” and “aircraft in service” are inserted as the terms are used in the Act and have technical meanings. The definition of “Director” is a phenomenon in the Public Service where there are Directors operating at a managerial level within the Government structural establishments. This title is also not consistent with the titles of other agencies of the Department of Transport (“the Department”) where they are referred to as Chief Executive Officer (CEO).

The definition of “helistop” is amended in order to differentiate a helistop from a heliport. A new definition of “safety programme” is inserted as the Bill extends the power of the Minister to issue regulations relating to the implementation of a safety programme. The other inserted definitions are intended to clarify terms inserted by the Bill.

### 2.1.2 Clause 2

Clause 2 amends section 2 of the Act to remove incorrect references. Furthermore, State aircraft (aircraft belonging to the South African National Defence Force (SANDF), South African Police Service (SAPS) and customs) are precluded from legislation regulating civil aviation. However, such aircraft may be subject to certain civil aviation regulations under certain circumstances. The Act was not very clear with regard to those circumstances and this clause amends such provisions.

### 2.1.3 Clause 3

Clause 3 amends section 3 to remove the obligation imposed on the Minister of Transport (“the Minister”) to agree with the Civil Aviation Authority (“the CAA”) in the process of ratification of amendments to the Convention of International Civil Aviation, 1944 (“the Convention”). This is intended to align the Act with section 231 of the Constitution of the Republic of South Africa, 1996.

### 2.1.4 Clause 4

Clause 4 amends section 4 of the Act to delete the provision that requires the designation of the CAA. This provision is superfluous as the CAA derives its powers and functions directly from the Act.

### 2.1.5 Clause 5

Clause 5 amends section 5 of the Act to remove the reference to a Protocol that does not exist.

### 2.1.6 Clause 6

Clause 6 amends section 7 of the Act to remove obsolete references.

### 2.1.7 Clause 7

Clause 7 amends section 8 of the Act to effect textual improvements.

### 2.1.8 Clause 8

2.1.8.1 Clause 8 substitutes Chapter 4 of the Act so as to redefine the establishment of an aircraft accident and incident investigation authority in compliance with the international obligation that South Africa has as a Contracting State to the Convention, whilst taking cognisance of the national legislative framework. Following the enactment of Chapter 4 of the Act that establishes the Aviation Safety Investigation Board, it transpired that certain provisions thereof, namely, the provisions dealing with the structure of the Aviation Safety Investigation Board, as well as the conflict interest of members, posed a hindrance to the appointment of members of the Aviation Safety Investigation Board.[[2]](#footnote-2) The amendment is intended to remove these hindrances.

2.1.8.2 The provisions that gave the Chairperson of the Aviation Safety Investigation Board the powers to appoint and manage staff are deleted in the attached draft. Another notable amendment in this Part is with regard to the provision dealing with conflict of interests. The existing legislation prohibits the appointment of a person as a member of the Aviation Safety Investigation Board if they or their families are involved in any way in the aviation business. The Amendment, on the other hand, requires a member of the Aviation Safety Investigation Board to recuse themselves when there is a potential conflict of interest. In addition, all the provisions dealing with the appointment of staff of the entity are deleted.

2.1.8.3 The provisions of the existing legislation dealing with the Director of Investigation are deleted and the power to designate accident investigators is vested with the Aviation Safety Investigation Board.

2.1.8.4 The Bill also provides for the insertion of a provision dealing with appeals against the findings of the Aviation Safety Investigation Board in relation to an accident.

### 2.1.9 Clause 9

Clause 9 amends section 69 of the Act to rectify grammatical errors.

### 2.1.10 Clause 10

Clause 10 amends section 71 of the Act in order to clarify the fact that the CAA had already been in existence when the Act was promulgated in 2009.

### 2.1.11 Clause 11

Clause 11 amends section 72 of the Act to extend to the objects of the CAA to include the environmental protection regulation, amongst others. The importance of the protection of the environment is increasing and the International Civil Aviation Organisation (ICAO) has adopted an amendment to one of its Annex to put emphasis on this.

### 2.1.12 Clause 12

Clause 12 amends section 73 of the Act to clarify the functions of the CAA. The amendment includes the environmental protection as one of the functions of the CAA. The amendment further effects certain textual amendments to clarify the role of the CAA.

### 2.1.13 Clause 13

Clause 13 amends section 74 of the Act to remove incorrect references, as well as to stress the requirement for consultation by the CAA with stakeholders in respect of determination of charges, fees and levies.

### 2.1.14 Clause 14

Clause 14 amends section 76 of the Act to effect some textual changes.

### 2.1.15 Clause 15

Clause 15 amends section 77 of the Act to remove an unnecessary qualification for one of the CAA Board members and to provide for an employee of the Department to sit on the Board.

### 2.1.16 Clause 16

Clause 16 amends section 82 of the Act to extend the restriction relating to the remuneration of CAA Board members to persons not only employed by the State, but by other State institutions that are wholly or partially funded by the State.

### 2.1.17 Clause 17

Clause 17 repeals section 83 of the Act. This is intended to bring the Act in line with Public Finance Management Act (No. 1 of 1999) (“the PFMA”). The CAA does not fall under the list of public entities that are required by the PFMA to submit a corporate governance plan.

### 2.1.18 Clause 18

Clause 18 substitutes section 85 of the Act so as to amend the process of the appointment of the Commissioner (formerly the Director of Civil Aviation) to include the role of the CAA Board. The Bill further bestows on this Board the power to suspend the Commissioner.

### 2.1.19 Clause 19

Clause 19 effects an amendment to section 86 of the Act pertaining to the duties of the Commissioner that are primarily to administer and manage the CAA.

### 2.1.20 Clause 20

Clause 20 amends section 90 of the Act to afford the CAA Board the power to appoint an acting Commissioner. The amendment is also intended to remove the provision that limits the acting period of the Commissioner to 12 months.

### 2.1.21 Clause 21

Clause 21 amends section 94 of the Act to effect textual amendments and to remove redundant references. Moreover, the amendment intends to remove provisions that have been found unnecessary to implement.

### 2.1.22 Clause 22

Clause 22 amends section 95 of the Act to remove an incorrect reference.

### 2.1.23 Clause 23

Clause 23 amends section 98 of the Act to enhance provisions regarding conflict of interest. The amendment also requires the Commissioner to develop procedures to deal with approval of engagement in other paid work by the employee of the CAA.

### 2.1.24 Clause 24

Clause 24 amends section 99 of the Act to extend the limitation liability to the CAA, rather than limit it to only employees of the Authority. In contradistinction to section 19 of the repealed South African Civil Aviation Act, the current provision does not protect the interest of the CAA in instances where the CAA does something in good faith. This proposed provision is standard and is akin to the one that is contained in other legislation.

### 2.1.25 Clause 25

Clause 25 amends section 103 of the Act to remove the provision conferring certain powers relating to aviation security that have already been bestowed to the CAA by virtue of section 73 of the Act. The segregation of powers pertaining to aviation security was underscored during the ICAO security audit conducted to verify the aviation security functions of the Republic.

### 2.1.26 Clause 26

Clause 26 amends section 104 of the Act to amend obsolete references and to remove the representative of the South African Intelligence Service from the composition of the National Aviation Security Committee.

### 2.1.27 Clause 27

Clause 27 amends section 108 of the Act to effect a textual improvement.

### 2.1.28 Clause 28

Clause 28 amends section 110 of the Act to designate the Commissioner as the authority to approve the appointment of a person responsible for the execution of security programmes of an aerodrome. Certain consequential amendment is effected thanks to this designation.

### 2.1.29 Clause 29

Clause 29 amends section 111 of the Act to effect textual amendments, as well as to remove incorrect references.

### 2.1.30 Clause 30

Clause 30 amends section 112 of the Act to remove an incorrect reference and to remove reference to the amount of the fine. This will allow the amount of the fine to be determined in terms of the Adjustment of Fines Act (No. 101 of 1991).

### 2.1.31 Clause 31

Clause 31 amends the heading of Chapter 7 of the Act with a view to removing unnecessary reference to compliance notice.

### 2.1.32 Clause 32

Clause 32 amends section 113 of the Act to delete an unnecessary word “reasonable”.

### 2.1.33 Clause 33

Clause 33 repeals section 114 of the Act. The provisions of this section were never implemented in practice and when considered in the light of the existing practice, they are impractical in some respects, especially when they indicate that non-compliances constitute an offence, implying that the criminal process must be invoked.

### 2.1.34 Clause 34

Clause 34 amends section 116 of the Act to clarify the powers of inspectors regarding the prohibition of certain activities. The restriction relating to the time period within which a prohibition may be issued is impractical because a prohibition may be as long as the event which caused it to exist.

### 2.1.35 Clause 35

Clause 35 amends section 118 of the Act to clarify the powers of authorised officers, inspectors or authorised persons. Most of the powers that are listed in the existing provision as appealable against are not bestowed on the authorised officers, authorised persons or inspectors and these powers are conferred on the Director of Civil Aviation. The amendment further extends the time period within which an appeal is lodged or adjudicated. The existing timeframes in the Act are unrealistic in practice.

### 2.1.36 Clause 36

Clause 36 amends section 119 of the Act in order to effect clarity to the process of medical appeals. In the absence of a designated body or institution, certain powers, for example, the power to suspend a medical certificate owing to non-compliance with certain regulations, vest in the Commission and by extension, to the CAA medical officers designated by the Commissioner. The appealable decisions that are currently mentioned in section 119 do not include these medical officers, and the amendment is intended to close the loophole. Moreover, section 119(7) is deleted as it sounds rather odd that an appellant in the medical case is entitled to legal representation where there are no similar provisions for other appellants. The issue of legal representation in administrative matters is dealt with in the Promotion of Administrative Justice Act (No.3 of 2000) and it is contended that it should be left that way.[[3]](#footnote-3)

### 2.1.37 Clause 37

Clause 37 amends section 120 of the Act to remove from appealable decisions those decisions that relate to privileges granted at the discretion of the Commissioner.

### 2.1.38 Clause 38

Clause 38 inserts section 120A to the Act to clarify the situation regarding the decision being appealed against, i.e. an appeal does not suspend a decision. This is to ensure aviation safety and security.

### 2.1.39 Clause 39

Clause 39 amends section 121 of the Act to remove superfluous text.

### 2.1.40 Clause 40

Clause 40 substitutes the heading of Part 2 of Chapter 8 of the Act.

### 2.1.41 Clause 41

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Clause 41 amends section 122 of the Act to provide for more effective composition of the appeal committee and avoid conflicts of interest.

### 2.1.42 Clause 42

Clause 42 amends section 123 of the Act to insert a provision prohibiting any member of the appeal committee who is employed by the State or State-owned institution from receiving remuneration for serving in the appeal committee.

### 2.1.43 Clause 43

Clause 43 amends section 124 of the Act to provide for the composition of the appeal committee, the chairperson, the acting chairperson of an appeal committee and the rules and procedures for the appeal committee.

### 2.1.44 Clause 44

Clause 44 amends section 125 of the Act to provide for the decision process of the appeal committee.

### 2.1.45 Clause 45

Clause 45 amends section 126 of the Act and provides for the furnishing of a decision of the appeal committee to the Commissioner and also provides for the legal representation of an appellant.

### 2.1.46 Clause 46

Clause 46 amends section 128 of the Act to move the administrative work of the appeal committee from the CAA to the Department.

### 2.1.47 Clause 47

Clause 47 amends the heading to Chapter 9 of the Act with a view to removing unnecessary reference to the “Director”.

### 2.1.48 Clause 48

Clause 48 amends section 130 of the Act to rectify the assignment of the power to issue exemptions from compliance with the Act. This amendment is intended to remove an inadvertent implication in which the Director may exempt himself or herself from complying with certain requirements prescribed in the Act. The reference is now to the Minister.

### 2.1.49 Clause 49

Clause 49 amends section 131 of the Act to rectify the provision pertaining to interception of aircraft and clarify that this must be done by an appropriate authority.

### 2.1.50 Clause 50

Clause 50 amends section 132 of the Act to remove an unnecessary provision. Article 83*bis* of the Convention already prescribes the process followed once an agreement is signed.

### 2.1.51 Clause 51

Clause 51 amends section 133 of the Act to insert new offences relating to the use of aircraft in service as a weapon or a mechanism for discharging weapons or explosives. The Bill also criminalises the transportation of prohibited biological weapons, weapons of mass destruction, explosives and nuclear material on board an aircraft.

### 2.1.52 Clause 52

Clause 52 amends section 140 of the Act to include an “officer and inspector” in the list of persons who may enter a restricted area in an airport.

### 2.1.53 Clause 53

Clause 53 amends section 142 of the Act to add explosives, radioactive material and weapons of mass destruction on the list of items whose conveyance by civilian aircraft is limited or prohibited.

### 2.1.54 Clause 54

Clause 54 amends section 143 of the Act to assign the power to avert threat to safety and security to the Commissioner, instead of the Minister. The Commissioner is considered as appropriately well vested with the opportunity to assess whether any action is likely to jeopardise aviation safety or security.

### 2.1.55 Clause 55

Clause 55 amends section 144 of the Act to extend the powers of the Commissioner in relation to administrative fines, and provides that he or she may recover an administrative penalty and also refuse to renew a licence, certificate, approval, registration or rating.

### 2.1.56 Clause 56; 57; 58 and 59

Clauses 56, 57, 58 and 59 amend sections 145, 146, 147, and 148 of the Act in order to include an authorised officer and inspector in respect of the power to search, seize and arrest.

### 2.1.57 Clause 60

2.1.57.1 Clause 60 amends section 155 of the Act to extend the regulation making powers of the Minister. The amendment was necessitated by ICAO requirements for the introduction of State safety programme, as well as requirements pertaining to facilitation, as prescribed in Annexure 9.

2.1.57.2 The clause also seeks to include the power to make regulations on the establishment of various advisory committees such as the National Air Transport Facilitation Committee and the Civil Aviation Regulations Committee.

2.1.57.3 The expression “aviation disaster plans” as proposed in the amendment is of a wider ambit than the existing words as it is not limited to disasters, hence the new proposal for “aviation emergency plans”.

### 2.1.61 Clause 61

Clause 61 repeals the procedures concerning consultative structures from the Act in order to deal with them in the Civil Aviation Regulations. The inclusion of the provisions relating to procedures regarding consultative structures in the Act created some anomalies in relation to provisions which are difficult to implement.

**Issue for Consideration:**

* The Department should explain how “the inclusion of the provisions relating to procedures regarding consultative structures in the Act created some anomalies in relation to provisions which are difficult to implement”.[[4]](#footnote-4) Stated differently, what are these “anomalies” that are referred to”?

### 2.1.62 Clause 62

Clause 62 amends section 163 of the Act to remove an incorrect reference. The power to issue technical standards for civil aviation is vested with the Commissioner and it is considered prudent that the Commissioner must consult the civil aviation industry before issuing a technical standard.

### 2.1.63 Clause 63

Clause 63 seeks to replace the expression “Director” with “Commissioner” throughout the Act.

### 2.1.64 Clause 64

Clause 64 and the associated schedule amend the various laws to align them with the new provisions of the Act.

### 2.1.65 Clause 65

Clause 65 provides for the short title and commencement.

# departments/bodies/persons consulted

According to the Department, the following Departments/bodies or persons were consulted in the course of the development of the Bill:[[5]](#footnote-5)

* Department of Planning, Monitoring and Evaluation (DPME);
* South African Civil Aviation Authority (SACAA);
* Airports Company South Africa (ACSA);
* Air Traffic and Navigation Services (ATNS);
* Airlines Associations of Southern Africa;
* Board of Airlines Representative of South Africa;
* Civil Aviation Regulations Committee;
* National Air Transport Facilitation Committee;
* National Economic Development and Labour Council (NEDLAC); and
* Economic Sector, Employment and Infrastructure Development (ESEID) Cluster.

# FINANCIAL IMPLICATIONS FOR STATE

The Department contends that the Bill will be implemented “within [its] budget allocation”.[[6]](#footnote-6)

**Issue for Consideration:**

* The Department should state the budget allocation it has set aside for the implementation of the Civil Aviation Amendment Bill.

# CONCLUSION

The Bill seeks to provide for the investigation of aircraft accidents, as well as aircraft incidents. In addition, it seeks to establish the Aviation Safety Investigation Board. Its objects are, inter alia, the advancement of aviation transportation safety and it strives to do so by conducting independent investigations including, when necessary, public inquiries into selected aircraft accidents and incidents in order to make findings as to their causes and contributing factors. Moreover, the Bill seeks to identify safety deficiencies, as evidenced by aircraft accidents and incidents and make recommendations designed to eliminate or reduce any such deficiencies and report publicly on its investigations and findings.

# References

Department of Transport (2018). *Civil Aviation Amendment Bill [B44*], Pretoria, Department of Transport.

1. Department of Transport (2018). [↑](#footnote-ref-1)
2. *Ibid*. [↑](#footnote-ref-2)
3. *Ibid*. [↑](#footnote-ref-3)
4. Department of Transport (2018), p. 54. [↑](#footnote-ref-4)
5. *Ibid*. [↑](#footnote-ref-5)
6. *Ibid*. [↑](#footnote-ref-6)