

**THE AIRCRAFT ACCIDENT AND INCIDENT INVESTIGATION
BILL, 2018**

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SCHEDULE

A Bill for

AN ACT of Parliament to establish an independent Aircraft Accident Investigation Bureau to provide for the control, regulation and orderly conduct of investigations into aircraft accidents and incidents in Kenya; and for connected purposes

ENACTED by Parliament of Kenya, as follows—

PART I—PRELIMINARY

Short title. **1.** This Act may be cited as the Aircraft Accident and Incident Investigation Act, 2018.

Interpretation. **2.** In this Act, unless the context otherwise requires—

“accident” means an occurrence associated with the operation of an aircraft which, in the case of a manned aircraft, takes place between the time any person boards the aircraft with the intention of flight until such time as all such persons have disembarked, or in the case of an unmanned aircraft, takes place between the time the aircraft is ready to move with the purpose of flight until such time as it comes to rest at the end of the flight and the primary propulsion system is shut down, in which—

(a) a person is fatally or seriously injured as a result of—

(i) being in the aircraft;

(ii) direct contact with any part of the aircraft, including parts which have become detached from the aircraft; or

(iii) direct exposure to jet blast,

except when the injuries are from natural causes, self-inflicted or inflicted by other persons, or when

the injuries are to stowaways hiding outside the areas normally available to the passengers and crew; or

(b) the aircraft sustains damage or structural failure which—

(i) adversely affects the structural strength, performance or flight characteristics of the aircraft; and

(ii) would normally require major repair or replacement of the affected component,

except for engine failure or damage, when the damage is limited to a single engine, (including its cowlings or accessories), to propellers, wing tips, antennas, probes, vanes, tires, brakes, wheels, fairings, panels, landing gear doors, windscreens, the aircraft skin (such as small dents or puncture holes), or for minor damages to main rotor blades, tail rotor blades, landing gear, and those resulting from hail or bird strike (including holes in the radome); or

(c) the aircraft is missing or is completely inaccessible:

Provided that an aircraft shall be deemed to be missing when the official search has been terminated and the wreckage has not been located;

“accident or incident site” means any of the following sites associated with an accident—

(a) a site containing an aircraft or any of its wreckage, parts or contents;

(b) a site where there is an impact point

associated with the accident;

- (c) if the accident or incident involved destruction or serious damage to property (other than an aircraft)—a site containing that property or any of its wreckage; together with such area around the site as the Chief Investigator determines to be reasonably necessary to facilitate the investigation of the accident and securing the site;

“accredited representative” means an investigator designated by the Bureau or by the accident investigation authority of another State, on the basis of his or her qualifications, for the purpose of participating in an investigation conducted by another State or by the Bureau respectively;

“adviser” means a person appointed by the Bureau or by the accident investigation authority of another State, on the basis of his or her qualifications, for the purpose of assisting the accredited representative in an investigation;

“aircraft” means any machine that can derive support in the atmosphere from the reactions of the air, other than the reactions of the air against the earth's surface, and includes all flying machines, aeroplanes, gliders, seaplanes, rotorcrafts, airships, balloons, gyroplanes, helicopters, ornithopters, unmanned aircraft systems and other similar machines;

“Annex 13” means the Annex to the Convention on International Civil Aviation that contains the International Standards and Recommended Practices related to Aircraft Accident and Incident Investigation;

“Bureau” means Aircraft Accident Investigation Bureau established under section 5 of this Act with authority and responsibility for aircraft accident and

incident investigations within the context of Annex 13 to the Convention on International Civil Aviation;

“Cabinet Secretary” means the Cabinet Secretary for the time being responsible for matters relating to aircraft accident and incident investigation;

“causes” means actions, omissions, events, conditions, or a combination thereof, which led to the accident or incident and of which the identification of causes does not imply the assignment of fault or the determination of administrative, civil or criminal liability;

“Chicago Convention” means the Convention on the International Civil Aviation concluded at Chicago on the 7th December 1944;

“Chief Investigator” means a competent government official who is appointed by the Cabinet Secretary to be responsible for the accident and incident investigations within the meaning of this Act;

“civil aircraft facility” means an installation in Kenya designed or used to facilitate the operation or maintenance of an aircraft that is not a State aircraft;

“competent authority” means a court of competent jurisdiction or a tribunal designated to administer the balancing test;

“contributing factors” means actions, omissions, events, conditions, factors or a combination thereof, which, if eliminated, avoided or absent, would have prevented or reduced the probability of the accident or incident occurring, or would have mitigated the severity of the adverse consequences of the accident or incident and of which the identification of contributing factors does not imply the assignment of fault or the determination of administrative, civil or criminal liability;

“crew member” means a person assigned by an

air operator to duty on an aircraft during a flight duty period;

“department” means any ministry, authority, organization or other concerned body of the government that has a direct interest in aircraft accidents or incidents;

“disclose” means—

- (a) in relation to information, to divulge or communicate the information in any way; and
- (b) in relation to information contained in a document or other article, to produce the document or other article, or make it available for inspection;

“document” means any correspondence, memorandum, book, plan, map, drawing, diagram, pictorial or graphic, film, sound recording, video tape, electronic files and data, and any copy thereof;

“draft final report” means a draft investigation report that is sent in confidence to departments in Kenya, States, and organizations involved in the investigation, inviting their significant and substantiated comments on the report;

“evidential material” means anything that may be relevant to an investigation;

“final report” means a conclusive report on investigation into an aircraft accident or incident issued by the Bureau and which includes the pertinent factual information, analysis, conclusions and, when appropriate, associated safety recommendations made with the intention of preventing accidents or incidents and in no case has the purpose of creating a presumption of blame or liability;

“flight recorder” means any type of recorder installed in the aircraft for the purpose of complementing accident or incident investigation;

“ICAO” means International Civil Aviation Organization;

“inappropriate use” means the use of safety information for purposes different from the purposes for which it was collected, namely, aviation safety;

“incident” means an occurrence, other than an accident, associated with the operation of an aircraft which affects or could affect the safety of operation;

“interim report” means a report released periodically in the course of an investigation, detailing established factual information, safety issues raised and indicating the progress of the investigation;

“investigation” means a process conducted for the purpose of accident prevention which includes the gathering and analysis of information, the drawing of conclusions, including the determination of causes or contributing factors and, when appropriate, the making of safety recommendations;

“investigator” means a person delegated by the Bureau to conduct its investigations;

“Investigator-in-Charge” means a person charged, on the basis of his or her qualifications and experience, with the responsibility for the organization, conduct and control of an investigation;

“mandatory incident reporting system” means a mandatory incident reporting system established by the Bureau to facilitate collection of information on actual or potential safety deficiencies;

“material fact in question” means a fact that is

significant or essential to the matter at hand, that one party alleges and that the other controverts, and is to be determined by the competent authority administering the balancing test;

“occupier” in relation to premises, includes a person present at the premises who apparently represents the occupier;

“occurrence” means any accident or incident associated with the operation of an aircraft;

“operator” means a person, organization or enterprise engaged in or offering to engage in an aircraft operation;

“participant” means a person authorized by the Bureau to participate in an investigation being conducted by the Bureau and in the opinion of the Bureau that person has the expertise to contribute to achieving the Bureau’s mandate;

“power” includes a function, responsibility or duty;

“premises” includes any place or aircraft;

“Regulations” means Regulations made under this Act;

“relevant person” means the pilot-in-command, operator, or the owner of the aircraft at the time of the accident or serious incident, or where the accident or serious incident occurs on or adjacent to an aerodrome in Kenya, the owner or operator of the aerodrome;

“relevant information” means information that is determined by the Investigator-In-Charge to be relevant to an investigation;

“safety recommendation” means a proposal of

the Bureau or an accident investigation authority of another State based on information derived from an investigation, made with the intention of preventing accidents or incidents and which in no case has the purpose of creating a presumption of blame or liability for an accident or incident; In addition to safety recommendations arising from accident and incident investigations, safety recommendations may result from diverse sources, including safety studies and in addition to safety recommendations arising from accident and incident investigations, safety recommendations may result from diverse sources, including safety studies;

“reportable occurrence” means an investigable occurrence that is prescribed by the regulations for the purposes of this definition;

“serious incident” means an incident involving circumstances indicating that there was a high probability of an accident and associated with the operation of an aircraft which, in the case of a manned aircraft, takes place between the time any person boards the aircraft with the intention of flight until such time as all such persons have disembarked, or in the case of an unmanned aircraft, takes place between the time the aircraft is ready to move with the purpose of flight until such time as it comes to rest at the end of the flight and the primary propulsion system is shut down; The difference between an accident and a serious incident lies only in the result; the difference between an accident and a serious incident lies only in the result;

“State” means a member State of the International Civil Aviation Organization (ICAO);

“State aircraft” means aircraft used in military, customs and police services or of any other State or any other civil registered aircraft at the time performing a State function and fully converted to offer services to heads of States, military service, customs or police services or any other State;

“state safety programme (SSP)” means an integrated set of regulations and activities aimed at improving safety;

“statement” means the whole or any part of an oral, written or recorded statement relating to an aircraft accident or incident given by the author of the statement to the Bureau;

No. 21 of 2013. “Tribunal” has the meaning assigned to it under section 66 of the Civil Aviation Act, 2013; and

“voluntary incident reporting system” means a proactive, non-punitive and confidential incident reporting system established by the Bureau to facilitate the collection of information that may not be captured by a mandatory incident reporting system.

Application of the Act.

3. (1) This Act applies in respect of aircraft accidents and incidents—

- (a) in or over Kenya;
- (b) when Kenya is the State of Registry, and—
 - (i) the location of the accident or the serious incident cannot definitely be established as being in the territory of any other State; or
 - (ii) the accident or the serious incident has occurred in the territory of a non-Contracting State which does not intend to conduct an investigation in accordance with Annex 13;
- (c) in or over any other place and when any of the following apply—
 - (i) Kenya is requested to investigate the

occurrence by an appropriate authority;

- (ii) the evidence relating to the occurrence is found in Kenya;
- (iii) the Bureau considers it necessary to conduct, or to participate in, an investigation into the occurrence and an agreement with the appropriate authority of another State has been obtained for the Bureau to conduct, or to participate in, such an investigation;
- (iv) Kenya has a right or obligation, under an international agreement, to participate in an investigation into the occurrence.

(2) Subject to subsection (3) and section 23(4), an occurrence shall not be investigated under this Act if it—

- (a) involves, or relates to, a State aircraft; and
- (b) does not involve, or relate to, a civil aircraft or a civil aircraft facility.

(3) Subsection (2) does not prevent the investigation of an occurrence that involves a State aircraft if the appropriate authority has requested the Bureau to conduct the investigation into the occurrence:

Provided that if the Bureau decides to investigate such an occurrence, then the Bureau shall publish, by electronic or other means, details of the request.

(4) The Bureau shall take all reasonable measures to ensure that the investigation procedures and practices that it follows in relation to accidents and incidents are compatible with this Act, Kenya's obligations under the Convention on International Civil Aviation, and the ICAO Standards and Recommended Practices contained in Annex 13.

Object of investigations under this Act.

4. The sole object of the investigation of an aircraft accident or incident conducted under this Act shall be the prevention of accidents and incidents and the purpose of such an investigation shall not be to apportion blame or liability.

PART II—ESTABLISHMENT AND FUNCTIONS OF THE BUREAU

Establishment of the Bureau.

5. (1) There is established a bureau to be known as the Aircraft Accident Investigation Bureau within the Ministry responsible for matters relating to Transport.

(2) The Bureau shall be a State agency having primacy on matters relating to aircraft accident and incident investigations in Kenya.

Mandate.

6. The mandate of the Bureau shall be to conduct independent investigations for the improvement of aviation safety, including—

- (a) the gathering, recording and analysis of all relevant information of an accident or incident;
- (b) if appropriate, the issuance of safety recommendations;
- (c) if possible, the determination of the causes or contributing factors; and
- (d) as appropriate, the completion of the final report.

Functions.

7. The Bureau shall be responsible for—

- (a) investigation of civil aircraft accidents and incidents;

- (b) formulation of regulations, policies and procedures relating to aircraft accident and incident investigation;
- (c) notification of aircraft accidents and incidents to relevant States;
- (d) advising the government on matters relating to air safety and aircraft accident and incident investigation;
- (e) participation in the State Safety Programme;
- (f) establishment and management of aircraft accident and incident database;
- (g) establishment and management of voluntary and mandatory incident reporting systems;
- (h) issuance and dissemination of aircraft accident and incident investigation publications;
- (i) appointment of accredited representatives, advisers, experts involved in aircraft accidents and incident investigations;
- (j) ensuring regional cooperation in aircraft accidents and incidents;
- (k) coordination with other State agencies on matters relating to aircraft accident investigation;
- (l) coordination of assistance to survivors and families of victims;
- (m) exchange of safety information with other States and the aviation industry;

- (n) implementation of ICAO Annex 13 obligations to the Chicago Convention;
- (o) establishment, participation in and promotion of aircraft accident and incident prevention programs;
- (p) conducting public educational programs about matters relating to aviation safety;
- (q) improvement of aviation safety by any other means as may be prescribed in the Regulations;
- (r) co-operating with—
 - (i) an agency, national authority or other body of a State or Territory, or regional agency that has functions or powers relating to aviation safety or functions affected by the Bureau's mandate of improving aviation safety;
 - (ii) a person who has, under a law of a State or Territory, functions or powers relating to aviation safety or functions affected by the Bureau's mandate of improving aviation safety; and
- (s) performance of such other functions incidental to the mandate of improving aviation safety as may, from time to time, be conferred on it by the Cabinet Secretary or by any other written law.

Guiding principles of the Bureau in carrying out its functions.

8. (1) The Bureau shall carry out its functions in a manner consistent with this Act, the Chicago Convention, and provisions of Annex 13 to the Chicago Convention and any amendment(s) thereto.

(2) Investigations by the Bureau shall be conducted

separate from investigations conducted for the purposes of establishing blame or civil or criminal liability.

(3) Any investigations conducted by the Bureau under the provisions of this Act shall have unrestricted access to all evidential material without delay and shall not be impeded by administrative or judicial investigations or proceedings.

(4) Information gathered in the course of an accident investigation and through the incident reporting system shall not be put to inappropriate use.

(5) No finding, cause or contributing factor determined under this Act or safety recommendation made under this Act shall be construed as assigning fault or determining civil or criminal liability.

PART III—INDEPENDENCE OF THE BUREAU AND APPOINTMENT OF INVESTIGATORS

Independence of
the Bureau.

9. The Bureau shall have independence in the conduct of the investigation and unrestricted authority over its conduct consistent with the provisions of this Act and shall not be subject to direction from anyone or any authority in relation to the performance of its functions.

International
obligations.

10. (1) The Bureau shall ensure that its powers under this Act are exercised in a manner consistent with Kenya's obligations under international agreements and obligations.

(2) In exercising powers under this Act, the Bureau shall have regard to any rules, recommendations, guidelines, codes or other instruments that are promulgated by international agreements.

Role of the
Cabinet Secretary
and appointment
of investigators.

11. For the purposes of carrying out the functions of the Bureau as stipulated under section 7, the Cabinet Secretary shall—

- (a) appoint, by way of notice, investigators of accidents from whom he or she shall appoint a Chief Investigator of accidents and the Deputy Chief Investigator;
- (b) ensure that sufficient funds are available to enable the Bureau perform its mandate.

Qualifications of investigators.

12. (1) Investigators appointed under section 11 shall have a professional pilot's background, or an aeronautical engineering qualification, or air traffic control qualification or, as appropriate, experience in specialized areas of aviation such as operations, safety, human factors, aerodynamics and aircraft design.

(2) The Chief Investigator appointed under section 11 shall, in addition to the qualifications in subsection (1), have fifteen years extensive professional aviation experience of which seven shall be as an aircraft accident investigator.

(3) The Deputy Chief Investigator appointed under section 11 shall, in addition to the qualifications in subsection (1), have ten years extensive professional aviation experience of which five should be as an aircraft accident investigator.

Responsibilities and powers of the Chief Investigator.

13. (1) The Chief Investigator shall have powers and responsibilities to—

- (a) establish and implement policies and procedures to be followed in the conduct of investigations;
- (b) establish an organizational structure and appropriate establishment that will ensure that sufficient number of investigators are appointed from time to time to meet the requirements of the Bureau;

- (c) ensure investigators are adequately and professionally trained to perform their duties;
- (d) institute investigations into the circumstances of accidents and incidents;
- (e) delegate the investigation, in whole or in part, to another State or a regional accident and incident investigation organization, when deemed to be appropriate;
- (f) designate in writing an investigator-in-charge for each investigation;
- (g) designate in writing any person with special skills or knowledge in specialized areas of aviation in an advisory capacity in any case where it appears to the Chief Investigator that such special skills or knowledge are required for proper completion of the investigation;
- (h) delegate the powers of investigation to the members of the investigation team, and provide each member with appointment letter; and
- (i) release a final report on investigations conducted by the Bureau.

(3) The Chief Investigator shall not be subject to direction from anyone in relation to the exercise of his or her powers under this Act:

Provided that, when exercising such powers, the Chief Investigator shall act consistently with the Bureau in the performance of its functions.

(4) In the absence, removal, resignation or death of the Chief Investigator, the Deputy Chief Investigator shall

assume all the responsibilities and powers of the Chief Investigator as stipulated in this Act pending the resumption of duty of the Chief Investigator or the appointment of a new Chief Investigator.

Duties of the Investigator-In-Charge.

14. (1) The Investigator-In-Charge shall have exclusive authority to direct the conduct of an investigation under this Act on behalf of the Chief Investigator.

(2) The Investigator-In-Charge shall—

- (a) report to the Chief Investigator on the investigation, including proposing findings as to causes and contributing factors, and safety recommendations related to investigations conducted by the Bureau;
- (b) appoint his or her Deputy in writing when necessary; and
- (c) be responsible for appointing observers and participants required for the investigation.

PART V—ACCIDENT INVESTIGATION PROCEDURES

Powers of the Investigator-In-Charge.

15. Where the whole or any part of the investigation is carried out in Kenya, the Investigator-In-Charge shall have—

- (a) free and unhindered access to the site of the accident or incident as well as to the aircraft, its contents or its wreckage;
- (b) powers to secure and preserve the accident or incident site;
- (c) immediate and unrestricted access to and use of the contents of the flight recorders, Air Traffic Service records and any other

recordings;

- (d) access to the results of examination of the bodies of victims or tests made on samples taken from the bodies of the victims;
- (e) immediate access to the results of examinations of the persons involved in the operation of the aircraft or tests made on samples taken from such persons;
- (f) power to issue summons pursuant to the provisions of this Act; and
- (g) free access to any relevant information or records held by the owner, the operator, the operator's maintenance contractors and subcontractors, the hirer, the designer or the manufacturer of the aircraft and by the authorities for civil aviation or airport operation or Air Traffic Services;

Entry into premises without search warrant.

16. (1) In carrying out an inspection under this Act, the Investigator-In-Charge shall have power to enter premises without search warrant if—

- (a) the Investigator-In-Charge believes on reasonable grounds that it is necessary to do so; and
- (b) the investigation is an investigation into a reportable occurrence.

(2) The Investigator-In-Charge may enter the premises referred to under subsection (1) with such assistance, and by such force, as is necessary and reasonable.

(3) Before entering premises under this section, the Investigator-In-Charge shall take reasonable steps to—

- (a) notify the occupier of the premises of the

purpose of the entry; and

- (b) produce the credential card issued under section 17 for inspection by the occupier.

(3) After entering premises under this section, the Investigator-In-Charge may—

- (a) search the premises, and anything on the premises, for evidential material;
- (b) make photos, video recordings, sound recordings or other records of the premises or evidential material;
- (c) make copies of evidential material found on the premises;
- (d) examine, take measurements of, conduct tests on, or take samples of, evidential material;
- (e) operate equipment on the premises in order to access evidential material;
- (f) in the case of evidential material that is equipment, operate the evidential material;
- (g) remove evidential material from the premises;
- (h) secure evidential material, pending seizure;
- (i) take equipment and material onto the premises, and use it, for any of the above purposes.

(4) The occupier of the premises is entitled to be present during the execution of the search on the premises and observe the search being conducted:

Provided that the right to observe the search being conducted shall cease if the occupier impedes the search.

(5) The provision of subsection (4) shall not prevent two or more areas of the premises being searched at the same time.

Issuance of
credential card.

17. (1) The Investigator-In-Charge shall ensure that a credential card is issued to every person who shall exercise premises search powers.

(2) The credential card shall be in the form prescribed by the regulations and shall contain a recent photograph of the person.

(3) A person commits an offence if—

- (a) the person has been issued with a credential card for the purposes of this section;
- (b) the person ceases to be a person who can exercise search premises powers; and
- (c) the person does not return the credential card to the Chief Investigator as soon as practicable.

(4) A person to whom a credential card is issued under this section shall carry it at all times when exercising premises search powers.

Detention of an
aircraft.

18. (1) Where the Investigator-In-Charge believes, on reasonable grounds, that—

- (a) evidential material is in or on an aircraft; and
- (b) it is necessary to exercise other powers under this Act in order to prevent the material from being removed from Kenya or from being interfered with or to prevent its concealment,

loss, deterioration or destruction, the Investigator-In-Charge may stop and detain an aircraft for the purpose of exercising the powers under this Act and the Investigator-In-Charge may do so with such assistance, and by such force, as is necessary and reasonable.

(2) The Investigator-In-Charge shall not detain aircraft for longer than is necessary and reasonable in exercise of powers provided for under subsection (1).

Securing
perimeter of an
accident.

19. (1) The Investigator-In-Charge may secure the perimeter of an accident site by whatever means the Investigator-In-Charge considers appropriate.

(2) A person commits an offence if—

- (a) while the perimeter is secured, a person enters the accident site, or remains on the accident site; and
- (b) the person does not have the permission of the Investigator-In-Charge to do so.

(3) Subsection (2) does not apply if the person entered the accident site, or remained on the accident site—

- (a) to ensure the safety of persons, animals or property;
- (b) to extricate deceased persons or animals from the accident site;
- (c) to move an aircraft, or the wreckage of an aircraft, to a safe place; or
- (d) to protect the environment from significant damage or pollution.

(4) In exercising powers under this section, the Investigator-In-Charge shall have regard to the desirability

of minimizing any resulting disruption to transport.

Summons.

20. (1) Where the Investigator-In-Charge has reasons to believe that a person is capable of supplying information, producing a document or giving evidence that may assist in the performance of an investigation, the Investigator-In-Charge may by summons signed by himself or herself and served on that person, require the person—

- (a) to furnish the information in writing signed by the person served, and in the case of a body corporate, signed by a competent officer of the body corporate;
- (b) to produce documents; or
- (c) to give evidence.

(2) A summon made under subsection (1) shall specify the required time and manner of compliance.

(3) A person shall not be excused from complying with summons under this section on the grounds that compliance may incriminate the person or make the person liable to a penalty:

Provided that such information, documents or evidence shall not be admissible against that person other than proceedings under this Act.

(4) A person who, without lawful excuse, refuses or fails to comply with a summon under this section commits an offence and is liable on conviction to a fine not exceeding fifty thousand shillings or to imprisonment for a term not exceeding six months or to both.

(5) Where the Investigator-In-Charge has reason to believe that a person is in possession or control of any information or document which may assist in the performance of an investigation and that person has refused or failed to supply such information or document,

the Investigator-in-Charge may apply to the Tribunal for issuance of a warrant authorising a police officer to enter into any premises believed to contain or into which a document is kept or hidden and conduct search and make copies or take extracts of documents therein.

(6) Any person, who knowingly gives false or misleading information or evidence in purported compliance with a summon under this section, commits an offence and shall be liable on conviction to a fine not exceeding fifty thousand shillings or to imprisonment for a term not exceeding six months or to both.

Investigation by
the Bureau.

21. (1) Where the Bureau considers it necessary to do so for the purposes of an investigation, the Bureau may—

- (a) require a person to attend before the Bureau and answer questions put by any person relating to matters relevant to the investigation; or
- (b) require a person to produce specified evidential material to the Bureau.

(2) A person to whom a requirement is given in accordance with the provisions of this section shall not—

- (a) fail to attend before the Bureau in accordance with the requirement; or
- (b) refuse or fail to answer a question lawfully put to the person; or
- (c) fail to produce to the Bureau the specified evidential material in accordance with the requirement.

Conflicts of
Interest.

22. To achieve functional independence of the Bureau, and to ensure the credibility of its investigations, members of the Bureau shall avoid actual and potential conflicts of interest.

Investigation
Jurisdictions.

23. (1) Despite any other act, no department may commence an investigation under this Act if the accident or incident has been investigated, is being investigated, or is going to be investigated by the Bureau.

(2) Nothing in subsection (1) of the Act prevents a department in Kenya from commencing an investigation into or continuing to investigate an aircraft accident or incident for any purpose other than that of this Act.

(3) Nothing in subsection (1) of the Act prevents any law enforcement department in Kenya from investigating an aircraft accident or incident for any purpose for which it is empowered to conduct investigations.

(4) In the event of an accident or incident involving a civilian aircraft and a State aircraft, investigation shall be conducted in accordance with the provisions of this Act and the regulations made thereunder, with the State being a party to the investigation.

(5) For any investigation conducted under the provisions of this Act, and in consideration of subsection (3), the Bureau shall—

- (a) have unhampered access to and unrestricted control over the accident or incident site, including the wreckage and any material relevant to the investigation;
- (b) have unhampered access to and control of the wreckage and all relevant material, including flight recorders and air traffic services recordings and records;
- (c) have unrestricted control over wreckage and parts to ensure that detailed examinations are made without delay;
- (d) take all reasonable measures to protect the

evidence and to maintain safe custody of the aircraft and its contents for such a period as may be necessary for the purposes of the investigation; and

- (e) relinquish control of the accident or incident site and release custody of the aircraft, its contents or any parts thereof as soon as they are no longer required by the investigation.

Mandatory and voluntary reporting.

24. (1) Subject to the provisions of the Regulations made under this Act, the owner, operator, pilot-in-command, crew members, operator of an airport, air traffic controller, or any other person having knowledge of an accident or incident shall report to the Bureau and provide as much information as soon as possible and by the quickest means available.

(2) If a relevant person has knowledge of accident or serious incident or a routine reportable incident, then the person shall within 72 hours of the occurrence give a written report to the Chief Investigator.

(3) The Bureau shall establish a non-punitive and confidential incident reporting system that protects reporters identity to facilitate collection of information on actual and potential safety deficiencies.

(4) Information gathered in the course of an accident investigation and through the incident reporting system shall not be put to inappropriate use.

(5) The Regulations may establish a system for voluntary and mandatory reporting of issues that affect, or might affect, air safety to the Bureau and may prescribe—

- (a) the purpose of the system;
- (b) the manner in which the reports are to be made;
- (c) the use and disclosure by the Bureau of—
 - (i) information contained in a report;
 - (ii) information the Bureau obtains or generates in the course of considering the report;
- (d) any other matter necessary or incidental to the establishment or operation of a scheme in accordance with section (1).

Extent of Investigation.

25. (1) Where the Bureau is notified of an aircraft accident or incident, the Bureau shall decide as to the extent of the investigation required and the procedures to be followed in carrying out the investigation, based on the lessons it expects to draw from the investigation for the improvement of safety.

Preservation of evidence.

26. (1) Where an aircraft accident or incident takes place, the owner, operator, and crew members shall, to the extent possible, and until otherwise instructed by the Bureau or except as otherwise required by this Act, take all reasonable measures to protect the evidence, including documents defined in this Act, and to maintain safe custody of the aircraft and its contents for such a period as may be necessary for the purposes of an investigation.

(2) Subsection (1) shall not be construed as preventing any person from taking necessary measures to ensure the safety of any person and property.

(3) Where evidence relevant to an accident or incident has to be interfered with pursuant to subsection (2), the person directing, supervising or arranging the interference

shall, to the extent possible in the circumstances, and prior to the interference, record the evidence by the best means available.

Non-disclosure of records.

27. When conducting the investigation of an accident or incident, the Bureau shall not make the following records available for purposes other than accident or incident investigation, unless the designated competent authority determines that their disclosure or use outweighs the likely adverse domestic and international impact such action may have on that or any future investigations—

- (a) audio content of cockpit voice recordings and image and audio content of airborne image recordings and any transcripts from such recordings;
- (b) records in the custody or control of the Bureau being—
 - (i) all statements taken from persons by the Bureau in the course of their investigation;
 - (ii) all communications between persons having been involved in the operation of the aircraft;
 - (iii) medical or private information regarding persons involved in the aircraft accident or incident;
 - (iv) recordings and transcripts of recordings from air traffic control units;
 - (v) analysis of and opinions about information, including flight recorder information, made by the Bureau and accredited representatives in relation to the accident or incident; and

- (vi) the draft final report of an accident or incident investigation.

Administration of the balancing test.

28. (1) Where the request is for a record listed under section 27 to be disclosed or used in a criminal, civil, administrative or disciplinary proceeding, the competent authority shall be satisfied that a material fact in question in the proceedings cannot be determined without that record, before administering the balancing test.

(2) For the purposes of this section “balancing test” means the determination by the competent authority of the impact the disclosure or use of accident and incident investigation records may have on current or future investigations.

Evidence of Investigators.

29. The Bureau investigators shall not be compellable to appear as a witness in any judicial, administrative or disciplinary proceedings related to apportioning blame or liability.

Draft final reports and interim reports.

30. (1) Before releasing the final report on its investigation, the Bureau shall send a draft final report to departments, States, and other organizations that participated in the investigation, inviting their significant and substantiated comments.

(2) No one shall circulate, publish or give access to a draft report or any part thereof, or any documents obtained during an investigation of an accident or incident, without the express consent of the Bureau, unless such reports or documents have already been published or released by the Bureau.

(3) The Bureau may provide a draft report, on a confidential basis, to any person whom the Bureau considers appropriate, for the purpose of—

- (a) allowing the person to make submissions to the Bureau about the draft report; or

(b) giving the person advance notice of the likely form of the published report.

(4) A person who receives a draft report under subsection (3) shall not—

(a) make a copy of the whole or any part of the report;

(b) disclose any of the contents of the report to any other person or to a court; or

(c) be entitled to take any disciplinary action against an employee of the person on the basis of information in the report.

(5) Subsection (4) shall not apply to any copying or disclosure that is necessary for the purpose of—

(a) preparing submissions on the draft report; or

(b) taking steps to remedy safety issues that are identified in the draft report.

(6) In addition to the provisions of subsection (4), a draft report provided for under subsection (3) shall not—

(a) include the name of an individual unless the individual has consented to that inclusion; or

(b) be admissible in evidence in any civil or criminal proceedings.

(7) The Bureau may, at any time before an investigation has been completed, publish, by electronic or other means, an interim report in relation to the investigation if it considers that the publication of the interim report is necessary or desirable for the purposes of aviation safety.

Final report.

31. (1) In the interest of accident and incident

prevention, the Bureau shall make a final report on its investigation publicly available, by electronic or other means, as soon as possible and, if possible, within twelve months.

(2) A final report and other reports published by the Bureau shall not—

- (a) be used as evidence in any court proceeding or in other proceedings related to apportioning blame or liability; or
- (b) include the name of an individual unless the individual has consented to that inclusion.

Safety
recommendations.

32. (1) At any stage of the investigation of an accident or incident, the Bureau shall recommend in a dated transmittal correspondence to the appropriate authorities, including those in other States any preventive action that it considers necessary to be taken promptly to enhance aviation safety.

(2) The Bureau shall communicate to the relevant person or appropriate authorities in Kenya any safety recommendations received from other States.

(3) The Bureau shall address, when appropriate, any safety recommendations arising out of its investigations in a dated transmittal correspondence to the accident investigation authorities of other State concerned and, to ICAO when ICAO documents are involved.

(4) Any person, organization or authority in Kenya to whom a safety recommendation has been communicated under subsection (1), shall take that recommendation into consideration and, where appropriate, act upon it or provide a full explanation as to why no measures shall be taken to implement the recommendation.

(5) Where the Bureau publishes the report in relation to an investigation and the report contains a

recommendation directed to a person, unincorporated association, or agency of a State or Territory to take safety action the person, association or the agency to whom the recommendation is made shall give a written response to the Bureau within 90 days of the report being published setting out—

- (a) whether the person, association or agency accepted the recommendation in whole or in part;
- (b) if the person, association or agency accepts the recommendation in whole or in part, details of any action that the person, association or agency proposes to take to give effect to the recommendation; and
- (c) if the person, association or agency does not accept the recommendation in whole or in part, the reasons why the person, association or agency does not accept the recommendation in whole or in part.

Closing of investigations.

33. (1) The Bureau may close or discontinue an investigation instituted under this Act at any time.

(2) The Bureau shall, within 28 days of closing or discontinuing an investigation, make publicly available, by electronic or other means, a statement setting out the reasons for discontinuing the investigation.

Re-opening of Investigations.

34. If new and significant evidence becomes available after the investigation has been closed, the Bureau shall reopen it.

PART VI—GENERAL PROVISIONS

Penalties.

35. (1) A person who contravenes any provision of this Act and Regulations, orders or notices made thereunder commits an offence and upon conviction, shall be liable to a fine or imprisonment or both as provided for under

subsection (2), and in the case of a continuing contravention, each day of the contravention shall constitute a separate offence.

(2) Any person who has been convicted under subsection (1) shall be liable to a fine of not more than one million shillings or to imprisonment for a term not more than six months or to both, and in a case of a continuing offence shall be liable to a fine of not more than fifty thousand shillings for each day the offence continues.

(3) Where it is proved that an act or omission of any person, which would otherwise have been a contravention by that person of a provision of this Act and Regulations, orders or notices made thereunder was due to any cause not avoidable by the exercise of reasonable care by that person, the act or omission shall be deemed not to be a contravention by that person of that provision.

Act to prevail.

36. The provisions of this Act shall supersede any other written law relating to aircraft accident investigation in Kenya.

Power to make Regulations.

37. (1) The Cabinet Secretary may make Regulations, issue guidelines or directions for the purpose of giving effect to the provisions of this Act and generally for the better carrying out of the objectives of this Act.

Consequential amendments to No. 21 of 2013.

38. (1) The Civil Aviation Act, 2013 is amended in the manner specified in the Schedule to this Act.

(2) Despite the provisions of subsection (1), any investigation, review or inquiry commenced under the repealed sections under Civil Aviation Act, 2013 shall be continued as if they were instituted under this Act.

SCHEDULE

[s. 38(1)]

**CONSEQUENTIAL AMENDMENT TO THE CIVIL AVIATION
ACT, 2013**

- | | |
|----------------------------------------------------|------------------------------------------------------------------------------|
| Repeal of section 52(b) and (c) of No. 21 of 2013. | 1. Section 52(b) and (c) of the Civil Aviation Act, 2013 is repealed. |
| Repeal of section 53 of No. 21 of 2013. | 2. Section 53 of the Civil Aviation Act, 2013 is repealed. |
| Repeal of section 54 of No. 21 of 2013. | 3. Section 54 of the Civil Aviation Act, 2013 is repealed. |

MEMORANDUM OF OBJECTS AND REASONS

The principal object of the Bill is to establish an independent Aircraft Accident Investigation Bureau to provide for the control, regulation and orderly conduct of investigations into aircraft accidents and incidents in Kenya. This is in line with the Standards and Recommended Practices for Aircraft Accident Investigation adopted pursuant to Article 37 of the Convention on International Civil Aviation (Chicago, 1944), designated as *Annex 13* to the Convention, in which Kenya is a signatory. According to the provisions laid down in ICAO *Annex 13*, States are obliged to investigate accidents occurring in their territory as to if and when they occur. This international requirement forms the basis of this Bill.

STRUCTURE OF THE BILL

Part I (Clauses 1-4) of the Bill deals with the preliminary matters focusing on the short title of the proposed Act, interpretation, application of the Act and object and purpose of investigation under the proposed Act.

Clause 2 of the Bill provides for the definitions of various terminologies used in the Bill including definition of accident and incident site. “accident” refers to an occurrence associated with the operation of an aircraft which, in the case of a manned aircraft, takes place between the time any person boards the aircraft with the intention of flight until such time as all such persons have disembarked, or in the case of an unmanned aircraft, takes place between the time the aircraft is ready to move with the

purpose of flight until such time as it comes to rest at the end of the flight and the primary propulsion system is shut down, in which—

(a) a person is fatally or seriously injured as a result of—

- (i) being in the aircraft;
- (ii) direct contact with any part of the aircraft, including parts which have become detached from the aircraft; or
- (iii) direct exposure to jet blast,

except when the injuries are from natural causes, self-inflicted or inflicted by other persons, or when the injuries are to stowaways hiding outside the areas normally available to the passengers and crew; or

(b) the aircraft sustains damage or structural failure which—

- (i) adversely affects the structural strength, performance or flight characteristics of the aircraft; and
- (ii) would normally require major repair or replacement of the affected component,

except for engine failure or damage, when the damage is limited to a single engine, (including its cowlings or accessories), to propellers, wing tips, antennas, probes, vanes, tires, brakes, wheels, fairings, panels, landing gear doors, windscreens, the aircraft skin (such as small dents or puncture holes), or for minor damages to main rotor blades, tail rotor blades, landing gear, and those resulting from hail or bird strike (including holes in the radome); or

(c) the aircraft is missing or is completely inaccessible:

Provided that an aircraft shall be deemed to be missing when the official search has been terminated and the wreckage has not been located.

The clause also defines “accident or incident site” as any of the following sites associated with an accident—

- (a) a site containing an aircraft or any of its wreckage, parts or contents;
- (b) a site where there is an impact point associated with the accident;
- (c) if the accident or incident involved destruction or serious damage to property (other than an aircraft)—a site containing that property or any of its wreckage; together with such area around the site as the Chief Investigator determines to be reasonably necessary to facilitate the investigation of the accident and securing the site; conduct constituting an offence under the laws of Kenya punishable by a term of imprisonment of at least six months.

Part II (Clauses 5-8) of the Bill establishes the Aircraft accident and investigation Bureau setting out its mandate, functions and guiding principles in the process of discharging its responsibilities.

Clause 7 of the Bill further lists the functions of the Bureau to include—

- (a) investigation of civil aircraft accidents and incidents;
- (b) formulation of regulations, policies and procedures relating to aircraft accident and incident investigation;
- (c) notification of aircraft accidents and incidents to relevant States;
- (d) advising the government on matters relating to air safety and aircraft accident and incident investigation;
- (e) participation in the State Safety Programme;
- (f) establishment and management of aircraft accident and incident database, etc.

Clause 8 of the Bill provides for guiding principles of the Bureau in carrying out its functions under clause 7. These include conducting of investigations separate from investigations conducted for the purposes of establishing blame or civil or criminal liability and unrestricted access by the Bureau to all evidential material without delay.

Part III (Clauses 9-14) of the Bill provides for investigations relating to the independence of the Bureau, adherence to obligations under international agreements when exercising its powers, the role of the Cabinet Secretary and appointment of investigators, qualifications of investigators, responsibilities and powers of the Chief Investigator and duties of the Investigator-In-Charge.

Part IV (Clauses 15 - 34) of the Bill provides for accident investigation procedures.

Clause 15 of the Bill empowers the Investigator-In-Charge, where the whole or any part of the investigation is carried out in Kenya, among others—

- (a) to access any site of the accident or incident as well as to the aircraft without hindrance;
- (b) to access to the results of examination of the bodies of victims or tests made on samples taken from the bodies of the victims;
- (c) to access to the results of examinations of the persons involved in the operation of the aircraft or tests made on samples taken from such persons, its contents or its wreckage;
- (d) free access to any relevant information or records held by the owner, the operator, the operator's maintenance contractors and subcontractors, the hirer, the designer or the manufacturer of the aircraft and by the authorities for civil aviation or airport operation or Air Traffic Services, etc.

Clause 16 of the Bill further empowers the Investigator-In-Charge to enter any premise in the course of inspection without search warrant if—

- (a) the Investigator-In-Charge believes on reasonable grounds that it is necessary to do so; and

(b) the investigation is an investigation into an occurrence.

Clause 18 of the Bill contains provisions empowering the Investigator-In-Charge to detain an aircraft where he or she believes, on reasonable grounds, that—

(a) evidential material is in or on an aircraft; and

(b) it is necessary to exercise other powers under the Act in order to prevent the material from being removed from Kenya or from being interfered with or to prevent its concealment, loss, deterioration or destruction.

Clause 19 of the Bill authorises the Investigator-In-Charge to secure the perimeter of an accident site by whatever means the Investigator-In-Charge considers appropriate.

Clause 21 of the Bill mandates the Bureau, where it considers it necessary and in the process of investigation, to summon a person to appear before the Bureau and answer questions put by any person relating to matters relevant to the investigation, or require a person to produce specified evidential material to the Bureau.

Clause 24 of the Bill contains provisions relating to mandatory and voluntary reporting to the Bureau by the owner, operator, pilot-in-command, crew members, operator of an airport, air traffic controller, or any other person having knowledge of an accident or incident.

Clause 26 of the Bill requires the owner, operator, and crew members to the extent possible, and until otherwise instructed by the Bureau or except as otherwise required by this Act, where an aircraft accident or incident takes place, to take all reasonable measures to protect the evidence, including documents defined in the Act, and to maintain safe custody of the aircraft and its contents for such a period as may be necessary for the purposes of an investigation.

Clause 28 of the Bill further prohibits the Bureau when conducting the investigation of an accident or incident, from making certain records available for purposes other than accident or incident investigation, unless the designated competent authority determines that their disclosure or use

outweighs the likely adverse domestic and international impact such action may have on that or any future investigations.

Clause 29 of the Bill protects the Bureau investigators from being compelled to appear as a witness in any judicial, administrative or disciplinary proceedings related to apportioning blame or liability.

Clause 30 of the Bill requires that before releasing the final report on its investigation, the Bureau must send a draft final report to departments, States, and other organizations that participated in the investigation, inviting their significant and substantiated comments.

Part V (Clauses 35-37) of the Bill provides for penalties and consequential amendments to the Civil Aviation Act, 2013.

Dated the....., 2018.

James Macharia,
*Cabinet Secretary for Transport,
Infrastructure, Housing and Urban Development.*