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**AVIATION NOTICE**

No. 02/19 Namibia Civil Aviation Authority: Notice of the Enforcement Code issued in terms of the Civil Aviation Regulations of 2018

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**(for GRN GAZETTE) Govt Notice**

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**NAMIBIA CIVIL AVIATION AUTHORITY**

No. 02/19

2019

**NCAA ENFORCEMENT CODE**

The Executive Director has under Parts 13.01.1 read with Part 185 of the Namibia Civil Aviation Regulations, 2001, (as amended by NAMCARS 2018), issued this Enforcement Code in the Schedule.

**R. GäRTNER**  
**INTERIM EXECUTIVE DIRECTOR OF CIVIL AVIATION**

26<sup>th</sup> July 2019

## **SCHEDULE**

### **THE ENFORCEMENT CODE OF THE NCAA**

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## CHAPTER I

### DEFINITIONS AND INTERPRETATION

In this Enforcement Code (also referred to herein as “this Code” or “the EC”), the words and expressions as used in section 1 of the Act, and Part 1 of the Regulations, 2001, remain for purposes of interpretation, and unless otherwise inconsistent with the context, the following expressions or words bear the meaning assigned to them below:

“**Applicant/Plaintiff**” means the person authorised by the Executive Director, or him-/herself, which serves notice against a participant in terms of the Act, or Part 13 and this Code, or issued by the Prosecutor-General, to be charged for contravening an applicable provision of the Act, Regulations issued under the Act or any aviation document issued by the Authority;

“**Accused /Respondent/Defaulter**” means any person who is alleged to have contravened or violated an applicable provision of the Act, Regulations issued under the Act or any privileged aviation document issued by the Authority; and who has been served notice issued by the Authority in terms of Part 13 and this Code, alleging a violation/offence;

“**Chairperson**” means a person appointed by the Authority in terms of this Code to preside over investigations relating to a violation;

“**Complainant**” means any person, who is a client or customer or party of interest of a participant;

“**Complaint**” means a written complaint submitted by a complainant to a participant and then to the Authority, to be dealt with as a matter of “public interest” in the manner contemplated by S38(2)(b);

“**Day**” means calendar day, or days, excluding a Sunday, a Saturday, or public holidays;

“**Enforcement action**” means any steps or processes taken by the Authority in relation to an alleged violation;

“**Enforcement order**” means any decision taken by the Executive Director, or under delegation, to ensure enforcement or compliance.

“**High Court**” means the High Court of Namibia;

“**Inspector**” a person referred to in section 37 of the Act; thus, inclusive of designated inspectors, authorised officers and/or authorised persons;

“**Infringement notice**” means a notice issued by designated inspectors, or authorised officers or authorised persons, in terms of the regulations, or this Code;

“**Investigation**” means the process of conducting any matter in terms of S41, the regulations, or this Code.

“**Investigation notice**” means a notice issued by the Executive Director, or his or her delegate, or a person assigned to be acting in such position, in terms of the regulations, or this Code;

“**Investigator**” means a person appointed by the Executive Director to investigate any matter for the purposes of the investigation conducted in terms of section 41, or infringement/violation of the

regulations or this Code.

“**Chief Legal Counsel**” means the head of the Legal & Enforcement Division in the NCAA, or the person assigned to act in this capacity, of the Authority;

“**Head of Safety**”, means the head of the Safety Division in the NCAA, or the person assigned to act in this capacity, of the Authority;

“**Head of Aviation Security**”, means the head of the Security Division in the NCAA, or the person assigned to act in this capacity, of the Authority;

“**Monitoring**” means the powers of the Authority to monitor compliance or infringement of any of the provisions of the Act, Regulations issued under the Act or any licence issued by the Authority;

“**Month**” means a calendar month, which do not equate to 30 days when so used;

“**Person**” means a legal person, and includes natural and juristic persons;

“**Postal service**” means the business of (1) receiving, collecting, dispatching, conveying and delivering postal articles; of (2) transmitting and delivering telegrams; and of (3) performing all incidental services; and

“**Prosecutor-General**” means an official appointed in terms of the Namibian Constitution to prosecute and defend appeals in criminal proceedings.

## CHAPTER II

### APPLICATION AND STATUS OF ENFORCEMENT CODE

#### 1. Strategic Context

- 1.1 NCAA has a general duty under the Civil Aviation Act No. 6 of 2016 (“the Act”), to develop enforcement strategies as one of its functions, with the objective to ensure compliance with aviation safety and security standards. (S10(1)(b)<sup>1</sup>.
- 1.2 Within the mandate and domain of its objects, powers and functions(SS 9 and 10 and Part 10) the NCAA has a number of roles and duties relating to identifying and responding to conduct/action which is contrary to the interests of the Namibia civil aviation system.
- 1.3 From an enforcement perspective it is within the discretionary powers of the Executive Director (S 38) to address conduct which is either/or:
  - a) unlawful;
  - b) in violation, incl breach, regarding the application of the regulations or technical standards or aviation directives;
  - c) regarded as being non-compliant or irregular;
  - d) committed in a careless and incompetent manner in regard to the utilization or carrying out of privileges and duties including gross negligence and wilful conduct; or
  - e) a failure to comply with a prescribed provision.

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<sup>1</sup> S = Section of the Act (SS = sections)

1.4 The NAMCARS (2018) in Parts 13 and 185 set in place enforcement procedures to achieve the aforementioned objectives and thus, it requires that an Enforcement Code be issued by the Executive Director (R13.01.1(2))<sup>2</sup>.

1.5 This Code seeks to curb any violation or illegal conduct of aviation safety and security regulation in Namibia. This will enable enforcement and compliance within the legal framework of Namibia. The EC aims to enhance the legality of NCAA enforcement actions. In particular, it enables the Executive Director of Civil Aviation<sup>3</sup> to ensure “adherence” to the civil aviation system as provided in S38(c).

(Note: Its efficacy is directly impacted by Namibian law generally by way of the following instruments: international aviation protocols and ICAO Annexes regulating the civil aviation sector (eg., international standards and (adopted) recommended practices– SARPS), the Namibian Constitution, the common law, and other statutory frameworks in addition to the Act of 2016, such as, the Criminal Procedure Act of 1977, the Labour Act of 2007, etc.)

1.6 “Just Culture”<sup>4</sup> : NCAA enforcement inspectors/authorised officers/personnel<sup>5</sup> as designated and with credentials, must take action most appropriate to promote aviation safety and security and compliance with the regulations. The initial priority of inspection/ investigative personnel is to correct any ongoing non-compliance (ie., through Corrective Action Plans – CAPs, warning letters, remedial action, etc) as part of “surveillance”<sup>6</sup> – see para. 7 on the applicability of criteria. Inspection/investigation personnel then determine what action to take by evaluating, among other things, the seriousness and safety and security risk imposed by the noncompliance /transgression /breach. In this manner the priority is to promote safety and security and greater compliance by encouraging regulated persons to disclose their own violations and the circumstances surrounding those violations. Based on information provided through such disclosures (which may also be given on basis of confidentiality), the NCAA’s compliance and enforcement policy fosters the implementation of permanent corrective measures to improve overall safety. After the failure of such actions, direct enforcement (fines/prosecution) as prescribed in the Code follows in a timely, fair and reasonable manner.

1.7 NCAA will conduct inspections and investigations and provide enforcement decisions in cases where there are reasonable and/or legitimate grounds and/or probable cause that a legal subject (natural or juristic person) is guilty of an offence or stands in violation of the provisions of the Act and its Regulations, directives, rules and this Code.

1.8 NCAA’s inspections and monitoring actions are aimed at curbing and responding effectively to potential, likely and actual violations. However, such actions must be addressed within the broader context of a safe and secure civil aviation system in the

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<sup>2</sup> R = NAMCARS / regulations

<sup>3</sup> Sect 34 of the Act

<sup>4</sup> “Just Culture”- see ICAO Annex 19 (SMS), Doc 9859 — Safety Management Manual (SMM):”..... all participants are encouraged to provide, and feel comfortable providing, safety-related information....(in) an environment in which participants understand they will be treated justly and fairly on the basis of their actions rather than the outcome of those actions, in the case of positive, as well as negative safety events”. See NCAA TGM Handbook – See Volume 1 – Administrative Procedures – Part 2 Chapter 7.

<sup>5</sup> Designated and having credentials under Sect 37 of Act

<sup>6</sup> See NAMCARS (2018) Part 140 .01.2 (p. 217) – definition “surveillance”

manner of the powers and functions of the Executive Director, generally and without limitation, as per S38.

For this reason NCAA handles the following types of oversight:

- a) compliance with regulatory conditions imposed under the Act by a holder, owner or participant of the civil aviation system (S38(2)(a) and S66);
- b) prohibiting unfairness which is against public interest within the civil aviation system (S38(2)(b));
- c) alleged conduct which could place the safety and security of aviation in jeopardy (SS 36 to 48);
- d) monitoring compliance with regulatory conditions especially through the use of enforcement (SS 38(2)(c) and S10(1)(h));
- e) on alleged abuse, and carelessness, of privileges and duties (SS42-45); and
- f) any other issues as may be deemed to fall under the jurisdiction of NCAA as specified in the Act (S10(2)(m)).

1.9 The Executive Director may “publish” the Code as per R13.01.1(2). Thus, the gazetting of the Code by Government Notice is preferred as a matter of public interest. When amended as may be deemed necessary in accordance with NCAA’s overarching regulatory approach and priorities, changes will be effected through Aviation directives/Notices (R Part 3.04) and revision Codes will then be Gazetted, with changes reflected by annotation.

1.10 This Code does not address criminal proceedings once lodged for action of prosecution.

## **2. Object/Scope/Status of Code**

- 2.1 The Code lays out the procedures, rules, determinations and order issued with regard to:
- a) investigations and inspections;
  - b) the assessment of inspection/ infringement reports submitted by inspectors;
  - c) the manner of conducting of inspections/investigations;
  - d) the assessment of the application of criteria when imposing fines;
  - e) the assessment of deciding fines for violations of the provisions of the Act and Regulations;
  - f) the assessment for deciding prosecution actions of the provisions of the Act and Regulations; and
  - g) status and issue of aviation document holders/participants following upon orders of violations, and findings of guilt by Court order.
- 2.2 The EC must be read in conjunction with the Act, any statutory provisions and Regulations applicable to the particular inspection or investigation being undertaken.
- 2.3 The EC applies to enforcement processes with regard to violations of the NAMCARS, directives and determinations, and offences under the Act.

- 2.4 The EC does not apply to complaints from individual consumers/clients in their relations in the ordinary course with holders, owners and participants.
- 2.5 There are two exceptions to the rule that this Code does not apply to complaints from individual consumers: (i) where a complaint is filed by individual consumers on a generalized basis regarding aviation safety and security; and (ii) where resolution of a complaint regarding aviation safety and security by individual consumers requires deploying an investigator/inspector.
- 2.6 In the event that it is considered appropriate, in particular where the Authority has received a number of complaints in relation to a similar issue, the Authority may investigate such complaints on a generalised basis. Such complaints will include but are not limited to:
- a) Individual complaints;
  - b) Class action by affected individuals;
  - c) Any other complaints as may be deemed appropriate by the Authority based on the prevailing circumstances, and subject to public interest.
- 2.7 Complaints from individual consumers are handled in terms of ICAO Docs and treaty provisions within the mandate of the NCAA<sup>7</sup> which are published in Aviation directives issued from time to time by the Executive Director as per S38(5) and (6).
- 2.8 Where NCAA decides to investigate matters of “public interest” in terms S38(2)(b) the procedures set out in the EC may serve as guideline when conducting investigations and/or inspections.
- 2.9 Decisions under the EC do not set precedents as each case is dealt with on the merits as per the procedures of the Act, regulations and this Code.
- 2.10 Barring the provisions set out in paragraph 2.9. above, the EC is binding only insofar as they reproduce the provisions of the Act and Regulations.
- 2.11 Where it departs from the approach set out in the EC, the Authority must explain or provide reasons for such departure.
- 2.12 The EC will be kept under review by the Chief Legal Counsel, and amended as appropriate in light of further experience, developing law and practice, and any change of the Authority’s powers and responsibilities. Amendments will follow as per para. 9.1
- 2.13 Any amendment(s) on the EC will become applicable on a date announced by way of Aviation Notice issued by the Executive Director under section 37 of the Act, read with NAMCARS Part 3.4. Also, see para.1.9 above.
- 2.14 The Code follows best practice guidance material / documents issued by ICAO, the FAA of the USA and several common law jurisdictions of the Commonwealth.

### **3. Regulatory principles**

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<sup>7</sup> Such as the Yamoussoukro Declarations, to which Namibia is a party. See S38(b)(ii)



- 3.1 The Authority has established a particular set of regulatory principles, providing a distinct statement of its approach to regulating the aviation sector in terms of the Act.
- 3.2 The Authority will adhere to regulatory principles based on, but are not limited to:
  - a) acting promptly and concisely;
  - b) taking regulatory decisions in a transparent, accountable, proportionate and objective manner;
  - c) not showing any undue preference to any person, body or organisation;
  - d) ensuring that its interventions are evidence-based, proportionate and consistent, in both deliberation and outcome; and
  - e) give due consideration to mitigation factors, and inform persons of their right to review and appeal .

### **CHAPTER III**

#### **NATURE OF THE VIOLATION**

#### **4. Identifying the violation**

- 4.1 In considering an allegation, complaint or request for determination/decision, the Authority must determine the nature of the violation.
- 4.2 The Authority must determine whether the violation is a criminal offence or not.
- 4.3 Determining the nature of a violation is fundamental as it dictates the rules and procedures to be followed and the persons and institutions to be involved when the Authority addresses an allegation, complaint or request for determination/decision.
- 4.4 If the violation concerns a criminal offence (eg., see Parts 13 to 16 of the Act), the Authority handles the matter by following the present Code (ie., administratively or by court proceedings - see below).
- 4.5 If the violation does not concern a criminal offence, the Authority may also institute civil proceedings before a court of civil jurisdiction, (S54(2)(c)(ii)), or deal with it administratively (ie., internally) to resolve the matter. In both instances prescriptions set out in NAMCARS Parts 13 and 185 will come into consideration.

#### **5. Distinguishing violations from offences (in the Act)**

- 5.1 (See R185.02.3).
- 5.2 When the Authority determines that the violation concerns a criminal offence, the Authority must further determine the category (-ies) of the violation for action under the Code.
- 5.3 As a general principle, the Prosecutor-General prosecutes offenses (via Court) and the Authority on the Prosecutor General's authorisation may deal with offences, as provided for in the Act and the regulations, under the Code, as violations.

5.4 Administrative violations, per se, (R13.3) are dealt with by the Authority in accordance with this Code.

## **6. Delegation of power to prosecute offenses**

6.1 If the accused denies the alleged offence or the Authority does not accept the admission by the accused of a different offence, the Authority, through NAMPOL, may forward all relevant information to the Prosecutor-General together with a request to him or her to prosecute such offence as is indicated in the request. This implies lodging a statement on the allegations with NAMPOL for purposes of recording in the Criminal Register (CR).

6.2 Should the Prosecutor-General decline to prosecute an offence the Executive Director may proceed to deal with such case as a violation to be dealt with administratively in the manner prescribed by the regulations and this Code.

## **CHAPTER IV**

### **INSPECTIONS AND INVESTIGATIONS**

## **7. Inspections/investigations by the Authority**

7.1 Inspections/investigations are made by the Authority in the normal course on the basis of the surveillance mandate of a civil aviation authority<sup>8</sup>.

7.2 The surveillance mandate under the authority of the Executive Director generally, and specifically as operational matters under delegation, under the domain of the head of Safety and the head of Aviation security, respectively, is executed in accordance with procedures set out in the TGMs, Operational; directives and generally accepted practices set out in the SARPs. Thus, the effective determination of surveillance is based on, ultimately, corrective action plans (CAPs). The assessment by the Executive Director, and/or on the recommendation/advice of either Aviation Safety or Security, as the case may be, on the non-compliance/findings indicated in CAPs and other surveillance reports, may require enforcement action in the manner prescribed in R13.01.4 and R13.01.5, read with R185, and this Code.

7.3 The Authority may on its own motion, conduct investigations with respect to any activity prohibited by the Act, the regulations, an aviation directive, or this Code, or for the purposes of doing anything required or permitted to be done under the Act, the regulations or this Code.

## **8. Receiving requests for decision/orders/determinations, on allegations of violations/offences and complaints**

8.1 The Authority can receive requests for decision from interested parties, and complaints (complainant or applicant) on any matter falling within the civil aviation system, including on a matter of public interest regarding civil aviation safety and security.

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<sup>8</sup> See note 6 above.

- 8.2 An allegation or complaint, or subject matter on the request for decision/determination/order, as the case may be, must be submitted, in writing, to the Executive Director, if the allegation or complaint or subject matter has not been resolved or adequately resolved by, where relevant, the participant/respondent within 14 days after receiving such allegation or complaint or subject matter.
- 8.3 The allegation/complaint/subject matter must set out clearly the following (see Annex A):
- a) the name and contact details of the applicant/ complainant on the allegation(s);
  - b) the name of the respondent, or if it is unknown, as many identifying details as are available in order to assist the Authority to identify the alleged defendant/respondent/defaulters of the alleged violation/complaint;
  - c) the relationship between the applicant/ complainant and the respondent, if any;
  - d) the facts and evidence illustrating the nature, extent and duration of the alleged violation and the circumstances in which the alleged violation took place and other supporting evidence; and
  - e) any other relevant information as may be requested by the Authority.
- 8.4 The Authority reserves its right not to accept a request for decision/complaint /determination or which does not meet the requirements for the submission of allegations/complaints to the Authority, as set out in the Regulations and /or this Code.
- 8.5 Upon receipt, the allegation/complaint may be addressed by the Executive Director to either the Head of Safety or Security, as the case may be, for resolution with a recommendation for decision. A recommendation may also be made on the advice of the Chief Legal Counsel.
- 8.6 The Authority does not apply the requirements for the submission of allegations /complaints on aviation safety and security in a strictly bureaucratic, legalistic or even a court -based, way and considers the circumstances of each case on its own merits.
- 8.7 Upon receipt of the allegation/complaint, or request for decision/determination/order, the Executive Director must determine whether it will conduct enforcement-based investigations and/or inspections (R Part 13).

## **9. Screening of allegations/ complaints or requests for decision**

- 9.1 Within 14 days after receiving an allegation/complaint, the Authority screens the allegation/ complaint it received in order to decide whether to inspect/investigate an alleged complaint/violation.
- 9.2 Not every allegation/complaint requires inspection/investigation. The majority of concerns raised by complainants/applicants can be resolved at an informal level or through other processes such as mediation or show cause conferences.
- 9.3 Following the screening of a complaint/allegation, the Executive Director may either –
- a) refuse to investigate an alleged violation, in which case the Authority informs the complainant/applicant in writing of its decision and reasons, closes its file and takes no further action on the matter; or

- b) decides to conduct an inspection or investigate the allegation/complaint, in which case the Authority issues an infringement/investigation notice (see Annex B) to the respondent/defaulters in terms of R13.01.5, or in the manner described in this Code.

9.4 The Authority may refuse to investigate an allegation/complaint if:

- a) the complaint/allegation falls outside the scope of the Act, regulations or this Code;
- b) an alternative and satisfactory means of redress is available;
- c) the complaint /allegation is trivial, frivolous or vexatious;
- d) the complainant /applicant has not provided any evidence to support his or her complaint/allegations and there are no reasonable prospects that investigations will yield the necessary evidence;
- e) investigation of the complaint/allegation conflicts with particular legislative requirements (i.e., applicable statutes assign the responsibility to conduct investigations or addressing those complaints to other agencies, for example, the Anti-Corruption Commission, Competition Commission, Communications Commission, NAMFISA, etc ); or
- f) the complaint/allegation or request for decision does not have any significance for aviation safety or security, the Authority or the complainant/applicant.

9.5 At this stage, the Executive Director should be able to decide whether a complaint/allegation needs to be investigated internally or should be referred externally.

## **10 Infringement/ Investigation notice**

10.1 After deciding to conduct the investigations (S.41/R13.01.5) into the complaint/allegation or request for decision, the Executive Director may decide to issue the infringement/investigation notice to the Respondent within seven (7) days from the date of concluding the screening process in the manner prescribed in para.9.

10.2 The investigation notice follows the form set out in Annex B of this Code.

10.3 The investigation notice must comply with the requirements set out under R13.01.5(1).

10.4 The Authority reserves its right not to issue an infringement/ investigation notice where it considers that alerting the Respondent/defaulting party might prejudice the inspections/investigations, and in the interests of aviation safety and security.

## **11. Public investigation notice (sect 17(8))**

11.1 The Authority reserves the right to issue a public notice to inform the public about the launched investigation where such notice would be in the public interest (S38(2)(b), unless such publication would adversely affect the investigation.

11.2 Prior to issuing the public notice, the Authority invites the Respondent/defaulting party to show cause within a time stipulated by the Authority why such public notice should not be made (S17(8)(b)).

11.3 Where the Authority has made an investigation public, the Respondent/defaulting party is entitled to publish a statement, without negating the right of the Authority to do so, relating

to the investigations.

11.4 A statement relating to the investigations must not address the merits of the investigation.

**12. Conducting investigations and inspections**

12.1 The Authority may, on the application of any interested person or on its own motion, conduct investigations with respect to any activity prohibited by the Act, the regulations, or this Code, or for the purposes of doing anything required or permitted to be done under the Act, the regulations, or this Code.

12.2 The investigators and inspectors must conduct the investigations and inspections in a professional manner<sup>9</sup> and in a manner that does not compromise the integrity of the evidence they collect during their inspections/investigations.

**13. Infringement/Investigation reports**

At the close of their investigations, investigators and inspectors must compile a report following the template set out in Annex C, attached to this Code.

**14. Timeframe for conducting and finalising investigations**

14.1 Inspections/investigations may be routine, non-routine, or urgent.

14.2 For routine investigations, the Authority makes sure that investigators and inspectors complete their investigations within six (6) months after the Authority has resolved to conduct investigations.

14.3 For non-routine investigations, the completion of investigations may take more than six months after the Authority has resolved to conduct investigations.

14.4 For urgent investigations or investigations relating to interference, the Authority must try to complete the investigations as soon as is reasonably possible, depending on the complexity of or circumstances informing the complaint/allegations under investigation.

14.5 General advisory note: The Authority’s discovery of, and response to, violations should be timely. Delays in investigation or processing of enforcement investigative reports can adversely affect the effectiveness of compliance and enforcement in several ways. Delays may let an unsafe/unsecure condition continue if prompt corrective action is not taken. Delays also may de-emphasize the seriousness of a given violation and lessen the deterrent value of any enforcement action taken. The deterrent quality of enforcement action, and effective linking of the enforcement sanction to objective change in compliance behaviour, can be best realized if the Authority investigates diligently and promptly and administers the appropriate sanction within a reasonable time period. If the allegations of violation are not sustained, any unwarranted delay in processing the case may impose an unjustified hardship. The time needed for investigation and processing will vary depending on the complexity of each case. Certain cases, because of their effect on aviation safety and security, including the need for emergency action, will

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<sup>9</sup> NCAA HR Staff Code

sometimes demand immediate involvement of the entire investigative and legal team to effect timely action, sometimes in only a matter of hours or a few days.

## **15. Appointment of Inspectors/investigators**

- 15.1 Once the Executive Director has resolved to conduct investigations and inspections, he/she must appoint designated investigators and inspectors with current credentials for that purpose. (This function may be delegated at his/her discretion.)
- 15.2 Notwithstanding the “authorised persons” as defined in the Act, persons other than Authority staff who possess acknowledged expertise, may be appointed for designation by the Executive Director as inspectors to exercise the powers conferred upon inspectors by section 37 of the Act. In such an event, the Executive Director may appoint a person who has expert knowledge in a particular field for a specific purpose to investigate any violation of a provision of the Act the regulations or this Code, or any aspect thereof. The instrument of investigation of such inspector must specify the field of expertise.
- 15.3 An Investigator must perform his or her functions –
- a) subject to the control and direction of the person designated by the Executive Director;
  - b) with the required of credentials generally, or for this purpose; and
  - c) on the terms and conditions as the Executive Director and the investigator may agree.
- 15.4 Inspectors/investigators may be required to comply with background checks (see R 114.01.1 – and further below under Miscellaneous).

## **16. General Powers of Inspectors/investigators**

- 16.1 Inspectors/investigators must have all powers necessary to conduct their investigations effectively, in conformity with the provisions of the Act (SS39, 47 and 48), the regulations (R13.01.2) and this Code (and ICAO manuals of procedures, eg., Doc 8335).
- 16.2. Inspectors/investigators will also take into account the delegations made to them under the Act by the Executive Director.
- 16.3 An Inspectors/investigators has the power to demand on behalf of the Authority any information from any person which that person is required to provide to the Authority by virtue of any provision of the Act and regulations ie., R13.01.2 and R185.01.2).
- 16.4 An Inspector/investigator may put any question to any person, or may examine any book, document, facility, any equipment or any other object, in order to obtain any information required by the Authority for the purpose of performing any function under the Act, or the regulations, or this Code ((R13.01.2; R185.01.2).

## **17. Requirements of inspection/investigation**

In conducting inspections/investigations, investigators and inspectors must make sure that the inspections/investigations do not contravene the provisions of the Constitution, the relevant criminal procedural laws, or any other applicable law, regulation, or rule (see Annex K).

## **18. Collection and handling of evidence**

- 18.1. See in general R13.02.2 and R185.01.1.
- 18.2 Investigators and inspectors must handle evidence with the utmost caution.
- 18.3 Investigators and inspectors must ensure that their handling of the evidence does not compromise the integrity of the evidence or otherwise dilute the probative value of the evidence.
- 18.4 Where any evidence has been taken by the investigators or inspectors exercising their authority in terms of the Act, the regulations and this Code, whichever is applicable, a receipt must be issued for it to the person from whom such evidence has been taken. The general and acceptable procedure regarding removal of anything from the premises being searched, must be adhered to by investigators and inspectors.
- 18.5 The receipt for the taking of evidence is set out in **Annex D** of this Code.
- 18.6 In performing any of their duties, the investigators or inspectors exercising their powers in terms of the Act, the regulations, this Code are vested with the discretion to consult or, where necessary, be accompanied by any person with expert knowledge of any matter they are investigating/inspecting.
- 18.7 For reporting purposes the investigators or inspectors must keep an inventory list of all evidence collected. (Note the recordkeeping requirements under R13.02.1(3)).

## **19. Types of evidence to be collected**

- 19.1 Investigators and inspectors can collect all types of evidence necessary to prove or disprove the main issue to be determined for an investigation (or hearing – see below).
- 19.2 In conformity with R13.02.2, evidence collected by investigators and inspectors, for it to be admissible, must prove an accused person's or defaulter's guilt as an offence beyond reasonable doubt such as in a criminal trial, and on a balance of probabilities such as in a civil matter. These principles of law serve as guidance for determining admissibility of evidence for the following reasons:
  - a) Relevance – evidence to be collected must prove or disprove an important fact to the investigation; and
  - b) Reliability – the source of evidence must be credible especially in so far as it concerns witness evidence.
- 19.3 In an inspection/investigation, the main sources of evidence are:
  - c) oral evidence (recollections),
  - d) documentary evidence (records),
  - e) Demonstrative evidence (sound recordings, maps, drawings, graphs, simulations, models, forensic animation etc. )
  - f) real (physical) evidence (an object, tape recording, computer printout, or a photograph)

- g) expert evidence (technical advice), and
- h) site inspection.

(See format of report in Annex D).

19.4 Factors which determine inadmissibility of evidence include but are not limited to the following:

- i) Unfairly prejudicial evidence (evidence that does not add material information to a case under investigation);
- j) Misleading evidence (evidence that draws officials away from the main issues under investigation);
- k) Hearsay evidence ( a testimony made outside of a court to prove the truth of a matter);
- l) Character evidence (evidence to prove that the accused person/defaulter has a certain personality trait and that the accused acted in accordance with such personality trait thereof);
- m) Expert testimony given by a lay person; and
- n) Privileges (evidence that is obtained from communication between an accused, respondent or defaulter, and his/her legal representative, amongst other things).

19.5 Any electronic evidence collected by the inspectors or investigators shall be deemed reliable if it is part of regularly recorded business records of the accused, respondent or defaulter. Any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of an act, transaction, occurrence, or event of the accused, respondent or defaulter's operations under investigation by the Authority, shall be admissible. Such electronic evidence must:

- a) Have been made and kept in the regular course of the accused, respondent or defaulter's action(s);
- b) Concern matters within the scope of the action(s) under inspection/ investigation;
- c) Have been made at or near the event raising the complaint/allegation; and
- d) Have been known by someone in the employ of the accused, defaulter respondent's action(s) under investigation.

## **20. Manner of collection of evidence**

20.1 Investigators and inspectors are not permitted to collect evidence in a manner that violates constitutionally-protected rights, applicable criminal laws, the general rules of evidence, or fundamental principles of administrative justice (see Annex K).

20.2 Investigators and inspectors may, by notice in writing in the prescribed form, require from any person such particulars and information as may be reasonably necessary for investigation purposes.

20.3 The request for information for purposes of investigation form is set out in Annex B of this Code.

## **21. Entry and search**



- 21.1 If, in the opinion of the Authority, it is necessary for the performance of any function under the Act, the regulations or this Code, the Authority may secure and issue a warrant instructing any participant to allow an inspector/investigator to enter and search any premises used by that person for the conducting of its business: Provided that nothing in this paragraph authorises an inspector/investigator to search any premises or part of any premises that is used as the dwelling of any person.
- 21.2 An application for a warrant on good cause may be made by the Executive Director for issue by a magistrate, and once issued, must be handed to an inspector/investigator to execute. The template for a search warrant is set out in **Annex E**.
- 21.3 An inspector/investigator executing a warrant referred to in this paragraph may enter any premises and there -
- a) make the investigation or inquiry for which he or she has been appointed by the Authority;
  - b) seize anything which in his or her opinion has a bearing on the investigation;
  - c) examine any article or document that is on or in those premises that has a bearing on the investigation;
  - d) request information about any article or document from the owner of, or person in control of, the premises or from any person who has control of the article or document, or from any other person who may have the information;
  - e) take extracts from, or make copies of, any book or document that is on or in the premises that has a bearing on the investigation;
  - f) in the presence of a person in charge of, or employed at, the premises, use any computer/electronic system on the premises, or require the assistance of any such person to use that computer/electronic system, to –
    - (i) search any data contained in or available to that computer/electronic system;
    - (ii) reproduce any record from that data; or
    - (iii) seize any output from that computer/electronic system for examination and copying; and
  - g) attach and, if necessary, remove from the premises for examination and safekeeping anything that has a bearing on the investigation.
- 21.4 Notwithstanding the provisions of this paragraph, if a person of interest for purposes aforesaid is not present or not able to give the assistance required by the authorised officer, the inspector/investigator may proceed, subject to the express consent of the aforementioned party, to use the computer/electronic system if in the circumstances of the case any delay may prejudice the purpose for which the search is carried out.
- 21.5 A person who removes anything from premises being searched must –
- a) issue a receipt for it to the owner of, or person in control of, the premises; and
  - b) return it as soon as practicable after achieving the purpose for which it was removed (also see S47).
- (See Annex D).
- 21.6 If the owner or person in control of an article or document refuses to allow the inspector / investigator conducting a search to inspect/remove that article or document, the inspector may request the Registrar or sheriff of the High Court, or the messenger of the magistrate's court of the area of jurisdiction where the premises are situated, to attach and remove the

article or document for safe custody until a competent court determines whether or not the information is privileged.

## **22. Assistance from police officers**

- 22.1 An inspector/investigator who is investigating any offence under the Act and this Code may request a police officer to accompany him or her while he or she is conducting such investigation / inspection .
- 22.2 A police officer requested to accompany an inspector/investigator as contemplated in this paragraph must accompany such inspector/inspector and may exercise any power vested in him or her by any law in the presence of that inspector/investigator: Provided that the police officer concerned may not search a person in the presence of the inspector/investigator concerned if that person is not the same gender as the inspector/investigator concerned.

## **23. Information requests**

- 23.1 In order to conduct investigations effectively, the Authority may request information that it deems relevant to an alleged violation and necessary for the purposes of the Authority's investigations. (SS 174 and 176).
- 23.2 The requested information should be accurate information and must be made available to the Authority within the period specified by the Authority when making the request for information.
- 23.3 The Authority may only agree to an extension of the deadline where the respondent/defaulters adequately demonstrates the need for such extension.
- 23.4 Meetings with respondents/defaulters, including show cause conferences, may be held as part of information gathering on condition that such events are recorded for purposes of recordkeeping.
- 23.5 Since the Authority takes seriously the failure to comply with lawful notices to produce documents or information, the Authority expects persons requested by the Authority to provide such documents and information to respond within the set timelines to the information request served upon them.

## **24. Summoning of witnesses**

When in the opinion of the Authority, it is likely that any person can give evidence concerning any matter that is relevant to any matter considered at any hearing held by the Authority in terms of the Act, the regulations or this Code, the Authority may issue a notice to appear/summons in the prescribed form instructing that person to attend a hearing of the Authority on a date, time and place indicated in that summons/notice. The template for a summons/notice is set out in **Annex F** of this Code.

## **25. Analysis of evidence collected during inspections/investigations**

- 25.1 Investigators and inspectors must analyse the evidence they have collected during the inspections/investigations.

25.2 The analyses of investigators and inspectors must assess the reasonable prospects of succeeding in an action against the respondents/defaulters on the basis of the probative force of the evidence so collected.

**26. Safe-keeping of evidence collected during investigations (R13.02.2(2))**

26.1 Investigators and inspectors must make sure that the evidence collected during the inspection/ investigations is safely kept.

26.2 Investigators and inspectors should not allow third parties or unauthorized persons to tamper with the evidence they have collected for investigation purposes.

26.3 If the evidence indicates that an investigation/further inspection is warranted, legal advice may be obtained beforehand to determine the processes in respect of securing an administrative fine or referring the matter for prosecution.

**27 Need for confidentiality**

27.1 Investigators and inspectors must ensure strict confidentiality in respect of investigations/inspections .

27.2 Any information provided to the Authority in the course of its investigations/inspections must be treated as confidential.

27.3 If an investigator or inspector fails to observe such standard of confidentiality, the appropriate procedures under the NCAA Staff Code may be made applicable. In the case of non-staff members the Executive Director may take the appropriate action to deal with the matter.

**28. Closure of a case without any enforcement action**

28.1 The Executive Director may close a case/action without any enforcement action if it determines that such action would be futile (see para.9.4 above).

28.2 The Executive Director may close a case /action without any enforcement action if the person involved is found to be not guilty of contravening the provisions of the Act, or from not having violated the Regulations or this Code.

**29. Determining Legal Enforcement action.**

29.1 If enforcement personnel select legal enforcement action (for example, certificate action such as revocation, suspension, imposition of conditions (SS42, or 43,or 45), or administrative fine action, they determine the type and amount of fine in terms of R185.02.

29.2 The Head of Safety/Security and Chief Legal Counsel jointly determine, based on the investigative or inspection report, as the case may be, the type and amount of fine sought in a legal enforcement action, for recommendation to the Executive Director for his/her approval.

- 29.3 The reporting is on the basis of Annex C in which must also set out the reason(s) for the action proposed. The criteria provided in R185.02.3 and the matrix – see appendix A to R185.02 must be considered and be included in the documentation. This report determines at the same time the mitigating or aggravating factors *in casu*

(General note: Procedures in relation to the administration of fines – see Chapter VI below..)

## CHAPTER V

### INVESTIGATIONS: HEARINGS / APPEARANCES

#### 30. Summoning of Respondents/defaulters

If the Authority is of the opinion that any person has committed an offence or violation, the Authority may issue a notice of appearance/summons in the prescribed form (**See Annex F**), which must –

- (a) state the offence/violation that the person has allegedly committed;
- (b) contain allegations of fact which if proved will establish the offence/violation concerned; and
- (c) indicate the fine or action that the Authority intends to impose/pursue for the offence/violation concerned.

#### 31. Admission or denial of alleged offence/violation

31.1 Within thirty (30) days from the date of the service of a summons/appearance notice, the accused/defaulters must deliver a notice to the Authority in the prescribed form indicating whether he or she admits or denies the commission of the offence/violation alleged in the notice or whether he or she admits any other regulatory offence/violation.

31.2 The decision of the respondent/defaulters to admit or deny the alleged offence or violation is crucial as it determines whether the Authority will conduct a hearing (S17(8)(b) – i.e., “...to any hearing before any organ of the Authority”), or to refer the matter to the Office of the Prosecutor-General for prosecution.

#### 32. When to refer a matter to the Prosecutor-General

32.1 If the accused/defaulters denies the alleged offence or the Authority does not accept the admission by the accused/defaulters of a different offence, the Authority may forward all relevant information to the Prosecutor-General together with a request to him or her to prosecute such offence as is indicated in the request.

32.2 The Prosecutor-General may request further information from the Authority in order to determine whether an offence has been committed.

32.3 If the Prosecutor-General is satisfied that there is a reasonable possibility of proving the alleged offence, he or she will inform the Authority as to prosecution of the offence concerned.

### **33. When to conduct a hearing (also, a S41 investigation)**

The Authority must hold a hearing/investigation if –

- (a) the accused/defaulters admits the violation alleged in the notice to the Authority, or admits a different violation and the Authority accepts that admission; or
- (b) the Prosecutor-General delegates the power to deal with any offence administratively, in terms of the Act, to the Authority, and to deal with the allegation as a violation, subject to such conditions or restrictions, if any, as the Prosecutor-General may deem appropriate; or,
- (c) conduct an investigation on its own accord of the matter in the manner set out in this Code, as an alleged violation.

### **34. Constitution of a hearing/investigation**

34.1 The Authority may hold a hearing/investigation in the manner contemplated by S41–

- (a) within three (3) months from the date of the admission by the accused/defaulters in order to determine the appropriate sanction or fine; or
- (b) within a reasonable time from the date of the delegation by the Prosecutor-General of the power to deal with the allegation in terms of the Act; or
- (c) on its own motion for adjudication of disputes/decision on a matter of public interest (S38(2)(b)), or in pursuit of an alleged violation; or
- (d) with a view to internal review proceedings in terms of R13.04.1

34.2 With a view to arms length proceedings, the Executive Director may set up a panel consisting of a chairperson, as sole lead investigator, or if considered appropriate, at least two other members as assessors, with a view to deal with the hearing/investigation and determine/decide the matter by way of recommendation. (S41(2) (b)(ii)).

34.3 The lead investigator or panel, as the case may be, must within 30 days of the completion of the assignment, or its terms of reference, make appropriate recommendations to the Executive Director in writing.

### **35. Sequence of hearings**

A hearing/investigation, depending on the circumstances of each case, proceeds along the following steps:

- a) actual hearing/investigation;
- b) decision on whether the accused/defaulters is in violation of the Act, regulations, or this Code; and/or
- c) decision on whether the allegation(s) can be dealt with through other powers at the disposal of the Executive Director; and
- d) give consideration of the mitigating and, if any, aggravating circumstances; and
- e) recommend the issuance of an enforcement order, including fine.

### **36. Appointment of a chairperson/assessors**

- 36.1 When constituting a hearing, the Authority must appoint a chairperson/lead investigator.
- 36.2 The Chairperson referred to in this paragraph specifies the procedure to be followed during the hearing/investigation, and in this regard will give consideration to the provisions in this Code.
- 36.3 In circumstances where the Chairperson referred to in this paragraph is appointed from outside the Authority, such person must:
- a) Be a suitably qualified person without a criminal record;
  - b) Have a working knowledge of the aviation sector;
  - c) Have no prior knowledge of the case being heard;
  - d) Be unbiased and impartial;
  - e) Remain neutral at all times and not represent either party to the hearing/investigation;
  - f) Have a good knowledge of correct procedure for hearings/ investigations;
  - g) Have a working knowledge of hearings/investigations of a similar nature as the hearing/ investigation in question;
  - h) Be able to justify and give reasons upon which his/her recommendation is based;
  - i) Be experienced in weighing up evidence, and experienced in separating facts from opinions;
  - j) Be able to justify and give reasons upon which the decided sanction/fine is based; and
  - k) Be in a position to present any findings, decisions or sanctions arrived at in the hearing to the Executive Director for validation.
  - l) Be in a position to submit preliminary/interim/final reports in the English language to the NCAA.

### **37. Outline of responsibilities of the Chairperson**

- 37.1 The Chairperson controls the proceedings. He/she greets and introduces all the parties present.
- 37.2 The Chairperson informs the parties that the hearing/investigation will take place in the official language, but that provision may be made for an interpreter, if and when necessary.
- 37.3 After consultation with the legal representative of the Authority, the Chairperson may authorize an audio recording of the proceedings.
- 37.4 The Chairperson introduces the parties and their roles and explains that the proceedings are dissimilar to court proceedings in the main but that formal procedures of court may serve as guidance. The parties are allowed to address the chairperson to secure the common understanding of the procedures that will apply. The Chairperson then decides this aspect.
- 37.5 If the accused/defaulting party is not represented, the Chairperson must determine whether the accused/defaulting party understands his or her right to representation and whether he or she waives it or not. The NCAA is represented by the Chief Legal Counsel or his/her

representative.

- 37.6 The chairperson asks the parties to indicate if they are ready to proceed and if any of them wish to raise any points *in limine*.
- 37.7 If the rights of an accused//defaulting party are prejudiced, or emotions run high, the Chairperson may adjourn to correct or calm the parties.
- 37.8 If the accused is represented or otherwise assisted, the Chairperson requests the accused to indicate whether he or she is satisfied with his or her representative.
- 37.9 The allegations in summons form must be presented and read.
- 37.10 The Chairperson requests the accused//defaulting party to indicate his or her plea and what is disputed.
- 37.11 If the accused/defaulting party pleads admission of the facts and violation, the Chairperson can find the accused/defaulting party in violation of the Act, regulations and/or this Code.
- 37.12 If the accused /defaulting party pleads that he/she is in dispute with the allegations, the Chairperson will refer to the representative of the Authority to make opening statements and to place its case for transgression of the Act, regulations, or this Code by the accused /defaulting party.
- 37.12 In the event of either sub.para. (11) or (12), the party as respondent or plaintiff, or as accused, defaulter or defendant, as the case may be, is allowed to present evidence and/ or witnesses.
- 37.13 The Chairperson allows either party, as the case may be, to put questions to the witness(es) and to test evidence.
- 37.14 The Chairperson allows either party, as the case may be, to put questions to and/or test the witness(es) or evidence presented by the accused/defaulting party or the representative of the Authority.
- 37.15 The Chairperson allows both sides to argue and/or present statements with regard to whether the violation was committed or not committed, as the case may be
- 37.16 The Chairperson adjourns and applies his or her mind to the issue, and also consults his/her assessor(s) where relevant.
- 37.17 The Chairperson reconvenes later to make the decision. The Chairperson, in consultation with the parties, decides, after consideration of the evidence, whether the accused/defaulting party stands in violation of the allegation.
- 37.18 If the accused/defaulting party, is found to have transgressed the act, the regulation, or this Code, the Chairperson allows the accused/defaulting party to present mitigating circumstances after announcing the decision, and the Authority representative, to present aggravating circumstances.
- 37.19 The Chairperson may request more detail.

- 37.20 The Chairperson adjourns to consider the factors and re-convene at a later stage to communicate to the Parties the appropriate decision for recommendation to the Executive Director.
- 37.21 If the accused/defaulters stand in violation of the allegation after consideration of mitigating and aggravating circumstances (two separate considerations), the Chairperson decides what the appropriate fine/sanction will be.
- 37.22 The Chairperson must inform the relevant party of his or her right to appeal in the event of the Executive Director having accepted his/her recommendation. (The Executive Director can reject the recommendation of the Chairperson on good reason(s) given within a reasonable time of the acceptance of the Chairperson's report.)
- 37.23 The Chairperson issues ruling(s) on procedural questions during the hearing/investigation, such as, but not limited to, adequacy of time to prepare for the hearing/investigation, representation, and postponements.

**38. Additional provisions on proceedings of hearings/investigations.**

- 38.1 The Authority may, by way of notice in writing in the prescribed form (notice of hearing is in Annex F of this Code), delivered by an authorised agent to any person, require such person to
- (a) appear before it at the date, time and place specified in such notice;
  - (b) make a statement; and/or
  - (c) submit to it all the documents or objects in the possession or custody or under the control of any such person which may be reasonably necessary.
- 38.2 At the hearing/investigation, through the Chairperson and after explaining applicable rights under the Namibian Constitution and relevant legislation, the Authority may -
- (a) question any person required to appear before it in connection with any matter which may be reasonably necessary; or
  - (b) retain for a reasonable period, for the purposes of this Act or the underlying statutes, any document or object submitted to it.

**39. Additional rules of evidence at hearings/appearances**

- 39.1 The rules of evidence that apply to hearings/investigations are less formal than court procedures. However, recognised evidentiary rules /practices of Namibian law apply in relation to hearings/appearances as per rulings of the chairperson.
- 39.2 At the hearing/investigation, the following four types of evidence are inadmissible:
- a) Hearsay evidence;
  - b) Opinion evidence;
  - c) The verdict in other proceedings; and
  - d) Character evidence.

Generally, Chairpersons should admit all material that is relevant [i.e. has probative value], unless the specific type of evidence requires a stricter approach based on fairness and



public policy.

**40. Legal representation at hearings**

Persons investigated/inspected and who must appear at the hearings held by the Authority have the right to bring legal practitioner(s) to appear and make representations on their behalf and at their own cost.

**41. Findings and decisions of the Chairperson**

41.1 The decision of the Chairperson is made in the name and with the express authority of the Authority.

41.2 The decision on the recommendations of the Chairperson must be in writing.

41.3 The decision on the recommendations of the Chairperson must be communicated to both parties.

**42. Reconsideration of the Authority's decision**

If an aggrieved person is not satisfied with the decision made by the Authority, such person may in terms of the Act, appeal to the High Court of Namibia.

**43. Publication of closures and findings**

43.1 When an investigation has been made public on opening S17(12)(9), the Authority may also publish its closures, findings of violation, or enforcement actions.

43.2 If the case is closed with no finding of a violation, the Authority may make this finding public.

43.3 The Authority reserves the right to make public any of its decisions, even though the investigations may not have been made public on opening. Where the hearing/appearance was conducted on the basis of confidentiality at the outset, the confidentiality may be waived by the Executive Director on the basis of public interest regarding aviation safety and security.

**44. Application for internal reviews**

(See R 13.04.1)

## **ENFORCEMENT ORDERS & MISCELLANEOUS**

### **45. Discretion to issue enforcement orders**

With a view to the exercise of his/her powers/functions in respect of the NCAS, and subject to the provisions of the Act, Regulations or this Code, the Executive Director may exercise his/her discretion to issue an enforcement order he/she deems appropriate in the circumstances prior to, or before, or during, or after a hearing/appearance (SS 38, 42,43,45, or R3.04).

### **46. When to issue an enforcement order**

If the Executive Director is of the opinion that any participant has contravened or failed to comply with any provision of the Act for which a specific sanction/fine has not been prescribed, or any provision for which the making of such an order is explicitly authorised, it may issue an enforcement order instructing the participant concerned to perform any action or refrain from any action stated in that order within the period specified in that order.

### **47. Factors to be considered when determining appropriate enforcement orders**

See R185.02

### **48. Possible enforcement orders**

With regard to the enforcement of the Act, Regulations or this Code, a range of possible options are available to the Authority. After a hearing/investigation, the Executive Director may, as enforcement order(s):

- (1) issue warning letters;
- (2) impose administrative fines (R13 and R185);
- (3) declare any equipment/product forfeited (S47);
- (4) suspend or revoke the privileges and/or duties in relation to an aviation document issued under the Act, or impose conditions or amend the terms of such aviation document (SS42/43);
- (5) issue directions or cease and desist orders aimed at preventing or rectifying a violation (R3.04);
- (6) report any matter to the Police;
- (7) refer to the Prosecutor-General any matter in which the Authority is of the view that criminal offence has been committed under the Act (SS13,14,15,16); or
- (8) institute civil proceedings before a court of competent jurisdiction.

Enforcement orders are appealable to the High Court.

### **49. Warning letters and cease and desist orders**

- 49.1 Where, upon conclusion of investigations, there are findings that a participant is contravening or has contravened any provision of the Act, Regulations or any aviation document issued by the Authority in terms of the Act, the Executive Director may issue a warning letter to the defaulter requiring the defaulter to take such steps to comply with the condition as may be specified or to take steps to remedy the consequences of the violation

within a particular time frame stipulated in the warning or cease and desist letter.

49.2 A warning or cease and desist letter is an order that the Authority may issue in response to a violation where a warning/cessation of action is considered a sufficient response.

**50. Additional: Fines (Regulations)**

50.1 The Executive Director may not impose a fine which exceeds the maximum penalty stipulated in the Act (S54(2)(a), or the regulations (R 185).

50.2 Any or fine imposed by the Executive Director pursuant to the regulations or Code must become due and payable by the defaulter person within thirty (30) days (SS64/65/66) from the date of the decision made by the Authority or within any other period prescribed by the Authority.

50.3 Corporate liability: Where a aviation document holder commits an offence/violation under the Act, or regulations, every person who at the time of the commission of such offence/violation was a director, manager or officer of the defaulter may be charged jointly in the same proceedings and where the holder is convicted of the offence or stands in violation of the regulation, every such director, manager or officer of the aviation document shall be deemed to be guilty of that offence/violation unless he or she proves that the offence/or in violation of it if it was committed without his or her knowledge or that he exercised all due diligence to prevent the commission of the offence/violation.

50.4 A specific General Ledger account in the NCAA will be created for Regulator - fines (an income account). It is important to keep this revenue item separate from the general "other".

50.5 The affected party would have to deposit the penalty directly into the bank account of the NCAA -

Account name: Standard bank Namibia, "NCAA CORP REC"

Account number: 042677068

Code: 087373

Reference: (invoice number of penalty invoice issued by Finance)

50.6 The invoice generated by NCAA will create a debtor in the books, monitored by the revenue account., i.e. normal process as per Regulator fee collection.

50.7 A write-off of debt would have to be approved by the ED in writing before the transaction write off could be processed.

50.8 Administrative fines do not result in criminal records. (R.13.03.4(1)). The NCAA may use the information in relation to an administrative fine in the manner prescribed by R 13.03.4(2) and (3).

## CHAPTER VII

### MISCELLANEOUS

#### 51. Forfeiture of equipment or apparatus

51.1 After a hearing/appearance, the Executive Director may declare any aviation equipment or product forfeited –

- (i) that has been used in the commission of an offence/violation;
- (ii) whose possession is prohibited by the Act or otherwise unlawful; or
- (iii) that does not comply with standards prescribed under the Act (on equipment approvals and standards) or that belongs to a category for which type approval has been prescribed and that has not been approved.

51.2 If a person is convicted in terms of an offence under the Act, the Authority may declare any equipment or product used in the commission of an offence or whose possession is prohibited by the Act, or whose possession is otherwise unlawful, to be forfeited to the Authority, unless the court directs otherwise..

51.3 The Authority may deal with any apparatus or equipment forfeited to it in terms of the Act as it thinks fit: Provided that the provisions in the laws relating to criminal procedure in Namibia dealing with the enforcement of rights by persons to property other than persons from whom the property has been seized, apply with the necessary changes to property contemplated in this section.

#### 52. Assessment Matrix

(See R 185.02 3 and as per Appendix A)

#### 53. Determinations

The Executive Director may issue provisional and final determinations.

#### 54. Provisional determinations

54.1 A provisional determination may be issued before the Executive Director concludes his/her investigation and where the Executive Director Authority has reasonable grounds to believe that there is a violation.

54.2 The provisional order may be issued to require aviation document holder to do or not to do something to prevent consequences for safety and security that might arise or that which is considered by the Authority likely to arise before the investigations are concluded.

54.3 The Executive Director may issue a provisional order if the balance of convenience favours the granting of a provisional order.

54.4 Before issuing a provisional determination, the Executive Director may at his/her own discretion afford the Respondent a reasonable opportunity to consider the allegations against it and to respond either by written and/or oral representations to the allegations made, unless the Authority has reasonable grounds to believe that doing so would defeat the purpose of the provisional determination.

54.5 A person who is subject to a provisional determination may file an objection to the provisional determination within ten (10) days after service of such provisional determination has been effected upon it.

54.6 In the case of an objection against a provisional determination the Executive Director considers the objection within a reasonable time depending on the urgency of the matter and either:

- a. revoke the provisional determination if it upholds the objection; or
- b. extend or uphold the provisional determination.

**55. Final determinations**

55.1 If the Executive Director Authority is satisfied after concluding its investigations that a participant has contravened an applicable provision of the Act, Regulations, or any aviation document it may impose a final determination or confirm a provisional determination issued (SS 67/68, SS134, 135)

55.2 The Executive Director reserves his/her right to enforce a final determination by civil proceedings before a court of competent jurisdiction.

**56. Background checks.**

56.1 In terms of SS 134 and 135, read with R. Part 114 of the regulations the Executive Director may authorise or conduct a background check on any person. This includes staff members and authorised persons.

**57. Conflicts of Interest (in civil aviation)**

(To follow – as per ICAO doc 9689 )

**58. NCAA Staff Code – applicable to inspectors**

(To follow - as per NCAA HR Policy authorised by decision in August 2017)



ANNEX A

**NAMIBIAN CIVIL AVIATION AUTHORITY**  
**Civil Aviation Act No. 6 of 2016**

ALLEGATION/ COMPLAINT: INFRINGEMENT (NON-COMPLIANCE/BREACH)  
**As per:** Civil Aviation Act (a.o., sections 38/ Parts 10, 13 to 16)  
Civil Aviation Regulations, 2001 (as amended – a.o., Parts 13, 185))  
NCAA Enforcement Code

To: \_\_\_\_\_ Date:.....  
The EXECUTIVE DIRECTOR  
NCAA Head office,  
Rudolf Hertzog Street, Windhoek  
email: to .....

From : (Name of person submitting complaint - required:)  
\_\_\_\_\_  
Address: \_\_\_\_\_ Place: \_\_\_\_\_  
Contact details \_\_\_\_\_

Concerning:  
(Name of person whose conduct is the subject of this allegation/complaint - required:)

Description of allegation/complaint (required):  
Provide a concise statement of the conduct that is the subject of allegations(s) or complaint (s) \_\_\_\_\_

1. Please attach to this form any relevant documents, as well as a typed statement describing the conduct that is the subject of this allegation / complaint, including -

- (a) the names of each party involved in the conduct;
- (b) the dates on which the conduct occurred;
- (c) a statement indicating when and how you became aware of the conduct, and
- (d) any other information your consider relevant.

2. Is the conduct continuing?

Yes:

No :

3. If not, when did the conduct/actions end?

\_\_\_\_\_

Name and title of person authorised to sign (required):

\_\_\_\_\_

\_\_\_\_\_  
Authorised signature:

Date: \_\_\_\_\_

For office Use only: of NCAA file number:

Date filed:

\_\_\_\_\_

Please note:

If this allegation/complaint is lodged by a person other than an individual, please provide contact details of the person of the person authorized to discuss the allegation/ complaint made.

:



ANNEX B

**Template for infringement/ investigation notice**

**NAMIBIA CIVIL AVIATION AUTHORITY**

**Infringement / Investigation Notice (Regulation Part 13)**

**TO:** \_\_\_\_\_

Whereas it appears on allegations(s)/complaint(s) made to the Authority and the Authority has decided it is necessary to conduct an inspection/investigation. The aim of the inspection/investigation is to establish the facts of the allegations(s)/complaint(s) by gathering as much relevant facts and information as possible

The allegations/complaints (as summarised here) are:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Kindly note that the Authority's inspectors/investigators by the name of may also invite you to attend an inspection/investigation (show cause) meeting in order to give you an opportunity to give your side of the story. If this is required, you will be informed of the time and date of the meeting in advance and you may bring a representative with you to this meeting.

It is currently expected that the inspection/investigation will be completed by this date:  
\_\_\_\_\_.

Once the inspection/investigation has been completed, you will be informed in writing of the outcome. If the Authority finds that there is a case to answer, you will be issued with appearance notice or summons and thereafter issued with a Notice of hearing inviting you to attend a formal hearing to be conducted by the Authority in terms of the Civil Aviation Act 6 of 2016 or the regulations.

In the meantime, should you have any information that might be of assistance to the inspection or investigation or wish to discuss anything, please do not hesitate to contact the Authority's inspector/investigator (Mr/Ms/Mrs) \_\_\_\_\_ at email address: \_\_\_\_\_ or at telephone number, xxxxxxxxxx.

Issued at \_\_\_\_\_ this \_\_\_\_\_ day \_\_\_\_\_ 20 \_\_\_\_\_.

\_\_\_\_\_  
**SIGNATURE**

\_\_\_\_\_  
**DESIGNATION**





**Annex C**

**Template for infringement/investigation report**

**NAMIBIA CIVIL AVIATION AUTHORITY**

**Infringement/ Investigation Report**

*This is a template infringement/investigation report that an inspector/investigator may adapt to suit the particular circumstances of his or her inspection/investigation or to reflect the individual circumstances or the needs of a case.*

<b>Introduction</b>	<b>Inspection/ Investigation authorised by:</b> [Name and role]
	<b>Inspector/ Investigator:</b> [Name and role]
	<b>Date inspection/investigation began:</b>
	<b>Terms of reference:</b> [include if they were amended and how]
	<b>Background to the inspection/investigation:</b> [Brief overview of the matter]

<b>Process of inspection/ investigation</b>	<b>The inspection/investigation process:</b> [Explain how the inspection/investigation was authorised]
	<b>Evidence collected:</b> [List all evidence collected]
	<b>Evidence not collected:</b> [List all evidence that could not be collected and why]
	<b>Persons interviewed:</b> [List all people interviewed]
	<b>Persons not interviewed:</b> [List any witnesses that could not be interviewed and why]
	<b>Anonymous statements:</b> [If any, explain why and provide details of any enquiries into witness]

**The inspection/ investigation –**

**Summary of written and physical evidence:** [name and summarise each document **tion findings** contained, set out how the evidence supported or did not support your findings and why]

**Summary of witness evidence:** [name and summarise each witness statement, quote from statement where relevant, set out how the witness statement supported or did not support your findings and why]

**Facts established:** [detail what the investigation has established]

**Facts that could not be established:** [detail any part of the investigation that was in-conclusive]

**Mitigating factors:** [detail if there were any mitigating factors uncovered that are rel-evant to the investigation]

**Other relevant information:** [detail any other information that is relevant to the matter]

<b>Conclusion</b> [if required]	<b>Recommendation:</b>
	<b>Formal action/Informal action/No action required</b>
	<b>Further details on recommendation:</b> [such as the type of action suggested for example, formal disciplinary meeting, and if there are any other recommendations related to the matter. In disciplinary matters, the investigator should not recommend a possible sanction. This should only be considered at a disciplinary hearing]
	<b>Investigator's signature:</b>
	<b>Date:</b>
<b>Supporting documents</b>	[List all documents collected as part of investigation and included in report]

**ISSUED BY THE**

**NAMIBIA CIVIL AVIATION AUTHORITY**

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**Annex D**



**Template for removal of evidence receipt  
NAMIBIA CIVIL AVIATION AUTHORITY**

**Receipt for Removal of evidence from a person or premises**

(In terms of sections 47 and 48 of Civil Aviation Act 2016 (Act No. 6 of 2016)  
Part 13 of the Regulations.)

**REMOVED BY INSPECTOR:**

---

**DATE OF REMOVAL:**

---

**PREMISES REMOVED FROM:**

---

---

**FULL NAMES AND SURNAME AND ID NUMBER OF OWNER OF EQUIPMENT OR  
PERSON IN CHARGE OF PREMISES UPON REMOVAL OF EQUIPMENT:**

---

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---

---

**REASON FOR REMOVAL:**

---

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---

**DETAILED DESCRIPTION OF EQUIPMENT REMOVED:**

---

---

---

---

---

---

**SIGNATURE OF OWNER / PERSON AT PREMISES**

---

**DATE**

---

**SIGNATURE OF NCAA INSPECTOR**



**Annex E**  
**Template for**  
**SEARCH WARRANT / DETENTION/SEIZURE ORDER**

**NAMIBIA CIVIL AVIATION AUTHORITY**  
**SEARCH WARRANT/DETENTION/SEIZURE ORDER**

(In terms of sections 47 and 48 of Civil Aviation Act 2016 (Act No. 6 of 2016)  
Part 13 of the Regulations.)

**TO INSPECTOR:** \_\_\_\_\_

Whereas it appears on allegation complaint made to the Authority that there are reasonable grounds for suspecting that there is at the premises situated at:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

- a) something in respect of which an offence/violation has been committed;
- b) something in respect of which an offence/violation is suspected on reasonable grounds to have been committed;
- c) something in respect of which there are reasonable grounds for believing that it will afford evidence as to the commission of an offence/violation;
- d) something in respect of which there are reasonable grounds for believing that it was used for the purpose of or in connection with the commission of an offence/violation;
- e) something in respect of which there are reasonable grounds for believing that it is intended to be used for purpose of committing an offence/violation,

to wit: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

**THIS IS THEREFORE**, to direct the investigators/ inspectors to search during daytime the said premises and to detain or seize the said:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

if found, and to take it before the Civil Aviation Authority of Namibia (“NCAA ”) to be dealt with according to the Civil Aviation Act 6 of 2016 and regulations.

Issued at \_\_\_\_\_ this \_\_\_\_\_ day of \_\_\_\_\_ 20\_\_\_\_\_.

\_\_\_\_\_  
**SIGNATURE**

\_\_\_\_\_  
**DESIGNATION**



**Annex F**  
**Template for APPEARANCE at INVESTIGATION**  
**NAMIBIA CIVIL AVIATION AUTHORITY**

**SUMMONS/NOTICE TO APPEAR**

**IN TERMS OF SECTION 41 OF THE CIVIL AVIATION ACT, 2016  
( ACT NO. 6 OF 2016) /NAMCARS, 2001 (as amended)**

To:	
Date:	
Physical Address:	
Postal Address:	
Telephone:	
Facsimile:	

You are herewith notified in terms of Sections 41/42/43 of the Civil Aviation Act of 2016 and/or NAMCARS, 2001 (as amended),

that on or about the \_\_\_\_\_, you are alleged to have committed **an offence/ violation** terms of section \_\_\_\_\_ of the Act and/or NAMCARS, 2001 (as amended) , in that you:

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

The Authority may, after a hearing to determine the appropriate sanction or fine, impose any or all of the following sanctions/ fines of the Act, if you admit the violation alleged in this summons or admit a different violation and the Authority accepts that admission:

- a) Impose a fine of \_\_\_\_\_

If you deny the violation alleged or the Authority does not accept your admission of a different violation the Authority may forward a request to prosecute the matter to the Prosecutor-General.

In terms of the Civil Aviation Act of 2016, and/or NAMCARS 2001, you must deliver a notice to the Authority, within thirty (30) days from the date of acknowledging receipt of this summons, indicating whether you admit any other offence – RESPONSE TO SUMMONS/NOTICE” which is attached hereto.

Issued on this \_\_\_\_\_ day of the, \_\_\_\_\_ at \_\_\_\_\_

---

**EXECUTIVE DIRECTOR OF CIVIL AVIATION  
(Namibia Civil Aviation Authority)**



**Annex G**

**NAMIBIA CIVIL AVIATION AUTHORITY**

**ACKNOWLEDGEMENT OF RECEIPT BY**

**ACCUSED/RESPONDENT/DEFAULTING PARTY :**

**ACKNOWLEDGEMENT OF RECEIPT:**

Full Name:	
Date:	
Place:	
Signature:	

**FOR OFFICE USE ONLY:**

DELIVERED BY:	
Full Name:	
Date:	
Place:	
Signature:	





**Annex H**

**Template for**

**A NOTICE OF HEARING/APPEARANCE**

**NAMIBIA CIVIL AVIATION AUTHORITY**

**Reference No/ Case No:**

**In the matter between:**

\_\_\_\_\_

**Plaintiff/  
Applicant**

**And**

\_\_\_\_\_

**Defendant/Defaulting/  
Respondent Party**

**NOTICE OF HEARING/APPEARANCE**

**To:** \_\_\_\_\_

**At address:** \_\_\_\_\_  
\_\_\_\_\_

**PLEASE TAKE NOTE THAT YOU HEREBY** are required to attend a hearing/make appearance on (date) \_\_\_\_\_ at (time) \_\_\_\_\_ at the (place) \_\_\_\_\_;

1. The allegations against you are:

1.1 \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

2. You have the right:

- 2.1 to be present at the hearing/investigation.
- 2.2 to be given time to prepare your case.
- 2.3 to be given advance warning of the charges.
- 2.4 to be advised of the allegations and charges.
- 2.5 to be represented or assisted at the hearing by legal representative of your choice
- 2.6 to ask questions of any evidence produced or of statements by the witnesses.
- 2.7 to call witnesses to testify on your behalf
- 2.8 To use an interpreter. In the event that an interpreter is required please indicate so in order for the Authority to secure the services of an interpreter.
- 2.9 to appeal within five working days against any penalty which may be imposed and conveyed to you.

3. It is your responsibility to arrange for your witnesses and representation and to ensure that they attend the enquiry. An interpreter will be arranged for you if you so require, provided the Authority is advised of your need for an interpreter on the date of receipt of this notice.

4. Should you fail to attend the hearing without valid reason, or you obstruct the progress of the proceedings the Chairman has the discretion to proceed in your absence, to make a finding, and impose a fine, including that of suspension/imposition of conditions/revocation of the aviation document (if any) in issue..

**Dated at Windhoek, on the \_\_\_\_\_ of \_\_\_\_\_ 2019**

---

**SIGNATURE**

---

**DESIGNATION**

**ANNEX I**



**TEMPLATE FOR A WITNESS TO APPEAR  
NAMIBIA CIVIL AVIATION AUTHORITY**

**Reference No/ Case No:**

**In the matter between:**

\_\_\_\_\_

**Applicant / Plaintiff**

**And**

\_\_\_\_\_

**Respondent/Defaulting/Defendant**

\_\_\_\_\_

**WITNESS TO APPEAR**

\_\_\_\_\_

To the Sheriff or his deputy:-

Notify: \_\_\_\_\_

At address: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

That he is herewith ordered to personally appear before the Authority at the Authority's premises situated at 12 Rudolf Hertzog Str Windhoek, on the date \_\_\_\_\_ at 10:00 and to stay present until he/she is excused by the Chairperson in order to testify on at the hearing regarding matters of which he/she has knowledge regarding a Complaint/Application/Allegations submitted to the Authority by the Complainant/Defaulting/Responding party against the Respondent.

And further notify the abovementioned person that he/she may under no circumstances omit to comply with this appearance notice as he/she can otherwise expose him-/herself to a regulatory offence/violation in terms of the Civil Aviation Act of 2016/NAMCARS 2001 (as amended) and be liable to a fine to be determined by the Executive Director

**Dated at Windhoek on this the \_\_\_\_\_ day of \_\_\_\_\_ 20.....**

**ISSUED BY:** \_\_\_\_\_

**DESIGNATION** \_\_\_\_\_

**Annex J**



**NAMIBIA CIVIL AVIATION AUTHORITY**

**RETURN OF SERVICE**

**ACKNOWLEDGEMENT OF RECEIPT:**

Full Name:	
Date:	
Place:	
Signature:	

**FOR OFFICE USE ONLY:**

DELIVERED BY:	
Full Name:	
Date:	
Place:	
Signature:	

---

**ANNEX K –**

**GUIDELINES ON FAIR AND REASONABLE ADMINISTRATIVE ACTION (AS  
 ACKNOWLEDGED BY PRECEDENTS OF NAMIBIAN COURTS)**

Administrative law decision-making in Namibia is generally summarised below. Adherence to these rules will assist functionaries of the NCAA to comply with its obligations accountability and good governance.

1. **Natural Justice** (Procedural Fairness)

- **Hearing Rule.** Persons affected by NCAA’s decisions have a right to be heard. To be meaningful, the hearing rule normally requires that NCAA provides persons with notice (usually in advance) that a particular decision is going to be taken, and the reasons for the decision NCAA proposes to take. Without notice and a statement of reasons, there may be little point to providing a person with an opportunity to be heard.
- **Rule Against Bias.** Decision-makers should not have a **personal** or **pecuniary interest** in the outcome of their decisions. Neither may decision-makers prejudge (or **pre-determine**) matters in respect of which they are called upon to make a decision.

2. A decision-maker must not act for **improper purposes**. Even if the purposes for which a particular decision are lawful, the decision may only be taken for the purposes specifically authorised by the law under which the decision has been taken.

3. A decision-maker must not take any **irrelevant considerations** into account in coming to a decision.

4. A decision-maker must take all **relevant considerations** into account in coming to a decision.

**Note:** Applicable Policy Is Always A Relevant Consideration.

5. A decision-maker must act on the basis of **evidence**, not mere supposition or speculation.

6. A decision-maker must not formulate requirements in **vague** or **uncertain terms**.

7. A decision-maker must not **inflexibly apply policy** (although departures from policy will normally need to be justified).

8. A decision-maker must not **act under influence** (although this does not preclude adherence to formal directions, compliance with lawful conditions in relation to the process by which a decision is taken or the obligation to consult in the process of considering a decision).

9. A decision-maker must decide the matter within a **reasonable time**.

10. A decision maker must not act in a way that is manifestly **unreasonable**. A decision must not be so unreasonable that no reasonable person would make such a decision.