



International Civil Aviation Organization

WORKING PAPER

A37-WP/289

TE/149

24/9/10

(Information paper)

English only

ASSEMBLY — 37TH SESSION

TECHNICAL COMMISSION

Agenda Item 25: Follow-up of the High-level Safety Conference (2010)

Agenda Item 26: Safety management and safety data

Agenda Item 27: The protection of certain accident and incident records

SOME CAVEATS ON “JUST CULTURE”

(Presented by Australia)

EXECUTIVE SUMMARY

This paper draws attention to the need to give careful consideration to the use and application of the expression “just culture” and the importance of ensuring that useful mechanisms for encouraging the free and frank disclosure of information are balanced with the need to take critical safety-related action in particular cases.

<i>Strategic Objectives:</i>	This working paper relates to Strategic Objective A (Safety — <i>Enhance global civil aviation safety</i>), having particular regard to measures 4 and 8; and Strategic Objective F (Rule of Law — <i>Strengthen law governing international civil aviation</i>), having particular regard to measure 5.
<i>References:</i>	A37-WP/60, A37-WP/66, A37-WP/122 and A37-WP/74 A36-WP/10, A36-WP/71, A36-WP/112, A36-WP/126, A36-WP/224 and A36-WP/232 Doc 9902, <i>Assembly Resolutions in Force</i> (as of 28 September 2007) Doc 9899, <i>Report of the Technical Commission of the 36th Session of the Assembly</i> Doc 9859, <i>Safety Management Manual (SMM)</i> , 2nd Ed. 2009 and 1st Ed. 2006 Doc 9935, <i>Report of the High-level Safety Conference (2010)</i> Doc 9914, <i>Report of the Accident Investigation Divisional Meeting (2008)</i> Annex 13 — <i>Aircraft Accident and Incident Investigation</i>

1. INTRODUCTION

1.1 In adopting Resolutions A36-7 — *ICAO Global Planning for Safety and Efficiency* and A36-8 — *Non-disclosure of certain accident and incident records*, the 36th Session of the Assembly was mindful of the several contributions¹ touching on the important relationship between the free and frank reporting and exchange of information related to aviation safety occurrences, the application of that information to efforts specifically calculated to enhance aviation safety, and the impediment to those efforts posed by the use of such information for what are broadly characterised as “inappropriate” purposes.²

1.2 In pertinent part, the 36th Session of the Assembly resolved to *urge* Contracting States to promote:

“[...] a just culture by creating an environment in which the reporting and sharing of information is encouraged and facilitated and in which remedial action is undertaken in a timely fashion when deficiencies are reported”³

1.3 Recognizing, in a related albeit narrower context, that “the protection of certain accident and incident records from inappropriate use is essential to ensure the continued availability of all relevant information to accident investigators in future investigations”, the 36th Session of the Assembly further resolved to urge Contracting States to:

“examine and if necessary adjust their laws, regulations and policies to protect certain accident and incident records in compliance with paragraph 5.12 of Annex 13, in order to mitigate impediments to accident and incident investigation, in consideration of the legal guidance for the protection of information from safety data collection and processing systems issued by ICAO, as set out in Attachment E to Annex 13”⁴

1.4 With particular regard to considerations of “the contribution of a just culture environment to aviation safety” in both contexts, the Technical Commission observed, in its Report to the 36th Session of the Assembly, that useful guidance could be found in Attachment E to Annex 13 — *Aircraft Accident and Incident Investigation* and the then-current edition of the *ICAO Safety Management Manual (SMM)* (Doc 9859). Acknowledging the manifest deficiencies in the latter and the possible need for improvements to the former, however, the Technical Commission commended consideration of Attachment E to Annex 13 to the Accident Investigation and Prevention (AIG) Division Meeting in 2008, and stressed the need to update and improve the guidance provided in the *SMM*.⁵

1.5 The AIG/2008 considered and reported at some length on issues germane to the concept of a “just culture”, making specific recommendations to ICAO on the need to constitute “an appropriate group of experts” to assist ICAO in a review of paragraph 5.12 and Attachment E to Annex 13.⁶ Related issues were considered by the High-level Safety Conference (HLSC) convened by ICAO in

¹ See Working Papers A36-WP/10, A36-WP/71, A36-WP/112, A36-WP/126, A36-WP/224 and A36-WP/232.

² See *Report of the Technical Commission to the 36th Session of the Assembly* (Doc 9899, A36-TE), pp. 12-15 and 17-21.

³ Assembly Resolution A36-7, Appendix A, para 4 c) (Doc 9902)

⁴ Assembly Resolution A36-8, 1 (Doc 9902)

⁵ *Report of the Technical Commission* (Doc 9899, A36-TE), p. 18, paras 28:12 and 28:14.

⁶ *Report of the Accident Investigation and Prevention (AIG) Divisional Meeting* (2008) (Doc 9914), pp. 1.7-2 to 1.7-2

March-April 2010, which also recommended that a multi-disciplinary task force be established for these purposes, having regard, among other things, to the ideas developed in the working papers presented to the HLSC on those issues.⁷

1.6 Australia actively participated in the discussion of these issues, and presented relevant working papers on them, at both the AIG/2008 and the HLSC 2010.⁸ A working paper on aspects of these issues is also presented by Australia to the current session of the Assembly,⁹ to which the ICAO Council has presented three related working papers in which recommendations to the Assembly are accordingly made.¹⁰

1.7 Reflecting the recommendation of the AIG/2008, the current edition of the *SMM* devotes considerable attention to the elements of an effective safety and reporting “culture”. In doing so, the *SMM* offers cogent cautionary observations about the meaning and implications of culture in this context.¹¹ Caution is similarly extended to the meaning and implications of the expression “just culture”.

2. JUST CULTURE AS A CONTESTED CONCEPT

2.1 While there may well be some broad measure of general understanding about what might constitute a just culture in relation to the reporting, disclosure and use of aviation safety-related information, in the absence of a specific, agreed and demonstrably shared understanding of what that expression means, the uncritical adoption of that expression for universal application is at best premature and fraught with risk. ICAO prudently cautions that, having regard to effective systems for safety reporting, “[t]he word culture . . . and the context in which it is used in this case can lead to misperceptions and misunderstanding.”¹² ICAO also states: “Global adoption of a single, common safety or just culture could . . . be considered discriminatory, perhaps even judgemental”¹³

2.2 Most current proposals for just culture predicate on the assumption that clear lines can be drawn between acceptable and unacceptable behaviour. Then, generally without specifying the particular criteria, many of the arguments in support of a just-culture approach to the disposition of safety information further proceed on the false assumption that what is unacceptable behaviour can be ascertained by fixed, circumscribed criteria that are independent of context, language or interpretation. Attempting to identify a particular set of values, policies, procedures and practices as definitively indicative of a just culture implicitly places any alternative set of values, policies, procedures and practices outside the ambit of such a frame. By implication, any approach that fails to satisfy those particular circumscribed criteria becomes “unjust”.

2.3 It is important therefore that there is further consideration of the meaning and practical application of just culture to ensure that the fundamental assumptions on which the concept is based are clearly articulated, broadly accepted and well-understood by everyone involved. At the same time, it may be useful to explore the utility of the term in light of its potentially contentious connotations.

⁷ *Report of the High-Level Safety Conference 2010* (Doc 9935), pp. 1-7 to 1-8.

⁸ See Working Papers AIG/08-WP/30 and HLSC/10-WP/30.

⁹ A37-WP/122 (Agenda Item 25).

¹⁰ Working Papers A37-WP/60, A37-WP/66 and A37-WP/74.

¹¹ *Safety Management Manual (SMM)* (Doc9859), 2nd Edition (2009), pp. 2-23 to 2-30.

¹² *SMM*, 2nd Edition, p. 2-30, para 2.8.21.

¹³ *SMM*, 2nd Edition, p. 2.30, para 2.8.21.

3. SAFETY AND JUSTICE AS A FALSE DICHOTOMY

3.1 Consideration of the factors that govern the use to which various kinds of safety-related information might be put invariably revolve around the propriety of the use of such information exclusively for safety-related purposes, on the one hand, and for a range of other improper purposes, variously described as involving disciplinary, civil, administrative and criminal proceedings, on the other.¹⁴

3.2 Although their form and content may vary from jurisdiction to jurisdiction, civil, administrative and criminal proceedings are generally types of judicial or otherwise legal proceedings. Recognizing that there will be differences in this context as well, disciplinary proceedings generally contemplate processes by which an employee of an organization may be brought to account and negatively sanctioned by his or her employer because of conduct in which the employee has been found to have engaged. In all such cases, the essential objectives of these proceedings are, in the first instance to establish and attribute blame, fault and or culpability for an act or omission, and then to (a) impose an obligation to pay compensation for the harm or damage done; (b) constrain or prohibit a person from exercising certain privileges; and/or (c) penalise the person for their conduct.

3.3 The proceedings and processes mentioned in paragraph 3.2 are elements of a State's system of justice, or in the case of organizational disciplinary proceedings, actions usually undertaken within a legally established or legally ordained industrial relations framework. All of these proceedings include processes that are implicitly directed toward an objective other than the enhancement of safety and/or the prevention of accidents.

3.4 In many cases, however, administrative proceedings are initiated by the aviation safety regulator solely in the interests of safety; that is, for the primary purpose of preventing (or minimizing the likelihood of) an accident. To achieve this purpose, the most suitable administrative action may involve the variation, suspension or in some cases even the cancellation of a person's civil aviation authorization. This is certainly the case in Australia.

3.5 Similarly, an employer may take action to enhance an individual's skills and competence, and to prevent or limit that individual from performing aviation-related activities until an acceptable level of competence can be demonstrated. Where action is taken for this purpose, its objective is safety.

3.6 It is wrong to characterize the safety actions taken by regulators and employers described in paragraphs 3.4 and 3.5 as inappropriate. This does not mean that the impact of such actions may not have an influence on the free flow of information because of the sometimes serious consequences that arise from these actions for a person or an organization. As serious as they may be, however, the occurrence of such incidental consequences does not make the actions giving rise to them inappropriate.

3.7 The free flow of safety information can still be managed by balancing the impact on the free flow of safety information generally against the need to take safety action in a particular instance. In striking that balance, action necessary to minimise or eliminate a serious and immediate danger to safety is likely to allow for a greater disclosure from protected sources of safety information than the case may be where safety-related action is not necessary to address a serious and immediate danger to safety.

¹⁴ See Annex 13, para 5.12.1, *Note 1*, and Attachment E to Annex 13, para 3.5.

3.8 No concept of just culture should preclude the possibility that there are a range of actions that may be taken by aviation safety regulatory authorities and other employing organizations which properly balance the impact on the future free flow of safety information against the safety-related objective of taking those actions in particular cases. However, the standard contained in paragraph 5.12 of Annex 13, the guidance in Attachment E to Annex 13, the *SMM* and other materials dealing with the same considerations may not provide the appropriate mechanisms for the release of safety information in circumstances that require preventative safety action to be taken.

4. THE LEGAL CONTENT OF A CONCEPT OF JUST CULTURE

4.1 Much of the literature supporting the development and implementation of a just culture in the aviation community seems to be at pains to underscore a distinction between justice and what the law in different jurisdictions requires and permits. This is particularly apparent in connection with discussions about the criminalization of aviation accidents and what are described as genuine mistakes in aviation-related contexts. At the same time, however, the same literature is quick to exclude from the protections provided by a just culture reporting regime, conduct characterized as wilful, deliberate, intentional or amounting to recklessness or gross negligence.

4.2 Noting that the meaning and import of these decidedly legal terms vary among major legal systems, and from jurisdiction to jurisdiction even within the same legal system, the use of these terms in, and the importation of these decidedly legal concepts into, the discourse on just culture that so often essays to distance itself from the courts and the law, is unhelpful.

4.3 Without foreclosing what can and should be a round and vigorous discussion on the circumstances under which certain kinds of safety-related information may and may not properly be used for various purposes, unless the fundamental premises of these discussions are to be altered significantly, the decidedly legal nature of the issues involved in these considerations should be explicitly recognized, and reflected in the composition of the multidisciplinary task force contemplated by Recommendation 2/4 of the High-Level Safety Conference.¹⁵

5. CONCLUSION

5.1 Complementing the discussion reflected in, and which will presumably be generated by, the relevant Assembly working papers presented by the ICAO Council,¹⁶ the working papers expected to be presented by other States and organizations on these issues, and Australia's working paper on the topic,¹⁷ this Information Paper is intended to draw attention to the need to give careful consideration to the use and application of the expression just culture and the importance of ensuring that useful mechanisms for encouraging the free and frank disclosure of information are rationally balanced with the need to take critical safety-related action in particular cases.

— END —

¹⁵ See Working Paper A37-WP/74.

¹⁶ See Working Papers A37-WP/60, A37-WP/66 and A37-WP/74.

¹⁷ Working Paper A37-WP/122 (Agenda Item 25).