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ASSEMBLY — 40TH SESSION

LEGAL COMMISSION

Agenda Item 40: Other issues to be considered by the Legal Commission

CRIMINALIZING ACCIDENTS AND INCIDENTS THREATENS AVIATION SAFETY

(Presented by Flight Safety Foundation)

EXECUTIVE SUMMARY

This Information Paper addresses criminalization of accidents and incidents, and the accompanying risks for aviation safety. Criminalizing an aviation accident or incident shifts the safety investigation's focus from determining the cause of the accident or incident and preventing it from re-occurring to apportioning blame and liability on aviation stakeholders. Recently, Flight Safety Foundation has seen criminal prosecutions and threat of legal proceedings against aviation professionals and organizations during safety investigations for honest mistakes. This trend is likely to have a chilling effect on the flow of critical safety information during safety investigations and a long-term negative impact on global aviation safety.

Flight Safety Foundation invites the Assembly to:

- a) Review and strengthen the existing ICAO legal guidance developed to assist States in enacting and implementing national laws and regulations to effectively protect safety information collected from mandatory and voluntary safety reporting systems, while allowing for the proper administration of justice;
- b) Urge all Contracting States to examine their existing laws and regulations, and adjust as necessary, or enact laws and regulations to effectively protect safety information from being used in disciplinary, civil, administrative or criminal proceedings based, to the extent possible, on ICAO legal guidance; and
- c) Provide a progress report to the next ordinary Session of the Assembly on this matter.

<i>Strategic Objectives:</i>	This working paper relates to Safety Strategic Objectives.
<i>Financial implications:</i>	Not applicable.
<i>References:</i>	Annex 13, <i>Aircraft Accident and Incident Investigation</i> Annex 19, <i>Safety Management</i>

1. INTRODUCTION

1.1 Under ICAO Annex 13 on *Aircraft Accident and Incident Investigation* (“Annex 13”), the safety investigation’s sole purpose is the prevention of future accidents and incidents, including the determination of causes and, where appropriate, the provisions of safety recommendations. An increase in legal actions that criminalize aviation accidents and incidents is likely to have a chilling effect on the flow of critical safety information and a long-term adverse impact on aviation safety.

2. BACKGROUND

2.1 Flight Safety Foundation and many other aviation stakeholders have long held that the safety of the traveling public and the continued improvement of the aviation industry’s safety performance depend on an open, cooperative, and non-punitive environment. This climate of openness and cooperation allows safety investigators to determine the probable causes of accidents and incidents and to make appropriate safety recommendations to ensure that similar accidents or incidents do not happen again.

2.2 Following recent civil aviation accidents and serious incidents, Flight Safety Foundation has noted cases of criminal litigation and threats of legal actions against individuals or organizations.

3. DISCUSSION

3.1 The primary objective of an aviation accident investigation is to determine the probable causes and contributing factors, not to apportion blame or liability on flight crews, maintenance employees, management and executives of aviation organizations, regulatory officials or air traffic controllers. When safety investigators identify the causes of an accident or serious incident, aviation professionals are better equipped to address safety issues and prevent future accidents or incidents.

3.2 The civil aviation industry is largely human-centric and human errors are inevitable. The redundancies and mitigations in our current processes, as well as the reporting of safety information, including errors, have helped identify these hazards so that in commercial aviation, there are fewer than three accidents per million flight sectors. Learning from those errors is necessary to maintain and improve upon this outstanding performance and to reduce the risk of similar accidents or incidents.

3.3 The aviation industry’s remarkable safety record is due in large part to the willingness of all aviation stakeholders to fully cooperate with investigation authorities. The benefit of collecting accurate safety information to increase safety standards and reduce recurring accidents and incidents outweighs the retributive satisfaction of a criminal prosecution, conviction or punishment. States should prioritize the improvement of aviation safety through safety information collection, sharing, and protection over criminal prosecutions or other disciplinary proceedings for inevitable human errors.

3.4 Section 3.1 of Annex 13 expressly provides that the safety investigation of accidents or incidents is not conducted to apportion blame or liability. For this purpose, Annex 13 provides that safety investigation records shall not be disclosed or made available for purposes other than the accident or incident investigation, unless the judicial authority deems that the disclosure is necessary for the proper administration of justice.

3.5 Annex 19 on *Safety Management* (“Annex 19”) also recognizes the need to protect safety information from inappropriate use or use for purposes other than safety to ensure the continued availability and exchange of safety information among aviation stakeholders. Attachment B to Annex 19 provides guidance for States to enact laws and regulations to protect safety information collected from safety reporting systems, which include accident and incident investigation records.

3.6 It is unrealistic to expect that aircraft accidents will not, in some cases, result in civil or criminal legal proceedings. Evidence of wilful acts of misconduct, intentional failures to follow procedures, or egregious reckless behaviour should result in appropriate enforcement action or, in some cases, criminal prosecution.

3.7 However, all parties involved in an aviation accident or incident must keep in mind that criminal investigations and other judicial actions hinder the collection and sharing of critical safety information during a safety investigation, impact the future availability of safety information, and in the end, interfere with the successful prevention of future accidents and incidents.

4. CONCLUSIONS

4.1 The Assembly is invited to consider the following:

4.1.1 That the safety investigation’s sole purpose is to determine the probable cause of an accident or incident, and to provide recommended safety measures to prevent future accidents or incidents, not apportion blame or liability;

4.1.2 That, except in cases of reckless conduct, gross negligence or wilful misconduct, any disciplinary, civil, administrative and criminal proceedings will have an adverse negative impact on aviation safety and are not in the public’s best interest;

4.1.3 That all Contracting States be urged to examine their existing laws and regulations, and adjust as necessary, or enact laws and regulations to effectively protect safety information from being used in disciplinary, civil, administrative or criminal proceedings based, to the extent possible, on ICAO legal guidance;

4.1.4 Reiterate the need for all Contracting States to adopt and use authoritative safeguards to protect safety information and guard against the misuse of safety information and balance the interests of aviation safety with the need for the proper administration of justice;

4.1.5 That Contracting States be encouraged to follow Just Culture principles before initiating investigations or pursuing criminal prosecutions in the wake of aviation accidents;

4.1.6 That all Contracting States safeguard safety investigation reports and probable cause conclusions from premature disclosure and direct use in civil and criminal proceedings; and

4.1.7 That all Contracting States remind accident investigation authorities to assert strong control over accident and incident investigations, invite international cooperation in investigations, conduct investigations deliberately and avoid a “rush to judgment,” ensure the free flow of critical safety information, and swiftly address any acts or omissions in violation of aviation standards.

4.2 The Assembly is also invited to request ICAO to:

4.2.1 Review and strengthen the existing ICAO legal guidance developed to assist States in enacting and implementing national laws and regulations to effectively protect safety information collected from mandatory and voluntary safety reporting systems, while allowing for the proper administration of justice; and,

4.2.2 Provide a progress report to the next ordinary Session of the Assembly on this matter.