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WORKING PAPER

ASSEMBLY — 36TH SESSION

TECHNICAL COMMISSION

Agenda Item 28: Protection of certain accident and incident records and of safety data collection and processing systems in order to improve aviation safety

ENHANCEMENT OF FUNDAMENTAL PRINCIPLES CONCERNING CONFIDENTIALITY AND THE NON-PUNITIVE NATURE OF SAFETY INFORMATION

(Presented by Australia)

EXECUTIVE SUMMARY

Safety investigation is dependent on a free-flow of information from the aviation industry that it serves. This free-flow of information is founded on trust — trust that the information divulged will not be used inappropriately for punitive purposes, trust that the information will be afforded the requisite confidentiality, and trust that the information will be used for the purpose of advancement of aviation safety. That trust is based, amongst other things, on industry consultation that leads to appropriate legislated protections for the safety information, with clearly defined exceptions. These requirements lie behind the operative functions of safety investigation detailed in Annex 13 — *Aircraft Accident and Incident Investigation*.

The task of continuing to reduce aviation's accident rate during a further period of predicted rapid expansion presents a unique challenge to the aviation industry. One tool highlighted by ICAO and the Global Aviation Safety Roadmap, as a prospective major contributor in achieving a reduction in the accident rate, is the further development of safety investigation and safety information systems, as well as a global sharing of this information. Recent amendments to Annex 13, and the introduction of Attachment E, are positive steps towards achieving global harmonization of national laws, to the extent practicable, for the protection of safety information. Australia encourages ICAO to continue its work in the development of Annex 13 in the interests of achieving clarity and the right balance. There is a need for continued inquiries to determine the effectiveness of the goal of harmonization of protections for safety information.

Action: The Assembly is invited to amend Assembly Resolution A31-10 and to take action as in paragraph 6 below.

<i>Strategic Objectives:</i>	This working paper relates to Strategic Objectives A and F in support of enhancing global civil aviation safety and strengthening the law governing international civil aviation.
<i>Financial implications:</i>	Nil. Australia considers that the proposed action is able to be borne under the current budget for the Legal Bureau.
<i>References:</i>	Doc 7300, <i>Convention on International Civil Aviation</i> Annex 13 — <i>Aircraft Accident and Incident Investigation</i> Doc 9848, <i>Assembly Resolutions in Force (as of 8 October 2004)</i> A35-WP/91 <i>Protection of Cockpit Voice Recordings (28 June 2004)</i> Global Aviation Safety Roadmap, <i>Parts 1 and 2</i> (www.icao.int/fsix)

1. INTRODUCTION

1.1 A successful aviation safety reporting and investigation system is based on a strong foundation of trust between the accident investigation authority and the aviation industry it serves. Trust engenders a free-flow of safety information, this being the foundation on which aviation safety is to be progressed. That trust is based, amongst other things, on appropriate legislated protections for the safety information regarding confidentiality and prevention from punitive use. Any exceptions to the protections must be clearly defined and operate in a manner that strikes an appropriate balance between the need for disclosure and the need to protect the safety information which underpins the safety reporting and investigation system.

1.2 Annex 13, Standard 3.1, identifies the principle that safety investigation of an accident or incident is to be non-punitive. Standard 5.12 requires that certain records in an accident investigation be protected from disclosure. Attachment E, adopted in November 2006, provides guidance for the protection of safety information from inappropriate use. Standards 3.1 and 5.12, as well as Attachment E, acknowledge that the vast majority of aviation accidents and incidents are the result of human error where no malice is intended and that protections for information from the reports and investigations of these events are appropriate. Australia strongly supports this ideology but is also concerned to ensure that the protections do not have the result of inadvertently inhibiting the advancement of safety. The protections need to be clear and workable. The aim of this paper is to promote the need for the protection of sensitive safety information while arguing that more work may be required to ensure they can be implemented.

2. BACKGROUND

2.1 Australia informed the 35th Session of the Assembly of the strong protections that have been afforded Cockpit Voice Recorders (CVRs) under the *Transport Safety Investigation Act 2003* (TSI Act) and the *Civil Aviation Act 1988* (see A35-WP/91). Powers in the TSI Act are vested in the Executive Director and the staff of the Australian Transport Safety Bureau (ATSB). The TSI Act provides powers to investigate safety accidents and incidents, as well as requiring compulsory reporting of accidents and a predetermined set of serious and other incidents. In accordance with the no-blame and confidentiality principles required under Annex 13, the TSI Act provides extensive protection to a broad range of safety information that goes beyond the categories listed in Standard 5.12. Information is divided into two categories:

- a) On Board Recordings (OBR): Information derived from cockpit video and/or voice recordings. Such information may not be used for disciplinary purposes against an employee, or as evidence in criminal proceedings against a crew member. OBR are also prohibited from being used in civil proceedings, other than in accordance with the exception criteria prescribed in Standard 5.12, with an added protection that the Executive Director of the ATSB must first authorise the release of OBR information; and
- b) Restricted Information: Essentially all other types of non-public information gathered during the course of a safety investigation. Such information may only be disclosed by the ATSB to facilitate transport safety, subject to strict disclosure criteria with respect to release of associated personal information. A court in civil proceedings may also require disclosure of restricted information, subject to the exception criteria prescribed in Standard 5.12 and the agreement of the Executive Director. Further, the TSI Act contains coercive information gathering powers. A person answering a

question or providing information in response to the exercise of a coercive information power is required to forgo their right not to incriminate themselves. However, in its place, the evidence, and anything derived from the evidence is protected from use in civil or criminal proceedings.

2.2 Since the 35th Session of the Assembly, Australia has implemented a new voluntary and confidential reporting scheme (REPCON) to supplement the broad mandatory reporting system contained in the TSI Act and associated regulations. The REPCON legislation was developed through extensive consultation with the Australian aviation industry. Industry consultation and support is a necessary process required to achieve the right balance between confidentiality and exceptions to confidentiality that are at the heart of a voluntary reporting scheme. The consultation process created a culture of trust in REPCON, without which the system could not be effective. REPCON requires confidentiality for the reporter and for a person referred to in a report. Confidentiality for the reporter is an integral element of the scheme necessary to encourage industry participation without fear of reprisal. Confidentiality for any person referred to in a report guarantees that the scheme is directed towards providing information to the industry to address a safety issue rather than prosecuting an individual. Exceptions to these protections are clearly defined and only provided where necessary. For example, the confidentiality regime does not apply to matters involving a serious and imminent threat to a person's health or life, or when the reported matter involves serious crime. A detailed description of the operation of the REPCON scheme is at Appendix A.

2.3 Where malice, security breach, or breach of safety regulation may be involved, the TSI Act and REPCON do not prevent another authority from conducting a parallel investigation to ascertain blame or fault. The aim of the parallel systems of investigation is to ensure that the principles of confidentiality and no-blame investigation—the foundation of an open safety investigation system—are not breached. This is particularly important when evidence that might incriminate is compelled. Where a parallel investigation is warranted, arrangements exist to ensure that a criminal or regulatory enforcement investigation is not denied access to evidence. Australia has found that the development of Memoranda of Understanding between the ATSB and other agencies are a useful tool for achieving this outcome. Arrangements exist so that other agencies are able to independently source their own evidence.

2.4 Australia has also introduced new legislation that has affected the workings of the regime for the protection of confidential information obtained during a transport safety investigation—the *Inspector of Transport Security Act 2006* (ITS Act). The ITS Act allows for independent, no-blame transport security investigations in a manner similar to that under which a safety investigation is conducted under the TSI Act. The ITS Act contains protections for confidential information equivalent to those in the TSI Act. As the security investigation process has a similar goal to a safety investigation, with equivalent processes, the ITS Act contains provisions that allow the ATSB to release confidential information to the Inspector of Transport Security (the Inspector). However, the ATSB is not bound to comply with a request from the Inspector to disclose any confidential information. Further, the ATSB must believe that any adverse effect that the disclosure may have on current or future investigations is outweighed by the public interest served by disclosing the information to the Inspector. Details of the interaction between the Security Investigation and Safety Investigation systems are included in Appendix B.

2.5 The foundation that underpins the whole structure described above is the no-blame and confidentiality principles with clear, just exceptions. There must be an understanding and awareness of the fact that jeopardising these principles could mean the effectiveness of the system, and the advancement of aviation safety, will be significantly diminished.

3. IMPORTANCE OF ALL STATES COMPLYING WITH ANNEX 13

3.1 Release of confidential information for purposes contrary to that which is authorised by Annex 13 has a fundamental effect on a safety investigation system. The consequences of inappropriate judicial and criminal interference into safety investigations have been more than adequately demonstrated on the international arena, as evidenced by the withdrawal of cooperation by accident investigation participants as well as the disabling of important cockpit recording devices (not to mention incarceration of aircraft crew). When safety information is shared with other nations it is done so on the premise that the principles of confidentiality and non-punitive action, as prescribed in Annex 13, are respected by the receiving State. When this is not the case, and confidential information is released or used for purposes which conflict with the principles of confidentiality and non-punitive action, the support of the aviation industry for the investigation system in the originating State is jeopardised. The result is a reduction in the effectiveness of the safety investigation system of the nation that provided the information.

3.2 Australia will continue to share information gathered through its safety investigation processes with other States as required by Annex 13. However, Australia proposes that the requirement to cooperate under Annex 13 should be balanced against the adverse effect that the exchange of information could have on an investigation by the State exchanging the information, where the other State does not comply with the protection of information Standards in Annex 13. As reinforced by the Global Aviation Safety Roadmap (GASR), ICAO must continue in its efforts to have all nations subscribe to the non-punitive and confidentiality principles prescribed in Standards 3.1 and 5.12. However, while this point is made, Australia suggests that the detail of Standard 5.12 needs to be reviewed with the potential for amendment, as outlined below, so that the Standard is practicable and workable for the purposes of enhancing aviation safety.

4. REVIEW AND AMENDMENT OF ANNEX 13

4.1 Australia notes that Attachment E contains inconsistencies with Standard 5.12. Attachment E, section 4, paragraphs a) and b) propose exceptions to the requirement to keep safety information confidential. Australia supports the thrust of these exceptions, but notes that they are not subject to the criteria, expressed in Standard 5.12, requiring a decision of the appropriate authority for the administration of justice before the information is disclosed. Attachment E, section 4, paragraphs a) and b) conflict with Standard 5.12 of Annex 13. This needs to be reviewed to determine whether either Standard 5.12 or the Guidelines need to be amended.

4.2 Noting Australia's comment above, on the application of the requirement in 5.12 for the appropriate authority for the administration of justice to make a decision on whether information is disclosed, Australia suggests that there do need to be exceptions to this requirement. Emergency situations are an example, such as where the disclosure of the information is necessary in order to prevent or lessen a serious and imminent risk to a person's life or health. Another would be where the disclosure is necessary to prevent a serious criminal offence. Given the time constraints in these circumstances, it may not be appropriate for the accident investigation agency to have to first contact 'the appropriate authority for the administration of justice' in order for that authority to grant disclosure. Australia suggests a revision of Standard 5.12 to take into account these types of exceptions.

4.3 Annex 13 should also be reviewed to determine whether 5.12 should permit the exchange of information between two agencies within a State, both of which observe the no-blame and confidentiality principles and protect the information in the methods required by Annex 13. Australia's

situation with the establishment of the Inspector of Transport Security under the ITS Act is an example. Annex 13 should be amended to reflect that in such circumstances it is not necessary to seek a decision from the appropriate authority for the administration of justice.

4.4 Australia also reiterates previous submissions to the Assembly (see A35-WP/91 section 3) that the operation of Standards 5.12 and 5.10 in Annex 13, covering the protection of safety information, requires clarification. The consistency of these paragraphs, and in particular the intent of paragraph 5.10 and its operation within Annex 13, needs to be considered.

4.5 Further, Australia suggests that Annex 13 should be reviewed to determine whether the restrictions in Standard 5.12 need to be adjusted to address disclosure of information in other circumstances. The Council may look at how disclosure for administrative action fits in with the regime in 5.12. Administrative action being where disclosure is for the purpose of varying, suspending or cancelling a civil aviation authorization where there is a real or suspected risk to aviation safety. To what extent is disclosure for these purposes considered inappropriate under Standard 5.12? Another question is: do all categories of information need to be afforded the same level of protection in all circumstances? Does a statement from an uninvolved third party bystander, in relation to an accident, need to be afforded the same level of protection as a statement from a crew member?

4.6 Australia suggests that the issues and questions raised need to be considered further by the Council. The development of the Guidelines in Attachment E does not complete the work on the protection of sensitive safety information from safety data collection systems. Australia would be prepared to provide further input at the proposed Accident Investigation and Prevention (AIG) Divisional Meeting on Annex 13 in October 2008. Additionally, the draft Assembly resolution at Appendix B to the Council's Working Paper A36-WP/10 contains a clause instructing the Council to provide a progress report to the next Ordinary Session of the Assembly on the extent to which States have implemented the Guidelines. This report should also seek to address the concerns raised above, in the interests of assessing the effectiveness of the guidelines and the regime for the protection of sensitive safety information as a whole. Taking on this task is consistent with the objective in the GASR of ensuring that there are structured programmes which effectively implement an open reporting environment and a just culture for the systematic collection, analysis and dissemination of safety information.

5. CONCLUSION

5.1 The task of continuing to reduce aviation's accident rate during a further period of predicted rapid expansion presents a unique challenge to the aviation industry. One tool highlighted by ICAO and the GASR as a prospective major contributor in achieving a reduction in the accident rate is the further development of the safety investigation and safety information systems, as well as a global sharing of this information. The success of these systems is dependant on the aviation industry's trust that information divulged to these systems will not be inappropriately used for punitive purposes and that requisite confidentiality is maintained. This may only be achieved through legislative guarantees which meet, at a minimum, the principles and Standards contained within Annex 13, and in particular Standards 3.1 and 5.12 and Attachment E. However, these Standards and principles need to be workable and clearly articulated. Recent amendments to Annex 13 and the introduction of Attachment E are positive step but further work is required. Australia encourages ICAO to continue its work in the development of Annex 13 in the interests of achieving clarity and the right balance.

6. **ACTION BY THE ASSEMBLY**

6.1 The Assembly is invited to:

a) Amend Assembly Resolution A31-10 to include the following preamble:

“Recognising that open safety investigation systems depend on principles of non-punitive action and confidentiality guarantees;

Recognising that sharing of safety information derived from safety investigation systems depends on all States respecting the non-punitive and confidentiality guarantees that underpin the generation of that information;”

b) Amend Assembly Resolution A31-10 to include the following directive:

“Urges all States which receive safety information derived from another State’s safety investigation system to respect the system of confidentiality and disclosure principles under which the providing State generated that information;” and

c) Request the Council to instruct the Legal Bureau to review the following matters concerning Annex 13:

- 1) the consistency between Attachment E, section 4, paragraphs a) and b) and the Standard in 5.12 of Annex 13; and
- 2) the need to look at the appropriateness of the restrictions in Standard 5.12 preventing disclosure in the following circumstances:
 - to prevent or lessen a serious and imminent risk to a person’s life or health,
 - to prevent a serious criminal offence;
 - to take administrative action where there is a real or suspected risk to aviation safety; and
 - to disclose benign information that is unlikely to affect the free flow of information in the future;
- 3) The need to Amend Standard 5.12 to enable sharing of safety information between authorities within one State when both authorities meet the principles of no-blame and confidentiality required to protect the safety information under Annex 13; and
- 4) Consider the operation and consistency of Standard 5.10 within Annex 13, and in particular with respect to Standard 5.12, as raised in A35-WP/91 section 3.

APPENDIX A

THE AUSTRALIAN AVIATION CONFIDENTIAL REPORTING SCHEME

1. BACKGROUND

1.1 Annex 13 Recommendation 8.2 recommends States establish a voluntary incident reporting scheme that supplements mandatory accident and incident reporting. From 1988 Australia met this Recommendation through the Confidential Aviation Incident Reporting (CAIR) scheme. However, CAIR was based on an administrative guarantee of confidentiality only. In response to Annex 13 Standard 8.3, which requires supplementary reporting schemes to be non-punitive with a system of protection for the source of submitted information, Australia recently introduced the *Air Navigation (Confidential Reporting) Regulations 2006* (ANCR Regulations). These regulations create the REPCON (short for Report Confidentially) scheme. REPCON is distinguished from CAIR through its legislative guarantee of confidentiality and protections from punitive use for the information contained in a REPCON report.

2. THE AUSTRALIAN REPCON SYSTEM

2.1 REPCON provides a scheme for the confidential reporting of aviation safety concerns. Its aim is to identify and counter unsafe procedures, practices or conditions in order to prevent or lessen the likelihood of aviation accidents and incidents. The ANCR Regulations allow the ATSB to achieve this objective through issuing information briefs and alert bulletins. Information from a brief or an alert can be used by the industry to change operational practices, or by the regulator to make changes in the regulatory system or introduce additional education campaigns or surveillance.

2.2 The ANCR Regulations require confidentiality for the reporter, an integral element of the scheme necessary to encourage industry participation without fear of reprisal. The Regulations also protect any person referred to in a report, the aim of which is to guarantee that the scheme is directed towards providing information to the industry to address broad safety issues rather than punitive measures being directed at individuals. REPCON reports cannot be admitted as evidence in a court or tribunal, or relied upon for making an administrative decision or taking disciplinary action against a person. Information from a report that is inappropriately admitted as evidence in a court or tribunal may result in a negative impact on the scheme as a result of declining support in the aviation community. Parties involved in court or tribunal proceedings must gather their own evidence separately from the REPCON scheme. There are two exceptions to the prohibition on the use of report material in court proceedings:

- a) proceedings in relation to a person who intentionally provides false or misleading information — the aim of which is to deter vexatious reporters from abusing the scheme; and
- b) where a Reportable Safety Concern has resulted in administrative or disciplinary action — the contents of the report being admissible in court should the reporter or

person named in a report seek to appeal against that action on the basis of misuse of information in a REPCON report.

2.3 It is recognised that some reports about aviation safety concerns may have implications outside of aviation safety reporting and therefore should be brought to the attention of the appropriate agencies. The ANCR Regulations therefore acknowledge the need to exclude certain matters from the operation of the regulations, those being where there is a serious or imminent threat to a person's health or safety, acts of unlawful interference, industrial relations issues, and conduct that is punishable by a maximum penalty of more than two years imprisonment (hereafter referred to as a serious offence). In these circumstances, the ATSB recommends the reporter go directly to the responsible body, for example, the police or a regulatory authority. When a report concerns a serious offence, a matter which is specifically excluded from the scheme, the Regulations permit the ATSB to disclose personal information given by the reporter for the purpose of investigating the offence, but such disclosure is not mandated. When making the decision to disclose personal information, the primary concern is to protect the scheme, being aware that maintaining the industry's trust in the scheme is vital to ensuring that the industry continues to use it.

2.4 The REPCON scheme is not a substitute for the mandatory accident and incident reporting scheme contained in the *Transport Safety Investigation Act 2003*. Reporters are not excused from their mandatory reporting requirements in the open reporting system.

APPENDIX B

THE INSPECTOR OF TRANSPORT SECURITY ACT

1. Australia has created the office of the Inspector of Transport Security (the Inspector) through the instrument of the *Inspector of Transport Security Act 2006* (ITS Act). The Inspector conducts independent and impartial inquiries into Australia's transport security arrangements. The Inspector is not responsible for regulating transport security in Australia — that role falls to the Office of Transport Security in the Australian Government Department of Transport and Regional Services and to various Australian States and Territories — nor is it a law enforcement agency. It is the security equivalent to the safety investigator. The legislative framework to support the role of the Inspector of Transport Security follows the same no-blame confidentiality principles that underpin safety investigation, and include:

- a) the independence of the Inspector;
- b) the no-blame nature of the Inspector's inquiries, where, except for coronial inquiries, the Inspector, employees or third parties involved in an inquiry cannot be compelled to provide evidence in any proceedings;
- c) protection of information collected as part of the inquiry, where all information gathered in the course of an inquiry is exempt from freedom of information legislation. Further, information provided to the Inspector in the course of an inquiry is protected from release; and
- d) the recognition that the work of other investigative agencies should not be interfered with by inquiries undertaken by the Inspector.

2. The ITS Act does not contain any coercive information gathering powers, but, as described above, it does contain strong protections for evidence gathered by the Inspector. The ITS Act also contains a special regime for the protection of information supplied by the safety investigator — the Australian Transport Safety Bureau (ATSB). The ITS Act enables the Executive Director of the ATSB to release confidential information to the Inspector. However, the Executive Director is not required to provide the information. Further, before deciding to release the information the Executive Director must be satisfied that the public interest in the disclosure to the Inspector is outweighed by any adverse impact on an investigation being conducted by the Executive Director. The Inspector may also use disclosed safety information in an inquiry or in a report, however such usage with or without subsequent disclosure is bound by strict criteria for release and restrictions on what may be released.

3. Confidential information received in the course of a safety investigation and released to the Inspector by the Executive Director, may be disclosed by the Inspector for civil proceedings as a result of a court order, where:

- a) the court is satisfied that the administration of justice outweighs the impact that release will have on any current or future inquiry; and
- b) the responsible Australian Government Minister has issued a certificate stating that disclosure will not interfere with any safety or security investigation.

4. The same considerations apply to disclosure for criminal proceedings, with the added criteria that the alleged criminal offence is a serious offence and that disclosure is necessary to establish proof of handling of evidence during the safety investigative phase. But the overriding consideration is that the safety information is only disclosed to the Inspector by the Executive Director after the Executive Director has determined that the public interest is served by disclosing that information to the Inspector and that the public interest outweighs any adverse affect on any current or future investigation conducted by the Executive Director.

— END —