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Paper for the House Committee meeting on 6 October 2017

**Report of Subcommittee on Hong Kong Civil Aviation
(Investigation of Accidents) (Amendment) Regulation 2017 and
Air Navigation (Hong Kong) Order 1995 (Amendment) Order 2017**

Purpose

This paper reports on the deliberations of the Subcommittee on Hong Kong Civil Aviation (Investigation of Accidents) (Amendment) Regulation 2017 and Air Navigation (Hong Kong) Order 1995 (Amendment) Order 2017.

Background

2. Civil aviation accident investigation is conducted in accordance with the Hong Kong Civil Aviation (Investigation of Accidents) Regulations, Cap. 448B with reference to the requirements of the International Civil Aviation Organization ("ICAO") as stipulated in the Standards and Recommended Practices on the manner of civil aviation accident investigation in "Annex 13 to the Convention on International Civil Aviation – Aircraft Accident and Incident Investigation" ("Annex 13").

3. The objective of civil aviation accident investigation is to identify the causes of accidents or serious incidents involving civil aircraft rather than to apportion blame or liability. According to Annex 13, an ICAO Contracting State is obliged to conduct investigation into civil aviation accidents or serious incidents which occur in its territory. It is also entitled to participate in the investigation of accidents or serious incidents which occur outside its territory but involve aircraft under its registry. A State may also participate in the investigation of aircraft accidents or serious incidents where fatalities or serious injuries to its citizens are involved.

4. Hong Kong, being part of China which is one of the 191 Contracting States of ICAO, has an obligation to meet the Standards and requirements set by ICAO on the investigation of civil aviation accidents. Under the current arrangement, Director-General of Civil Aviation ("DGCA") is appointed by the Chief Executive ("CE") as the Chief Inspector ("CI") responsible for investigating civil aviation accidents in accordance with Cap. 448B and Annex 13.

Hong Kong Civil Aviation (Investigation of Accidents) (Amendment) Regulation 2017

5. The Hong Kong Civil Aviation (Investigation of Accidents) (Amendment) Regulation 2017 ("L.N. 115"), made by the CE in Council under section 13 of the Civil Aviation Ordinance, Cap. 448, amends Cap. 448B to implement the latest requirements of ICAO on aircraft accident and incident investigation. The main amendments include:

- (a) transferring the air accident investigation-related powers of DGCA to the future CI (who is directly accountable to the Secretary for Transport and Housing ("STH")) leading the new air accident investigation authority ("AAIA") to be set up under the Transport and Housing Bureau ; and
- (b) with reference to Annex 13, amending definitions relevant to civil aviation accident investigation (including "accident" and "incident") and adding a new definition of "serious incident".

6. L.N. 115 also provides for transitional arrangements to cater for, among others, the situation where an investigation was commenced by DGCA but not completed before the commencement of L.N. 115.

Air Navigation (Hong Kong) Order 1995 (Amendment) Order 2017

7. The Air Navigation (Hong Kong) Order 1995 (Amendment) Order 2017 ("L.N. 116"), made by CE in Council under section 2A of Cap. 448, amends the Air Navigation (Hong Kong) Order 1995, Cap. 448C to revise certain cross-references relating to Cap. 448B as a result of the amendments made by L.N. 115 to Cap. 448B.

Commencement

8. L.N. 115 and L.N. 116 were gazetted on 9 June 2017 and tabled in the Legislative Council on 14 June 2017. The notices will come into operation on a day to be appointed by STH by notice published in the Gazette.

The Subcommittee

9. At the House Committee meeting held on 16 June 2017, Members agreed that a subcommittee should be formed to examine the subsidiary legislation in detail. The membership list of the Subcommittee is in **Appendix**.

10. Under the chairmanship of Hon Jeremy TAM Man-ho, the Subcommittee held two meetings with the Administration on 26 June 2017 and 3 July 2017.

Deliberations of the Subcommittee

Air Accident Investigation Authority

Justification of setting up the independent authority

11. Members query whether an AAIA with a full time CI and several supporting staff is justified if it only has to conduct a handful of investigations each year. Members also ask if the proposed AAIA would publish annual reports highlighting issues identified from mandatory occurrence reports ("MORs") for the aviation sector's reference. The Administration advises that in addition to accident investigation, AAIA would also be responsible for other duties related to accident prevention and promotion of air safety, as well as communicating with the aviation stakeholders in Hong Kong and other international organizations. It would publish reports on issues of concern to the aviation sector in addition to carrying out investigations into accidents and serious incidents. The workload of AAIA would be reviewed before expiry of the three-year period in the light of actual experience.

Authority to conduct investigation

12. Some members query whether L.N. 115 provides sufficient power for the proposed AAIA to investigate incidents of civil aircraft which in the view of CI significant air safety lessons can be drawn by conducting investigations. Other members also query whether the powers and practice of CI under L.N. 115 would be different from those of DGCA under the current legislation.

13. The Administration advises that, in carrying out an investigation into an incident that is not classified as a serious incident, but one which CI expects that significant air safety lessons can be drawn from the investigation (pursuant to the proposed regulation 8(5)), an Inspector would have all the powers available to him/her for conducting investigation of any serious incident or accident under

the proposed regulation 9. The major changes to Cap. 448B to be effected by L.N. 115 involve the transfer of the powers and functions of DGCA to the proposed CI and aligning the legislation more closely with the latest version of Annex 13. The Administration would examine CI's powers and functions more thoroughly in the next stage of review.

Chief Inspector

14. Members query if the rank of CI, at Assistant Director (D2) level, is comparable to those of other civil aviation jurisdictions, whether ICAO has prescribed the qualification requirements for the position and whether the appointee, at the proposed rank, is senior enough to carry out investigation and deal with other investigation authorities outside Hong Kong independently. The Administration responds that it was up to individual contracting parties to implement Annex 13 and appoint the investigator with suitable qualification and experience to carry out investigation-related tasks.

15. Some members ask if the proposed remuneration package for the proposed CI post would be competitive enough to attract persons with the right calibre and professional background. The Administration advises that the proposed remuneration package should be attractive enough, and Hong Kong being an aviation hub offers opportunities for civil aviation professionals to gain more experience.

Implementation of Annex 13

16. Members query whether ICAO needs to be consulted on the proposed legislation to establish AAIA to ensure compliance with Annex 13. The Administration maintains that there is no need to seek ICAO's consent on any legislation to implement Annex 13, as ICAO's role is mainly to set the standards and general guidelines on accident and incident investigation. It is up to individual contracting parties to implement the Standards and requirements.

Division of work between Chief Inspector and Director-General of Civil Aviation

17. Members discuss whether future MORs would, upon establishment of the proposed AAIA, be submitted to CI instead of DGCA. The Administration advises that detailed division of responsibilities between DGCA and CI in handling of investigation of MORs would be further worked out when the post is filled. The Administration intends that any MOR should be submitted to both DGCA and CI in parallel. CI may then decide whether an investigation should be initiated on his or her own volition. According to the statutory requirement, MORs are reported to DGCA for follow-up.

Protection of investigation information

18. Members discuss whether the regulations should provide for the protection of information given by a witness in the course of AAIA's investigation. The Chairman points out that some pilots have expressed concerns that the evidence they provide may be used by law enforcement authorities in subsequent investigations that may incriminate them. Some members query if CI could refuse requests from law enforcing authorities for information or documents gathered in the course of incident/accident investigations.

19. The Administration advises that the objective of investigation is to identify the causes of the serious incident/accident concerned and ways to prevent recurrence. The investigation is not to assign blame to any party. The investigation authority would notify the stakeholders concerned if their reputation is likely to be adversely affected by a proposed investigation report, and consider any representations made, before finalizing the report. It is up to CE to determine whether an investigation report should be publicized. Even so, documents that are mentioned in the report would not normally be passed to the police for other investigations. Assistant Legal Adviser ("ALA1") expresses similar views on the issue of whether documents mentioned in the report would be handed over to law enforcement agencies for other investigation. The Administration would examine the issue in the next stage of the review targeted to be completed in 2018-2019.

Investigation of incidents or accidents in Flight Information Region

20. Members discuss whether the proposed AAIA would be in charge of an investigation into a serious incident or accident that happened within Hong Kong's Flight Information Region ("FIR"), but in or over another jurisdiction. Members also query whether AAIA would take charge of an investigation that happened in or over Hong Kong but within FIR of another jurisdiction.

21. The Administration advises that the proposed regulation 3(2)(b)(i) provides that Cap. 448B, as amended, applies to an accident or incident that occurs to a civil aircraft in or over Hong Kong. Accordingly, the proposed AAIA would be in charge of an investigation of such accident or incident that occurs in or over Hong Kong but at the same time within another jurisdiction's FIR. In such a case, the provisions in Cap. 448B as amended would apply.

22. The Administration further advises that except where the aircraft to which the accident or incident occurred is a civil aircraft registered in Hong Kong as provided for in the proposed regulation 3(2)(b)(ii), AAIA would not be in charge of an investigation into an accident or incident that occurred within Hong Kong's FIR but in or over another jurisdiction.

23. Members note that Article 130 of the Basic Law stipulates that the Hong Kong Special Administration Region shall be responsible for, among other matters, the provision of air traffic services within Hong Kong's FIR. However, the Administration advises that, according to Annex 11 to the Convention on International Civil Aviation, "air traffic service" is a generic term denoting flight information service, alerting service, air traffic advisory service and air traffic control service. Accordingly, Article 130 of the Basic Law is unlikely to be intended to cover civil aviation accident investigation within Hong Kong's FIR but in or over another jurisdiction.

Incidents or accidents involving a military aircraft

24. Members also query whether the proposed AAIA would be in charge of an investigation into an accident involving a civil aircraft and a military aircraft. The Administration advises that Article 3 of the Convention on International Aviation provides that the Convention is applicable only to civil aircraft and shall not be applicable to state aircraft (including military aircraft). Accordingly, Annex 13 to the Convention is not applicable to accidents or serious incidents in relation to military aircraft. In case where an accident or incident involves both a civil aircraft and a military aircraft, the investigation under Cap. 448B could be carried out with respect to the civil aircraft only.

25. Members note that according to article 37(1) of Cap. 448C, the cockpit voice recorder ("CVR") should always be in use from the beginning of the take-off run to the end of the landing run. The Chairman comments that CVR would normally begin recording when the aircraft's engine starts and would stop when the engine extinguishes. The Chairman points out that it is not an offence under Cap. 448C if an aircraft operator refuses a request from CI to provide the CVR recording during the period when the aircraft taxis its way to the runway before taking-off. He queries whether Cap. 448C should be suitably amended to cater for such situation. The Administration notes the Chairman's concern and would look into the need to further clarify the requirement in section 37 of Cap. 448C in the next stage of the review.

Clause by clause examination

Clause 3(10) of L.N. 115

26. Members query whether an incident involving an uncontrolled aircraft moving on the ground could be regarded as a serious incident that warrants an investigation. The Administration advises that such kind of incident would normally be followed up by the Airport Authority although CI may decide to initiate an investigation if it is considered necessary.

Clause 9 of L.N. 115

27. Members query whether and why police officer and officer of the Customs and Excise Service are by default "authorized persons" under the proposed regulation 7(4). Members query whether a police officer of a certain rank or above would qualify as "authorized person". Members are concerned that the way proposed section 7 is presented may give a police officer, being an "authorized person", an unfettered power to cause the removal of important evidence from an aircraft involved in an accident or serious incident without the authority/supervision of CI. Some members suggest that the authorized person should be required to report to CI on anything that has been removed from the aircraft involved in an investigation.

28. The Administration agrees to examine the Subcommittee's suggestion in the next stage of review, ALA1 indicates that there is no provision in Cap. 448B that provides that an "authorized person" has to be a police or customs officer of a certain rank or above, or that the list of "authorized person" under the proposed regulation 7(4) is exhaustive. ALA1 also observes that an authorized person can be authorized generally or specifically by CI to access an aircraft, as provided under the proposed regulation 7(4), and that the proposed regulation 7(2) and (3) list out certain exceptional circumstances under which an aircraft and/or its contents may be removed or interfered with.

Clause 11(8) of L.N. 115

29. In response to members' query, the Administration advises that there is no requirement for CI to give public notice by a certain date of his/her decision to discontinue an investigation.

Clause 12 of L.N. 115

30. Members ask if the investigation report would have to be cleared by STH before submission to CE under the proposed section 10A to be made under clause 12 of L.N. 115. The Administration advises that CI's investigation report to CE may be copied to STH for reference. However, STH would not edit or change the contents of the investigation report prior to its submission to CE.

Clause 19 of L.N. 115

31. In response to the enquiry from the Subcommittee, the Administration advises that when CE appoints a commission of inquiry into the circumstances and causes of an accident or incident, the investigation being carried out by CI would be discontinued pursuant to the proposed regulation 17(1A). However,

there are no provisions that empower CE to terminate an investigation being conducted by CI.

32. The Subcommittee has completed scrutiny of L.N. 115 and L.N. 116 and supports the amendment regulation and the amendment order. The Subcommittee supports the amendments.

Extension of scrutiny period

33. To allow sufficient time for members' deliberation of the amendment regulation and the amendment order, the Subcommittee Chairman has sought the Council's approval at the meeting of 5 July 2017 to extend the respective scrutiny period. Accordingly, the Council passed the resolution under section 34(4) of the Interpretation and General Clauses Ordinance that the period for amending L.N. 115 and L.N. 116 would be extended to the first meeting of the 2017–2018 session of the Legislative Council to be held on 11 October 2017. Members have been informed that any proposed amendment to L.N. 115 and L.N. 116 would have to be submitted by 3 October 2017.

Advice sought

34. Members are invited to note the deliberations of the Subcommittee.

**Subcommittee on Hong Kong Civil Aviation
(Investigation of Accidents) (Amendment) Regulation 2017 and
Air Navigation (Hong Kong) Order 1995 (Amendment) Order 2017**

Membership List

Chairman Hon Jeremy TAM Man-ho

Members Hon Frankie YICK Chi-ming, SBS, JP
Hon WU Chi-wai, MH
Hon YIU Si-wing, BBS
Hon CHAN Han-pan, JP
Hon Kenneth LEUNG
Hon Alvin YEUNG
Hon Tanya CHAN

(Total : 8 members)

Clerk Mr Daniel SIN

Legal Adviser Miss Joyce CHAN