



Hong Kong Airline Pilots Association

香港民航機師總會

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

30 June 2017

The Chairman,

SAFEGUARDING OF EVIDENCE USED IN AIR ACCIDENT/INCIDENT INVESTIGATIONS

Thank you for including our comments in your subcommittee discussion on 26 Jun 2017. It is our understanding that the Hong Kong Civil Aviation Department and the Hong Kong SAR Government intends to begin work on incorporating ICAO Annex 13 articles into the law of Hong Kong in the following legislative year. We hereby provide the extra information as requested.

Confidentiality Of Air Accident/Incident Investigation Witness Statements

We would like to draw the committee's attention to ICAO Annex 13 (11th edition):

Chapter 5.12 concerns the "**Protection of accident and incident investigation records**".

The paragraph includes "... *all statements taken from persons by the accident investigation authority in the course of their investigation;...*", and, under the Note for 5.12.2, states that "... *The disclosure or use of such information for purposes where the disclosure or use is not necessary in the interest of safety may mean that, in the future, the information will no longer be openly disclosed to investigators.*"

Appendix 2 concerns the "**Protection of Accident and Incident Investigation Records**".

In Note 1, it states "*The disclosure or use of records listed in Chapter 5, 5.12, in criminal, civil, administrative or disciplinary proceedings, or their public disclosure, can have adverse consequences for persons or organizations involved in accidents and incidents, likely causing them or others to be reluctant to cooperate with accident investigation authorities in the future.*" It also covered the "**Balancing Test**" if "*such request if for a record to be disclosed or used in a criminal, civil, administrative or disciplinary proceeding*".

ICAO Annex 13 clearly recommends that the witness statements collected during the investigation are to be protected from use other than for the purpose of accident prevention.

We would also like to draw your attention to two examples of how the recommendations in ICAO Annex 13 have been implemented in local laws and regulations.

European Union - REG EU 996/2010 The investigation and prevention of accidents and



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incidents in civil aviation

(<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2010:295:0035:0050:EN:PDF>)

Section 25) - *“The information provided by a person in the framework of a safety investigation should not be used against that person, in full respect of constitutional principles and national law”.*

Article 14 - Protection of sensitive safety information

1. *“The following records shall not be made available or used for purposes other than safety investigation:*
 - (a) *all statements taken from persons by the safety investigation authority in the course of the safety investigation”.*

Australia - Transport safety Investigation Bill 2002

(<https://www.legislation.gov.au/Details/C2004B01284>)

47 Self-incrimination not an excuse

“(1) A person is not excused from answering a question or producing evidential material in response to a requirement under this Part on the ground that the answer, or the production of the material, might tend to incriminate the person or make the person liable to a penalty.

(2) However, if the person is an individual, then:

- (a) *the answer or the production of the material; and*
- (b) *any information or thing (including any document) obtained as a direct or indirect result of the answer or the production of the material;*

are not admissible in evidence against the person in any civil or criminal proceedings.

(3) Subsection (2) does not prevent an answer being admitted in evidence in criminal proceedings in respect of the falsity of the answer”.

60 Limitations on disclosure etc. of restricted information

Courts

“(6) If the court is satisfied that any adverse domestic and international impact that the disclosure of the information might have on any current or future investigations is outweighed by the public interest in the administration of justice, the court may order such disclosure”.



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The above examples echo our positions on “data collected not be used in any subsequent criminal or civil proceedings, nor released to any outside agency”. It is our contention that in order to properly investigate the causal factors leading to an incident/accident, witnesses giving evidence to an air accident/incident enquiry should be free to speak without concern that their evidence might be used in a court of law set up to consider the individual’s personal liability. Therefore, evidence given to an air accident board of inquiry should not be released to legal authorities or to any outside agencies, including employers. Evidence to be used in any civil or criminal court proceedings subsequent to the accident/incident investigation should be gathered separately from the board of enquiry. However, Legislators might consider that if a court decides that in exceptional circumstances, it is in the overriding public interest that the evidence given to the board of inquiry be released, then a court order could be made to release such information.

Safeguarding Of Recorder Data

I would like to draw your attention to the self-explanatory position papers issued by the International Federation of Air Lines Pilots (IFALPA) on:

- Use of accident related safety information
- Airborne Image Recorders (AIRs)
- CVR Erase Functions

As an international group of professionals, airline pilots have consented to an unprecedented level of intrusion into their workplace in the form of data and voice recordings of their entire work pattern. No other profession has such intrusive monitoring of their every action. Pilots consented to this level of monitoring precisely and exclusively to assist investigators in fully investigating an accident/incident with a view to preventing a reoccurrence. To use such recordings in criminal or civil proceedings directed against individuals or as entertainment on public broadcast systems is a betrayal of the trust which pilots placed in the system to prevent abuse. Again, Legislators might decide that data or voice recordings could be released to legal authorities in the event of proven overriding public interest; however, if this is the case, then any release of data should be restricted to the precise timescale associated with the incident/accident and voice data should be in the form of written transcripts, not the actual voice tapes.

Conclusion

As emphasised in the IFALPA statement, in promoting the strict safeguarding of evidence and recorder data, it is not our intention to seek to grant pilots “immunity from prosecution” in the event of their criminal negligence. However, we do contend that the rules for the gathering and analysis of evidence in the investigation of air accidents/incidents should be different from those involved in a court of law. In particular, a proper accident investigation requires the analysis of raw data and complete and honest statements from witnesses, and should not be restricted by consideration of the legal consequences for the individuals making the statements or monitored in the data recordings. The gathering of evidence for any legal proceedings must be done as a separate exercise, when all witnesses have been appraised of their legal rights and responsibilities and data and voice recordings have been edited to remove content which is not relevant to the accident/incident or is likely to cause unnecessary distress to the relatives of any deceased persons. We believe that building these safeguards into the framework of the legal system surrounding the setting up of Hong Kong’s independent air accident investigation



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authority is essential to ensure that Hong Kong meets its obligations under ICAO Annex 13 and conforms to international best practice.

The Hong Kong Airline Pilots Association fully supports the legislation initiative that will align Hong Kong with the highest civil aviation safety standards in the world, in accordance with the Government's vision to continue to develop Hong Kong as the regional aviation hub. HKALPA stands ready to support any consultations during the legislative process.

Yours Sincerely

Capt. Dave Newbery
President

Hong Kong Airline Pilots Association represents more than 2800 pilots at 4 airlines in Hong Kong, and is a member of the International Federation of Air Line Pilots Associations (IFALPA). HKALPA is a professional, non-commercial association with the mandate to promote flight safety, professionalism and the interests of its members.

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