

# Chapter 10

## Changes to mandatory and confidential reporting

10.1 Another key issue raised with the committee was the proposed changes to mandatory and confidential reporting. The Australian Transport Safety Bureau (ATSB) has been consulting on proposed regulatory changes covering mandatory reporting of accidents and incidents and confidential reporting of safety concerns. A consultation paper was issued by the ATSB and comments closed 27 July 2012.

### Mandatory reporting

10.2 First, it is being proposed by the ATSB to 'improve the Civil Aviation Safety Authority (CASA)'s access to the information contained in notifications reported in accordance with the *Transport Safety Investigation Act 2003* (TSI Act).' The reasons given for the proposed change is that:

Providing more open access to the regulator will be in line with international practice. CASA will be in a better position to regulate aviation safety with its enhanced knowledge of the hazards and risks encountered by industry.<sup>1</sup>

10.3 The consultation paper advises that:

To ensure that the full safety benefit is derived from mandatory reporting of accidents and incidents CASA, in its regulatory role, also needs open access to these reports. CASA has an enforcement function that the ATSB does not have. Depending on the circumstances of an accident or incident, the regulator may need to take legitimate action, in the interests of safety, to ensure compliance with applicable requirements.<sup>2</sup>

10.4 Following the first consultation period, this proposed change will be developed into a legislative amendment which would be subject to further consultation.<sup>3</sup>

10.5 Second, it is also being proposed 'to revise the existing list of accidents and incidents that need to be reported as immediately reportable and routinely reportable matters.' The new reporting requirements will be based on an assessment of the risk of death, injury and damage involved with each incident.<sup>4</sup>

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1 Information available from: [www.atsb.gov.au/aviation\\_newregs.aspx](http://www.atsb.gov.au/aviation_newregs.aspx) (accessed 19 March 2013)

2 ATSB, Enhanced Aviation Mandatory and Confidential Reporting, Consultation paper, p. 3.

3 ATSB, Enhanced Aviation Mandatory and Confidential Reporting, Consultation paper, p. 1.

4 Information available from: [www.atsb.gov.au/aviation\\_newregs.aspx](http://www.atsb.gov.au/aviation_newregs.aspx) (accessed 19 March 2013).

## Confidential reporting

10.6 Third, the consultation also includes draft confidential reporting regulations which would replace the existing aviation REPCON<sup>5</sup> regulations to create 'a multi-modal confidential reporting scheme for the aviation, maritime and rail industries.' The ATSB noted that the purpose of making the scheme multi-modal will be its capacity to assist all three industries to learn from reports of safety concerns that contain transferable lessons.<sup>6</sup>

10.7 The consultation paper noted that the second and third items have already been the subject of consultation so after the current round, a final set of regulations will be drafted and finalised.<sup>7</sup>

## Issues raised with the committee

10.8 Mandatory reporting is provided to the ATSB in the interests of improving safety. It is an important source of information about accidents, incidents and safety concerns to identify hazards and risks:

The *Transport Safety Investigation Act 2003* (TSI Act) and the Transport Safety Investigation Regulations 2003 (TSI Regulations) contain the requirements for certain responsible persons (i.e. operators and crew members) to report the occurrence of accidents and incidents to the ATSB. Presently, CASA receives a summary of each occurrence with only a little more detail than in the Weekly Summaries posted on the ATSB's website.

This level of information supply needs to be enhanced to ensure that CASA is in the best position to regulate aviation safety in a manner which fulfils the main objective of the *Civil Aviation Act 1988* (CA Act).<sup>8</sup>

10.9 Concerns raised with the committee centred on the access to occurrence reporting and the potential for misuse of the information. Several witnesses believed that the proposed changes signal a change in access for CASA which, with its 'strict liability' provisions could result in self-incrimination and may result in reporters seeking legal advice prior to submitting a report.<sup>9</sup>

10.10 The Australian and International Pilots Association (AIPA) stated:

AIPA is not convinced that such a substantial policy shift through changes to subordinate legislation provides appropriate Parliamentary scrutiny. We believe that the ATSB is attempting through legislation to abrogate a

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5 REPCON is a voluntary and confidential reporting scheme which allows any person who has an aviation safety concern to report it to the ATSB confidentially. See [www.atsb.gov.au/voluntary/repcon-aviation.aspx](http://www.atsb.gov.au/voluntary/repcon-aviation.aspx) (accessed 15 May 2013).

6 Information available from: [www.atsb.gov.au/aviation\\_newregs.aspx](http://www.atsb.gov.au/aviation_newregs.aspx) (accessed 19 March 2013).

7 ATSB, Enhanced Aviation Mandatory and Confidential Reporting, Consultation paper, p. 1.

8 ATSB, Enhanced Aviation Mandatory and Confidential Reporting, Consultation paper, p. 1.

9 AIPA, *Submission 8*, Appendix 1, Australian Airline Pilots' Association response to ATSB Enhanced Aviation Mandatory and Confidential Reporting, pp [45–46].

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report's common law privilege against self-incrimination. We believe that the current proposal will adversely affect the free flow of safety-related information.<sup>10</sup>

10.11 First Officer Ian Whyte, AIPA, elaborated:

Essentially, if CASA is getting full access to these reports, people will not do or will modify their reports, especially where their performance could be questioned. The key thing with most of our regulations with aviation is that they are strict liability provisions. If you are writing something down saying, 'I made a mistake unintentionally' or, 'My performance was not good,' this is information the aviation system needs to improve to find where the humans are not up to speed. If you are writing a report and it goes to the regulator, essentially you are self-incriminating.<sup>11</sup>

10.12 AIPA pointed out that the US Aviation Safety Reporting System which 'provides protection from civil penalties and certificate suspensions provided the occurrence, which involved the inadvertent regulatory breach is reported'. It also pointed out the Danish occurrence reporting system as a model to learn from.<sup>12</sup>

10.13 The other area of concern centred on the third change, the Voluntary and Confidential Reporting Scheme Regulation and the need for a separate avenue for confidential reporting, given the lack of protection provided to reporters under the mandatory reporting scheme. AusALPA explained:

A major area of concern is ATSB's present authority to reject a REPCON report on the basis that an event is reportable under mandatory reporting requirements. It is easily conceivable, with no protection presently to reports under Australia's mandatory scheme, that a reporter may only be willing to report some information confidentially for fear of sanctions by employers or CASA. Should the REPCON report be rejected, this will probably lead to the event going unreported. Whilst if the REPCON report is accepted, the confidential aspects of an event may well result in two records (the REPCON record, and a minimalist Mandatory Report) which are unable to be combined. The solution is not to amend REPCON; rather AusALPA advocates providing report protections with in the mandatory reporting scheme.<sup>13</sup>

10.14 AusALPA stated that 'improved access [for CASA] should only occur following a comprehensive review of reporting requirements that create adequate

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10 AIPA, *Submission 8*, p. 29. See also: Captain Geoffrey Klouth, *Committee Hansard*, 22 October 2012, p. 22.

11 First Officer Ian Whyte, *Committee Hansard*, 22 October 2012, p. 25.

12 AIPA, *Submission 8*, Appendix 1, Australian Airline Pilots' Association response to ATSB Enhanced Aviation Mandatory and Confidential Reporting, p. [46].

13 AIPA, *Submission 8*, Appendix 1, Australian Airline Pilots' Association response to ATSB Enhanced Aviation Mandatory and Confidential Reporting, p. [48].

protections and incentives for reporters to be open and frank regarding their experiences and actions'.<sup>14</sup>

10.15 The common concern was whether a person reporting an incident can be easily identified by CASA. The ATSB consultation paper indicates that in regard to mandatory notifications, CASA only receives a summary of each occurrence.<sup>15</sup> The committee heard that when a person reports an incident the information contains details of the aircraft's registration, the location, time and date of the incident. The committee heard that using this information, CASA can identify individuals.<sup>16</sup>

10.16 Capt. Geoffrey Klouth, AIPA, advised the committee that currently most pilots would assume that the information is not going to CASA, but rather that it would stay within the ATSB. If pilots thought it was going to CASA with identifying information it could change the amount of reporting.<sup>17</sup>

10.17 The Airline Passenger Safety Association (APSA) agreed that the concern over the ability to identify individuals would compromise the important reporting regime:

Indeed, we are of the view that such is the importance of confidential reporting in determining what is going on in "the real world", that safeguards should be further strengthened. This should be the degree that ATSB should de-identify data to the degree that it cannot be used by CASA to identify individual incidents or individuals who may have been the reporter.

Such is the all-pervading nature of (over) regulation in Australia, and aviation regulation in particular; that almost any incident reported will reveal a breach of a regulation.

Thus, extreme reticence about the potential outcomes of honest reporting is resulting in a reporting system, in which the aviation community have lost confidence.

Whether it be a pilot, engineer or anybody else in the aviation community, they are not going to report a safety issue, if they genuinely believe they are just putting their head in a noose. Whether the perception is right or wrong, the perception is the reality, and a serious contribution to improving air safety outcomes is being lost.<sup>18</sup>

10.18 The concern expressed is that the proposed changes will lead to a decrease in reporting:

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14 AIPA, *Submission 8*, Appendix 1, Australian Airline Pilots' Association response to ATSB Enhanced Aviation Mandatory and Confidential Reporting, p. [49].

15 AIPA, *Submission 8*, Appendix 2.

16 Mr Julian Walsh, *Committee Hansard*, 22 October 2012, p. 62.

17 Captain Geoffrey Klouth, *Committee Hansard*, 22 October 2012, p. 25.

18 APSA, *Submission 4*, p. 5.

The concern with that would be that people would stop reporting incidents. The concern would also be what CASA would do with that information. As a regulator, they are not simply allowed to see something and go, 'We can't touch this, because it's been provided to us by the ATSB.' It is a bit like a check captain in a simulator. He might be your best mate, but he is representing CASA. If he sees you doing something wrong, he has to fail you...

It would also put the ATSB in a bad position because if people do not have faith and trust that the ATSB are keeping that information confidential then they will simply stop.<sup>19</sup>

10.19 The committee discussed how to strike the right balance between people reporting incidents in the interests of enhancing a culture of safety and immediate action being required in cases of recklessness or deliberate actions. First Officer Whyte advised:

Where that line is is something that needs to be debated and determined. In an ideal world it would be clear, but unfortunately there will always be grey areas. It needs to be consistent. Certainly we would be saying somebody who intentionally acts recklessly is unacceptable. The grey area comes in with gross negligence versus a simple sort of negligence situation.<sup>20</sup>

### **Response from CASA**

10.20 The ATSB consultation paper notes:

However, except in those cases where enforcement is necessary, CASA's regulatory response to notification of an accident or incident will normally involve CASA seeking to educate and promote training.<sup>21</sup>

10.21 Mr McCormick was asked whether CASA had ever taken enforcement action on the basis of information provided by the ATSB. He informed the committee CASA have done so once:

One thing that we have reviewed is whether we have ever taken enforcement action on the basis of information we have been given from ATSB that has been identified—in other words, that identifies somebody. We have done that once. The issue was raised with us because the ATSB considered that the information they were getting from the individual constituted fraud. When we looked at the individual, yes, it was, and action was taken. The person was basically lying. We have not taken regulatory action, enforcement action, against anybody else.<sup>22</sup>

10.22 Mr McCormick emphasised that the ATSB's accident or incident notification form has the following note at the bottom:

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19 Captain Geoffrey Klouth, *Committee Hansard*, 22 October 2012, p. 25.

20 First Officer Ian Whyte, *Committee Hansard*, 22 October 2012, p. 24.

21 ATSB, Enhanced Aviation Mandatory and Confidential Reporting, Consultation paper, p. 4.

22 Mr John McCormick, *Committee Hansard*, 22 October 2012, p. 51.

Privacy notice: The Australian Transport Safety Bureau collects information for the purposes of enhancing transport safety. The collection of aviation incident information is required in connection with the *Transport Safety Investigation Act 2003*. Some information may be disclosed to the Civil Aviation Safety Authority (CASA) and other bodies or individuals for the purpose of enhancing aviation safety. Where possible the identity of individuals will be protected. If the information is the subject of an investigation, it will only be used and disclosed in accordance with the *Transport Safety Investigation Act 2003*.<sup>23</sup>

10.23 The committee then asked whether CASA could identify a pilot because of the aircraft information. Mr McCormick answered in the following way:

The risk comes—and the invidious situation the ATSB can find itself in—is if it knows of something that is a safety risk that could lead to an accident or a serious incident and withholds that from CASA. That would be an indefensible position.<sup>24</sup>

10.24 Mr McCormick went on to describe the protections as 'rugged' and 'just'.<sup>25</sup> Subsequently CASA provided the following information:

CASA has documents to provide guidance to CASA staff on the use and protection of safety information and the assessment of aviation safety incident reports provided by the ATSB on a daily and weekly basis. This information includes the aircraft registration details, date of the occurrence and a brief description of the event. No pilot details are provided in any report. The ATSB also provides CASA with a regular data report which does not contain any registration details and is used primarily to analyse any trends in occurrences and take appropriate action as necessary for aviation safety.

The details described above are essentially information which is reported to the ATSB as part of the Transport Safety Investigation Act (TSIA) reporting requirements and are not entitled to protection by the ATSB under the TSIA when that information is passed on to CASA.<sup>26</sup>

### **Response from the ATSB**

10.25 The committee asked whether the following information contained in the ATSB consultation paper is misleading and that identification of individuals is possible:

Presently, CASA receives a summary of each occurrence with only a little more detail than in the Weekly Summaries posted on the ATSB's website.<sup>27</sup>

10.26 Mr Walsh, General Manager, Strategic Capability advised:

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23 Mr John McCormick, *Committee Hansard*, 22 October 2012, p. 51.

24 Mr John McCormick, *Committee Hansard*, 22 October 2012, p. 51.

25 Mr John McCormick, *Committee Hansard*, 22 October 2012, p. 51.

26 CASA, Answers to questions taken on notice from 22 October 2012 hearing, number 6.

27 ATSB, Consultation paper, p. 2.

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We certainly provide CASA with a daily report on all occurrences that the ATSB has received. We remove any overt personal information that identifies any individual from those—<sup>28</sup>

10.27 The committee received confirmation that the information about the aircraft is retained and through identifying the aircraft the pilot can be identified.<sup>29</sup> Mr Walsh added:

We have just completed some face-to-face consultation as part of the consultation package that you have talked about. During that process, we flew around the country and spoke to many operators—all the major airlines, a lot of the regional airlines and the like—and we also met with representatives, as I understand it, from AIPA. During those conversations, we made it quite clear what we provide to CASA currently. Obviously, the reaction by industry to the proposal in that consultation package has been very strong.<sup>30</sup>

10.28 The committee asked about the current protections given the apparent ease with which CASA can identify pilots. Mr Dolan replied:

On the specific question, the system is designed to provide safety information not just to the ATSB but to the broader system. It is designed to minimise the risk that it will be used by the regulator to identify and take action against individuals.<sup>31</sup>

10.29 Mr Walsh added:

I think the point is that the ATSB, as I think Mr Dolan said, only plays one part in the safety system, and we do not have any responsibility for the management of risk in the aviation industry. That is something that is much more aligned with CASA. For CASA to be able to perform its functions, it must have access to occurrence information, and information that is de-identified to the extent that it does not become usable would not be helpful.<sup>32</sup>

10.30 Mr Dolan responded to questions about the risk pointed out to the committee that this proposed change may result in a possible decrease in the amount of reporting:

We have certainly had that risk drawn to our attention as part of our consultation about potential new arrangements. We have paid serious attention to that, and in the light of those comments we are reviewing the proposal we put out for consultation. The existing reporting form makes it clear that information that is reported to us through the current system will be shared with CASA, so it is not operating in a vacuum. I think it is a fair comment that not everyone who is notifying us would be aware of all the

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28 Mr Julian Walsh, *Committee Hansard*, 22 October 2012, p. 62.

29 Mr Julian Walsh, *Committee Hansard*, 22 October 2012, p. 62.

30 Mr Julian Walsh, *Committee Hansard*, 22 October 2012, p. 62.

31 Mr Martin Dolan, *Committee Hansard*, 22 October 2012, p. 62.

32 Mr Julian Walsh, *Committee Hansard*, 22 October 2012, p. 63.

details of how that information is shared. And, yes, there is a risk that that will lead over time to some reduction in the extent and the detail of the reporting we receive.<sup>33</sup>

10.31 The committee asked the ATSB whether there was any evidence at this point of a decrease in the amount of reporting. It advised there was not:

For the period January to June 2012 the ATSB received an average of 1,306 reports per month. In July 2012, the ATSB briefed industry on the draft mandatory reporting changes. For the period July to December 2012 the ATSB received an average of 1,308 reports per month.<sup>34</sup>

### ***Committee view***

10.32 The committee agrees that the information provided by the ATSB in the consultation paper is potentially misleading because it appears anonymity is guaranteed when in fact CASA can identify the pilot because the aircraft is identified. What is currently being passed on to CASA appears to be beyond the current expectations of the general aviation community and the committee is concerned that the proposed changes may lead to a decrease in the amount of reporting.

10.33 The committee understands the concern that information is provided in good faith in the interests of enhancing the safety of the system and it could be used for an altogether different purpose. In particular this possibility is not transparent to the general aviation community. This leads to a disconnect between the emphasis from the ATSB on 'no blame' and safety outcomes.

10.34 The committee believes that the default position should be that no identifying details (or details that can, with a little effort, identify an individual) should be provided or disclosed. However, if there is a clear safety risk then the ATSB, CASA and industry representatives (eg. AIPA, AOPA), should work on a process that puts appropriate checks and balances in place.

### **Recommendation 26**

**10.35 The committee recommends that in relation to mandatory and confidential reporting, the default position should be that no identifying details should be provided or disclosed. However, if there is a clear risk to safety then the ATSB, CASA and industry representatives should develop a process that contains appropriate checks and balances.**

**Senator the Hon. Bill Heffernan**

**Chair**

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33 Mr Martin Dolan, *Committee Hansard*, 22 October 2012, p. 65.

34 ATSB, Answers to questions taken on notice, 28 February 2013, number 5.