



Australian Government  
Civil Aviation Safety Authority

# SUMMARY OF PROPOSED CHANGE



## Protection and use of safety information

Civil Aviation Orders 82.3 and 82.5

<b>Date</b>	September 2019
<b>Project number</b>	FS 19/02
<b>File ref</b>	D19/353557

## Introduction

In Australia and elsewhere in the world, there has been some misunderstanding about the scope and application the provisions in Annex 19, Safety Management to the Convention on International Civil Aviation (the Chicago Convention) governing the use and protection of safety data and information.

The relevant standards and recommended practices (SARPs) currently appear in section 5.3 (Safety data protection) of, and Attachment B (Legal Guidance for the Protection of Information from Safety Data Collection and Processing Systems) to, the first edition of Annex 19. As amended, with an application date of 7 November 2019, these SARPs appear in section 5.3 (Safety data and safety information protection) of, and Appendix 3 (Principles for the protection of safety data, safety information and related sources) to, the second edition of the Annex.<sup>1</sup>

The proposed amendments to the Civil Aviation Orders (CAOs) address issues left unresolved following the 2018 public consultation of Part 119 of the *Civil Aviation Safety Regulations 1998 (CASR)*. The amendments to the relevant CAOs are proposed with a view to their transposition into corresponding amendments to Part 119 of CASR when that Part commences in March 2021. Eventually, it is envisaged that some of these provisions will appear in Part 5—Safety Management of the *Civil Aviation Safety Regulations 1998 (CASR)*

As set out in CASA Directive 02-0053, Limitations on the Use of Safety Information (July 2019), which has been in effect since 2017, the substance of what appears in the provisions of Amendment 1 to Annex 19 governing the use and protection of safety information is already reflected in CASA’s approach to these issues.

Implementing the principles of CASA’s Regulatory Philosophy, this directive applies rational ‘just culture’ principles not only to the processes and products of voluntary safety reporting, it extends these to all safety reporting as well CASA’s disposition of any safety information that comes to the Authority’s attention — irrespective of the means the information has been obtained or under the circumstances it became apparent to CASA. The Directive also indicates that CASA will apply a similar approach in its assessment of the way an operator deals with the safety information it acquires in the course of normal operational activities, as the amended provisions of Annex 19 will require.

To inform the application of the safety information protection principles reflected in Amendment 1 to Annex 19, the International Civil Aviation Organization (ICAO) has published extensive guidance and advisory material in the 4th edition of the Safety Management Manual (SMM).

The SMM describes preventive, corrective or remedial action as potentially entailing action to restrict, limit or prevent the exercise of certain privileges, the performance of services or the operation of aircraft, until the safety risks identified have been effectively addressed.<sup>2</sup> When taken for these purposes, under established protocols, protective or precautionary actions are

---

<sup>1</sup> The first edition of Annex 19 was published in July 2013 and will be superseded by second edition, inclusive of Amendment 1, which was published in July 2016 and supersedes the first edition on 7 November 2019.

<sup>2</sup> SMM, para 7.2.9

not to be regarded as punitive or disciplinary. Rather, their purpose is to prevent or minimize the exposure to an unmitigated safety risk.<sup>3</sup>

Critically, because actions of this kind are recognised as fundamental to the objectives and efficacy of any safety management system, Annex 19 expressly provides that the use of safety data or safety information ‘to take preventive, corrective or remedial action that is necessary to maintain or improve aviation safety’ shall not be prevented<sup>4</sup>.

## Purpose and scope of the proposed amendments

Currently, the only provisions in CAO 82.3 and CAO 82.5 that deal with the protection of safety data and information relate exclusively to data and information captured by a flight data analysis program (FDAP), where operators are required to have such a program in place. In the context of an approved SMS, an operator's use of FDAP data for punitive or disciplinary purposes is restricted, but not in terms that effectively align with the Annex 19 SARPs applicable from 7 November 2019. The purpose of the amendments proposed here is to enable Australia's timely compliance with the amended provisions of Annex 19 and to clarify the operation of these new requirements, as these have been expressed as a matter of CASA policy since 2017.

Amendment 1 of Annex 19 became effective on 11 July 2016 and will be applicable from 7 November 2019. The amendment includes important changes to the provisions governing the protection of safety data, safety information collection, analysis, protection, sharing and exchange within the safety data collection and processing systems (SDCPS), which ICAO member States are expected to adopt. The following is an extract from the State Letter on the subject – State Letter AN 8/3.1-16/16.

Amendment 1 provides enhanced protections to safety data and safety information including their sources. The proposed amendments enhance legal safeguards intended to assure the appropriate use and protection of safety information, thereby facilitating its continued availability to support proactive safety improvement strategies. Definitions for safety data and safety information have also been developed to provide clarity to the scope of the provisions, thereby facilitating consistent application.

Safety-related purposes include reasonable protective, remedial or corrective action necessary to address identified safety risks. In some cases, such action may unavoidably involve, or be perceived to involve, a measure of disadvantage or inconvenience to an individual because of the need to impose limitations on their aviation-related privileges. Such actions are consistent with the principles of ‘just culture’, as described in the provisions of CASA’s Regulatory Philosophy, CASA Directive 02-0053 and contemporary best practices of leading aviation regulatory authorities,<sup>5</sup> and as reflected in the amended provisions in Annex 19.

To give timely effect to the new Annex 19 provisions, interim amendments will need to be made to the relevant provisions of CAO 82.3 and 82.5, with a view to corresponding amendments to Subpart 119.F of CASR (which commences in March 2021). Eventually, it is envisaged that some of these provisions will be included in Part 5 of CASR.

---

<sup>3</sup> *Ibid.*

<sup>4</sup> Annex 19 (second edition), para 5.3.4. See also SMM, para 7.2.8.

<sup>5</sup> Refer here to the EU Guidance provisions, UK CAPs, the Canadian SMS guidance and the NZ legislation.

## Current policy

CASA's current policy regarding safety data and safety information protection by operators was set out in the 2018 public consultation exposure draft of Part 119 of CASR whereby punitive action relating to FDAP may not be taken unless one of the following occurs:

- a. an individual persistently acts in an unsafe without appropriate safety reasons  
or
- b. an individual persistently contravened the civil aviation legislation or the operator's exposition  
or
- c. an individual contravened the civil aviation legislation or the operator's exposition, and they were reckless about whether such a contravention was involved.

Consistent with the principles reflected in Amendment 1 to Annex 19, CASA's Regulatory Philosophy encourages the development throughout the aviation community of a rational approach to 'just culture', as an element of an organisational culture where people are not punished for actions, omissions or decisions taken by them that are commensurate with their experience, qualifications and training, but where gross negligence, recklessness, wilful violations and destructive acts are not tolerated. It also states that appropriate policies will be developed and implemented to ensure the integrity of this approach, and to guard against any inappropriate punitive action by CASA, or disciplinary action by a service provider.

Limitations on the use of punitive or disciplinary action by CASA are set out in CASA Directive 02-0053, which states that, except in situations involving serious and imminent risks to air safety, safety information will not be used for, or in support of, administrative action to vary, suspend or cancel a civil aviation authorisation, to refuse to issue a civil aviation authorisation, or to issue a direction to a particular person under or pursuant to a provision of the civil aviation legislation, if the person whose interests would be affected by such action has satisfied CASA that all necessary and appropriate steps have been or are being taken to:

- a. ensure that preventive, corrective and remedial actions have been, or will timely be, taken to rectify identified deficiencies or shortcomings and/or to eliminate or effectively mitigate the risk of a recurrence of the conduct in question
- b. eliminate or effectively mitigate the risk of harm, injury or damage to persons or property pending the successful completion of the actions contemplated by paragraph a) above.

## Previous consultations

During consultation on Part 119 of CASR in 2018, some stakeholders expressed concerns about the formulation of the public consultation draft regulations 119.220 and 119.225 of CASR, which outlined the use and protection of FDAP safety data.

In keeping with the principles of 'just culture' that are expected to govern such practices, questions were raised about when, by whom and to what end information contained within an FDAP might be accessed and used by an operator.

As outlined in the Part 119 Summary of Consultation issued in January 2019, CASA agreed that the regulations could reflect a better balance between protecting the identity of a data source and when punitive action could be taken by the operator against the data source. CASA

committed to conduct further consideration in 2019 of how the regulation could better reflect the balance between protection principles and exception principles (using ICAO terminology) outlined within ICAO guidance. These changes to CAOs 82.3 and 82.5 are the first step in articulating the balance between these two sets of principles and ensuring the objectives of Amendment 1 to Annex 19 are more fully reflected in the relevant provisions of the civil aviation legislation.

## Impact on industry

The proposal will be introduced at no cost to industry.

Without taking these actions, inconsistencies between Annex 19 and CASA's regulatory framework will remain. CASA undertook to implement these changes in 2016.

## Regulation impact statement

The proposed amendment has a minor impact as it relates to the enforcement of existing regulatory requirements preventing the misuse of FDAP data. CASA will submit a preliminary impact assessment to the Office of Best Practice Regulation (OBPR) and prepare a Regulation Impact Statement (RIS) if required.

## Closing date for comment

CASA will consider all comments received as part of this consultation process and incorporate changes as appropriate. Comments on the draft Civil Aviation Orders 82.3 and 82.5 should be submitted through the online response form by close of business **22 October 2019**.