

DEGAS Advice 2009-022

**Rather Responsible than Free-for-All**

The role of criminal law in aviation incidents

**Distribution:**

C.M.P.S. Eurlings, Minister  
of Transport  
Lower House of the  
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DEGAS Chair and Members  
DGLM

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**Division:**

N.R.

**Compiled by:**

DEGAS

**Approved by:**

B. Baksteen/



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## Summary

- This advice focuses on the question as to what role criminal prosecution should play in aviation incidents. The underlying fundamental question is not only important in aviation, but also in other policy areas. What's the social role of criminal law in situations where highly-qualified professionals acting to the best of their knowledge and abilities make mistakes?
- The reporting system established in the Netherlands for implementation of EU Directive 2003/42/EC in the Aviation Act takes into consideration the need of the aviation sector for an open reporting culture. Section 5.3 of the Aviation Act nonetheless gives the Public Prosecution Service unlimited freedom to institute criminal proceedings. It must be noted that the meaning of the term 'gross negligence' in the section of the Act is not clearly defined. Definitions used in practice vary from 'a significant degree of culpable imprudence' to 'gross fault or recklessness.' Such a wide range of interpretations provides little legal certainty.
- A just culture is about protecting employees from the uncertainty associated with such vague definitions. For legal certainty and aviation safety, it would be advisable to let the experts decide whether behaviour can be qualified as gross negligence. Experts are also in the best position to decide who was responsible and who should be prosecuted.
- Furthermore, due to the ever greater complexity of business processes and due to the international dimensions of the risk issue, government cannot be expected to keep track of all individual dangers. This calls for a division of tasks in which the sector is responsible for the safety system and government is responsible for supervision of the system.
- This division of tasks is jeopardised as public pressure on government to take action in each individual incident increases. In this respect, both the general public and government pay insufficient consideration to what society expects from such government action. Society apparently expects criminal law to contribute to an increase in safety, but that effect is not very likely. On the contrary, prosecution is often detrimental to aviation safety.

- A crucial factor in this matter is the role of the Inspectorate: a vigorous Transport and Water Management Inspectorate (IVW) sends a clear signal to the Public Prosecution Service. If an incident is reported to IVW and an administrative law sanction is applied, the Public Prosecution Service will consider this to be a reason to not institute criminal proceedings. This also applies to cases in which IVW responds to an inspection according to administrative law.
- Safety management systems have undergone tremendous developments in recent years. Criminal law must adapt to those developments. This requires the aviation sector to demonstrate that internal safety is well-organised. Only after the Public Prosecution Service is convinced of this and if it is clear that incidents involving intent or gross negligence are actually reported to the Public Prosecution Service, the judicial authorities can be expected to exercise restraint.
- It is also important that administrators and the Public Prosecution Service become aware of the importance of an open reporting culture and that they are prepared to learn how the aviation safety system works.
- In general, there is a strong need for resistance against the idea that government should ensure the safety of citizens to the smallest detail. For aviation, a solution to the threat of criminal prosecution should not be found in incidental agreements between the sector and individual aviation officers, but rather in a clearer division of tasks in which the unobstructed functioning of Safety Management Systems is of utmost importance. The recommendations by DEGAS primarily apply to this division of tasks.

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## 1 Introduction

This advice arises from a discussion regarding criminal prosecution following aviation incidents. This discussion between the aviation sector and the Ministry of Justice deepened when in November 2006 the Aviation Act was amended to implement Directive 2003/42/EC. The European directive adopted on 13 June 2003 stipulates that Member States must introduce a reporting system that requires specific individuals and legal entities to report aviation occurrences. The purpose of this reporting requirement is to ensure that all information relevant to the prevention of future incidents is collected, processed and distributed.

The aviation sector is traditionally concerned about criminal prosecution when reporting incidents. While there is no dispute about punishment in the event of incidents involving criminal intent or gross negligence, the importance of punishment is strongly disputed in all other cases. At best, the sector views punishment as a reaction that adds nothing to aviation safety. At worst, punishment is considered to be largely detrimental to aviation safety. Humans will never be infallible. In the so-called “just culture” pursued by the aviation sector, human errors are therefore not considered a valid reason for investigating who was at fault, but rather as a starting point for improving safety measures and safety systems. Without the threat of punishment, aviation is after all an exceptionally safe system. The unrestricted ability to report errors and incidents generates the feedback that is critical to learning processes. The threat of punishment is an undesirably serious infringement on this system.

While the aviation sector and scientists do not dispute the importance of a just culture, politicians and the legal system seem to be opposed to it. This is probably due to the social climate: any aviation incident immediately puts public pressure on government to take action. However, society and government give insufficient thought to what society expects from such government action. Would citizens really call for criminal prosecution if they realised that this would compromise safety?

It is of utmost importance that administrators and the Public Prosecution Service recognise that an open reporting culture is critical and that they are prepared to learn how the aviation safety system works. Considering the international dimension of aviation, it would be advisable to increase this awareness at least

on a European level. This calls for a joint effort by European ministries of justice and the European Commission.

The role of criminal law in the discussion about the Public Prosecution Service's role in respect of aviation incidents also must be defined more clearly. The aviation sector has a tendency to rather naively define the role of criminal law as imposing punishment following a guilty verdict. This is a procedural approach that disregards the meaning of criminal law to society's sense of justice.

In theory, although unlikely, society might view the certainty of justice as such an important issue that they would be prepared to sacrifice aviation safety. Citizens might consider a stricter society more important than safer aviation. If this is the case, it should be expressed more clearly or more explicitly in the discussion.

Overall, the main question is not how to improve aviation safety, since the sector is able to handle this, as the past decades show. The main question is what exactly society expects from criminal law.

## **2 Regulation**

The reporting system established as a result of European Directive 2003/42/EC takes into account the concerns of the aviation sector and the need for an open reporting culture. To ensure that the willingness to report is not jeopardised, the Directive firstly requires Member States to protect reporters of incidents and errors from administrative law sanctions. This protection is guaranteed under Section 11.25 of the Dutch Aviation Act. It prohibits the State from filing a civil law claim, and a government body from filing an administrative law sanction, if any offences have been committed unintentionally or out of carelessness. This protection from government action at least applies if the State learned of the offence only as a result of a report. The protection also does not apply in the event of gross negligence: this may still lead to a claim or a sanction.

Since the protection does not apply to criminal law procedures, the Public Prosecution Service, in the Instruction for the Investigation and Prosecution of Reported Occurrences in Civil Aviation, additionally protects reporters from prosecution in a similar manner. It also stipulates that no prosecution will be

initiated for offences committed unintentionally or out of carelessness, provided that the Public Prosecution Service is aware of the facts only as a result of the mandatory reporting thereof, i.e. not if the Public Prosecution Service discovered the offence as a result of its own investigation. Occurrences due to intent or gross negligence may still lead to criminal prosecution.

The Public Prosecution Service sees no conflict between learning and punishing in this system: one does not rule out the other, provided that data from internal Safety Management Systems is not used for criminal prosecution. This does not happen, since the law protects those systems from third-party use. Section 11.26 of the Aviation Act prohibits the Public Prosecution Service from accessing this data unless this has been approved by the examining magistrate. It must be noted that this stipulation is hardly a barrier against the use of internal data since examining magistrates are replaced with great frequency and therefore have little knowledge of the operation of the Safety Management System. However, this is not a major problem, since the Public Prosecution Service does not use, or rarely uses, the possibility to retrieve data from the systems.

However, despite the protection provided by the law, actual situations soon cause conflicts between the Public Prosecution Service's task and the sector's responsibility for internal safety. After all, the Public Prosecution Service wants to collect data in other ways in order to determine whether gross negligence exists, and this is where his role collides with the operation of the safety systems. If the Public Prosecution Service conducts an active investigation and prosecution policy and immediately starts searching for data after each incident or occurrence, aviation organisations lose much costly energy to either satisfy or find an excuse for the Prosecutor. Furthermore, people are less willing to report if they face criminal prosecution. (According to a Eurocontrol spokesman, European pilots and traffic controllers report only approximately 20% of all dangerous flight incidents out of fear of dismissal or prosecution.)<sup>1</sup>

In the ensuing discussion about the new reporting system, the aviation sector therefore expressed its dissatisfaction with protection from criminal law sanctions. Section 5.3 of the Aviation Act – a section that has existed for a longer time – provides an extremely broad description of the ban based on the Traffic Act: 'It is prohibited to participate in air traffic or air traffic control in such

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<sup>1</sup> Eurocontrol spokesman Erik Merckx quoted by Menelaos Hadjicostis in *The Associated Press*, 17 March 2009

a manner that this could jeopardise the safety of persons or objects.' Combined with the Instruction, this vague stipulation of Section 5.3 in effect continues to provide the Public Prosecution Service with unlimited possibilities for prosecution. The term 'gross negligence' is not clearly defined either.

The use of broad terms such as 'jeopardising' and 'negligence' in effect undoes the protection provided by the Act and by the Instruction. Any action in retrospect can be interpreted as reckless or culpably imprudent, which would justify prosecution. Furthermore, it makes little sense to create general categories of unacceptable behaviours (negligent acts, reckless acts) since such categories are difficult to define.

A just culture is about protecting employees from such vague definitions and the insecurity they cause. A just culture therefore is not about classifying behaviours, but rather about who should draw the line between acceptable and unacceptable behaviour.<sup>2</sup> For reasons of legal certainty and aviation safety, it is advisable to have experts – those responsible for the safety of civil aviation – decide whether certain behaviour must be classified as 'gross negligence'. Leaving this decision to the discretion of the Public Prosecution Service would free the way for unlimited prosecution.

### **3 Safety and responsibility**

The aviation sector is pre-eminently able to give an opinion on the meaning of incidents and the acceptability of behaviour. Reporting incidents is critical to the safety of civil aviation and the sector therefore has been using, for decades, an effective internal reporting system throughout much of the western world. This system is explicitly intended to learn lessons from mistakes made by ourselves and by others, and has proven to be extremely effective in improving aviation safety, as evident from the performance of civil aviation in western countries. This obviously does not mean that there will be no more incidents and that no more mistakes will be made. After all, safety cannot always be fully guaranteed. Every type of activity has its risks, and damage or misfortune can never be ruled out. This is an issue that every society must face. However, an effective Safety Management System can help us to better understand and control existing risks.

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<sup>2</sup> Sydney Dekker: Just Culture, Balancing Safety and Accountability, Ashgate, 2007, pp. 83-90

Government obviously also has a responsibility to promote aviation safety, since one of government's main responsibilities is to guarantee the safety of citizens and of society as a whole. However, due to the increasing complexity of business processes and due to the international dimensions of the risk issue, it is unfair to expect government to manage each individual risk.

'In a knowledge-intensive area such as the responsibility for physical safety with its many uncertain factors, government can no longer pretend to be the know-it-all entity that is able to precisely define all responsibilities in advance,' according to the Scientific Council for Government Policy (WRR) in its report entitled *Onzekere veiligheid*<sup>3</sup> (*Uncertain Safety*). The Council believes that government should not want to have this role. 'Their responsibility is largely to ensure in an effective manner that society takes responsibilities.'

In aviation, those responsibilities are clear to a certain extent. Risks encountered in aviation are relatively simple compared to other sectors that face complex and uncertain risk issues, such as nanotechnology and healthcare. Aviation is therefore less suitable than other sectors when it comes to applying the precautionary principle. Risks are relatively easy to identify, they are clearly recognisable and largely known. You never know when an incident will occur, but you do know what can go wrong and you recognise the signs as soon as anything happens.

Since aviation is nonetheless an exceptionally knowledge-intensive sector, government is no longer in a position to precisely define the responsibilities in this sector as indicated by the Council. This distant role of government not only means that the aviation sector should be given greater autonomy to establish its own safety systems, but this division of roles also means that the sector should be prepared to accurately render account to government. Safety management systems must be reliable: government must be confident that those systems indeed ensure safety and improve performance in the best possible manner. If the safety systems fail to do so, government will intervene and take action to improve them.

This division of tasks, in which the sector is responsible for the safety system and government is responsible for supervising the system, is jeopardised as soon as

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<sup>3</sup> Scientific Council for Government Policy: *Onzekere veiligheid, Verantwoordelijkheden rond de fysieke veiligheid (Uncertain Safety. Responsibilities for Physical Safety)*, Amsterdam University Press, 2008

pressure on government to intervene in each individual incident increases. This public pressure on government has increased in recent years. When it comes to aviation safety, society is reluctant to accept risks. While the risk of serious incidents or accidents is minor, their consequences can be major and alarming. The call for safety is therefore becoming louder. There is a tendency in society to introduce increasingly stricter safety standards, a 'revolution of rising expectations' that leads to increased regulation, inspection and enforcement. The media and the general public also have an increasingly stronger need to call someone to account as soon as an accident occurs, based on the unfounded view that the accident could have been prevented if those involved would have handled the situation in a better manner. Journalists asking air-crash survivors who they blame make it difficult for government authorities and politicians to refer to the airline's safety system in a matter-of-fact manner.

Thus, pressure on government has been increasing and criminal prosecution is therefore a fairly recent development. The trend started in the United States following the 1996 verdict in the case of the Everglades crash. The trend in the Netherlands started with the Delta incident in 1998.<sup>4</sup> Society apparently expects criminal law to contribute to an increase in safety, but this effect is very unlikely since criminal law does not focus on increasing aviation safety. Whenever an incident occurs, the aviation sector focuses on establishing the cause of the incident in order to learn from the occurrence. Criminal law focuses on establishing guilt and restoring the rule of law. These are different tasks and different roles. It cannot be emphasised too strongly or too often that the aviation sector has fully accepted the role of criminal law in those cases where incidents are due to intent or gross negligence. Anyone who intentionally violates the rules of the Safety Management System makes themselves liable to criminal prosecution. There is no discussion about that. But if such exceptional situations do not exist – if an incident is not due to gross negligence, but rather due to fate, human error or system deficiencies – criminal prosecution is undesirable from the perspective of safety. Criminal prosecution may in fact jeopardise the pursuit of safety.

The 'revolution of rising expectations' is generally not effective: introducing increasingly stricter regulations is no guarantee that aviation will be completely

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<sup>4</sup> Patrick Hudson: Drawing the Line, Non-Punitive Safety Reporting in Civil Aviation Department of Psychology, Leiden University, pp. 5-6

safe. At some point, regulations will create more noise than order. We will reach, or may already have reached, a stage where the social costs of regulation are greater than the social benefits. This applies to administrative legislation and definitely also to the application of criminal law.

There is a strong need for resistance against the notion that government should ensure the safety of citizens to the smallest detail. For aviation, a solution to the threat of criminal prosecution should not be found in incidental agreements between the sector and individual aviation officers, but rather in a clearer division of tasks where the unobstructed functioning of Safety Management Systems is of utmost importance. The responsibility for aviation safety rests with the airline companies. The task of government is to supervise the sector and its internal safety systems. Criminal prosecution is only necessary in exceptional cases involving gross negligence.

#### **4 Aviation sector: just culture**

This takes us back to the question 'what is gross negligence and who establishes this?' The answer to this question is crucial to determining whether an incident calls for criminal prosecution. The Public Prosecution Service's Instruction for the Investigation and Prosecution of Reported Occurrences in Civil Aviation guarantees that incident reporters will not be prosecuted, but this restriction does not apply in the event of intent and gross negligence. Thus, since intent is highly unlikely in aviation, the term 'gross negligence' carries great weight. Unfortunately, the legal scope of this term is not entirely clear. Gross negligence is not clearly defined in Dutch criminal law. Definitions used in practice vary from 'a significant degree of culpable imprudence'<sup>5</sup> to 'gross fault or recklessness'<sup>6</sup>. Such a wide range of interpretations provides little legal certainty.

Who decides which behaviours can be classified as 'gross negligence'? Imprudent or reckless behaviour cannot be established without thorough knowledge of safety systems and of the complex decisions to be made by

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<sup>5</sup> Upper House of the Dutch Parliament, Budget Year 2005-2006, 29 977, Amendment of the Aviation Act to implement Directive 2003/42/EC on reporting occurrences in civil aviation, Memorandum in Reply, p. 5

<sup>6</sup> H. Scholtens, *Wet luchtvaart en Koninklijke besluiten (The Aviation Act and Royal Decrees)*, Kluwer, 2008, p. 159

those responsible. The aviation sector is afraid that criminal investigation by the Public Prosecution Service will lead to the procedural ticking-off of rules and procedures without being able to assess their significance in everyday reality. This might result in the qualification of 'gross negligence' being assigned much too frequently and too quickly.

Another negative to establishing gross negligence without specialist knowledge of safety systems: the knowledge-in-hindsight effect. While it may be easy to say in hindsight that a decision was wrong, this is much more difficult to say beforehand. The Italian Public Prosecution Service and court can decide in hindsight that the pilots of an aircraft with a faulty fuel gauge could have safely reached the airport 'if they had made proper use of airflows'<sup>7</sup> but this conclusion was less evident beforehand and they therefore decided to make an emergency landing at sea.

Once a professional has taken a decision, he apparently had good reasons to be convinced that this decision was well-founded and appropriate. Deciding in hindsight that he took the wrong decision does not mean that his decision was imprudent or reckless, even if his decision resulted in rules being violated. Research shows that violations of rules are almost always due to the uniqueness of the situation, due to the desire to do what is best for the organisation or for the general public, due to ignorance, or due to the impossibility of following the rules in that particular situation. Violations of rules are rarely due to unacceptable behaviour.<sup>8</sup>

Gross negligence – whether interpreted as imprudence or as recklessness – is rare in aviation. Quality awareness and safety awareness in the sector are exceptionally great. This is partly due to the considerable commercial consequences faced by the aviation sector as a whole in the event of an accident, but it has even more to do with the consequences experienced by pilots themselves if anything goes wrong. 'The responsibility for a safe flight and the consequences of system failure are concentrated in a single location and are also very close in respect of time.'<sup>9</sup> It is therefore very important for the

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<sup>7</sup> Piloten Tuninter veroordeeld voor crash met ATR 72 bij Palermo (Tuninter pilots sentenced for ATR 72 crash near Palermo), [www.aviationnieuws.nl](http://www.aviationnieuws.nl), 23 March 2009

<sup>8</sup> Patrick Hudson, op.cit., summary

<sup>9</sup> Ten oosten én ten westen van het Prins Clausplein: Gezond verstand in risicoland (East and West of Prins Clausplein: Common Sense in Risk Issues), Final Report by the Mixed Committee on Hazardous Materials/Risk Policies, June 2005, p. 9

sector and its professionals to have an effective Safety Management System. From a distance and in hindsight, there is a tendency to put the blame for an accident on one individual, but the system has now reached the stage where knowledge in hindsight is a major obstacle to learning from incidents.

In short, the assessment of aviation events requires knowledge and expertise. The question is whether it makes sense to focus on the individual's visible behaviour. Human error is a fact, but this conclusion alone is insufficient. It is more important to investigate the cause, the pressure put on those involved, and the reasons why others did not take any corrective action. Experience and research shows that many individual errors are actually due to larger problems within the organisation. Safety therefore not only depends on individual reliability, but also on the organisation and the organisational culture as well as the performance of technical equipment. Those factors are closely interwoven and influence one another.

It is therefore difficult to assess the issue of guilt and culpability without addressing this absolute interweaving of factors that determine safety. This is exactly the reason why a tribunal of experts is needed, not only to assess whether criminal prosecution is appropriate, but especially to assess who was responsible and who should therefore be prosecuted. Such a diagnostic analysis of the system as a whole requires a culture that encourages data collection and that enables lessons to be learned from errors.

## **5 Inspection and administrative sanctions**

A just culture not only requires internal Safety Management Systems of airlines, but also government supervision of those systems' performance. Above all, the sector must comply with current regulations. The aviation sector has a very comprehensive, rigorous set of laws and regulations. According to ICAO standards, there are more than 10,000 specific requirements that responsible authorities must implement in their aviation regulations.<sup>10</sup> Additional requirements are imposed by the Safety Management Systems. The Inspectorate is responsible for enforcing all those rules. An Inspectorate that does not enforce the rules may sound like manna from heaven to the aviation

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<sup>10</sup> ICAO Safety Oversight Audit Comprehensive Systems Approach, Compliance Checklists

sector, but it is not. The aviation industry benefits from an effective Inspectorate that takes action if the sector fails in its responsibilities. The Inspectorate must also ensure that the sector reports all incidents suspected to involve intent and gross negligence.

To understand the importance of effective supervision, one must realise that safety is not the sole or primary objective of the aviation sector. As in other sectors, companies always assess the various business objectives, such as cost control and customer service, and measures to promote safety. This calls for room to manoeuvre, a bandwidth within which each company can make its own business decisions. This makes it impossible to define a clearly defined, precise safety level that all airline companies should achieve. Provided that the boundaries of what is acceptable are respected, each party in the sector is responsible for its own decision. An excessive focus on the pursuit of safety would be detrimental to other responsibilities of the aviation sector, such as providing transportation.

However, this also means that supervision is needed since this independence is not entirely risk-free. The great sense of quality awareness in the sector does not eliminate the risk of 'drift into failure', i.e. the risk that safety margins will gradually shift if an adapted practice becomes the standard practice. Since the internal systems alone do not provide sufficient guarantees against these errors, the Inspectorate will have to closely monitor especially such shifts in standards, i.e. conduct effective inspections and respond with administrative law measures. The Inspectorate must impose administrative sanctions if necessary. The sector will view this as a clear deterrent and take this into account when using its room to manoeuvre.

A vigorous Inspectorate also sends a clear signal to the Public Prosecution Service. If an incident is reported to the Inspectorate and followed by an administrative law sanction, the Public Prosecution Service will have a reason to not institute criminal proceedings. This also applies when the Transport and Water Management Inspectorate (IVW) takes administrative law action in response to an inspection. If inspections and reports do not occur, the Public Prosecution Service in the current situation is more likely to institute criminal proceedings.

## 6 Government and justice: the role of criminal law

With an effective inspectorate in place, what is the role of criminal law if incidents occur in aviation? What is the advantage of criminal prosecution to society?

The first possibility would be to take a formal position. One could argue that the law presses for criminal prosecution in case of gross negligence and that the Public Prosecution Service only acts according to the law in this respect. Another possibility would be to provide a less formal answer to the question about the role of criminal law. Instead of referring to existing laws, the justification of criminal prosecution should be reconsidered. What does society expect from criminal law? Answering that question is difficult since standard criminal law theories do not hold true for aviation. That is to say, those standard theories, the theory of retaliation and the theory of prevention are of little use if you want to demonstrate that punishment is an important tool to increase safety. Retaliation definitely has no positive effect on safety, and the Public Prosecution Service is also aware of this. Furthermore, in aviation, unlike in other areas of society, punishment has no preventive effect. 'Punishment (or penalisation) has a preventive role if it prevents the respective professional from punishable behaviour or if the entire profession will start to behave more prudently. This is not the case. Thinking differently demonstrates lack of knowledge of the respective target group.'<sup>11</sup>

Criminal law therefore is definitely not a method to control accidents or to manage risks. Why then is there an increasingly louder call for punishment? Even if it is established time and again that punishment is not conducive to aviation safety?

Criminal law obviously has its own role and significance, regardless of the question whether or not criminal law contributes to aviation safety. After all, in cases involving gross negligence, criminal prosecution does have an undisputed purpose: to send a signal to society that gross negligence will not be tolerated. In those rare cases where an individual flagrantly violates the safety standards established for and by the sector, thus withdrawing from the

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<sup>11</sup> A.A. van Dijk en M. Otte: Vage normen in de Wet Luchtvaart, een onderzoek naar het bestaansrecht van artikel 5.3. Wet Luchtvaart (Vague standards in the Aviation Act, a study into the justification of Section 5.3 of the Aviation Act), a study report issued on behalf of the Schiphol Safety Platform, p. 22. Also refer to the recent study by Sofia Michaelides-Mateou and Andreas Mateou quoted in: David Learmont: Study finds criminal prosecution following accidents damages flight safety, [www.flightglobal.com](http://www.flightglobal.com), 19 March 2009

control of the internal system, a need for criminal law arises. This is then no longer about safety, but rather about safety in a much broader sense, i.e. about confirming the justice and operation of the law. If you view the role of criminal law in this manner as an *ultimum remedium*, the Ministry of Justice should exercise restraint when initiating investigation and prosecution. This was also the government's opinion according to the Explanatory Memorandum in respect of the Transport Safety Board Act:

'Criminal law should be used only in serious cases. This primarily applies to behaviours that seriously upset the rule of law, including behaviours resulting in death or (serious) physical injury. (...) In view of the nature of the facts – death, physical injury or damage that is culpable – criminal law enforcement falls within the doctrine that criminal law must be used only as an *ultimum remedium*.<sup>12</sup>

Now that the investigation of aviation accidents falls within the competency of the Transport Safety Board, criminal law will be considered only in the event of intent or gross negligence even in cases that seriously upset the rule of law.

Safety management systems have undergone significant development in recent years, and criminal law must adapt to that development.<sup>13</sup> This calls for recognition of the sector's responsibility for aviation safety. The Public Prosecution Service claims that gross negligence cannot be established unless data is provided that is now largely protected. Whenever an incident occurs, government has the responsibility to investigate the occurrence and requires at least the flight data, if alone to rule out the need for prosecution. The notion that an investigation is justified only in the event of gross negligence is a circular argument according to the Public Prosecution Service. However, this is no circular argument if you decide to leave that decision to others, i.e. if you let aviation safety authorities decide what is considered gross negligence. Such a decision requires extensive specialist knowledge. Aviation safety authorities are more likely to have such knowledge than the Public Prosecution Service, and the division of tasks does not affect the actual mission of the criminal law system in any way whatsoever.

In view of the need for a division of tasks where cases involving gross negligence are prosecuted on the basis of thorough knowledge of safety

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<sup>12</sup> Quoted in Van Dijk and Otte, *loc. cit.*

<sup>13</sup> Refer to Hans Boutellier: *De veiligheidsutopie. Hedendaags onbehagen en verlangen rond misdaad en straf (The Utopia of Safety. Current discomfort and desires in respect of crime and punishment)*, Boom Legal Publishers, The Hague, 2002.

standards, the British model could serve as an example. In Britain, the Civil Aviation Authority (CAA) rather than the Ministry of Justice decides on prosecution in aviation. The CAA is an independent body that is funded by the Ministry of Transport, but acts independently as a public prosecutor in accordance with the Code for Crown Prosecutors.<sup>14</sup>

Any violation of aviation laws and specific European safety regulations is considered a criminal offence that falls within the competence of the CAA. The Ministry of Transport orders the CAA to investigate the case and to initiate prosecution if necessary. These tasks are carried out by the Aviation Regulation Enforcement Department (ARE) and the Legal Department of the Civil Aviation Authority. The Ministry of Justice is not involved in any of these decisions.

Considering the significant differences in legal systems, the introduction of such an independent aviation authority with its own prosecution powers would not be feasible in the Netherlands, although the principle could be adopted. Only aviation experts have the knowledge to assess the acceptability of behaviours. In the Dutch legal system, this means that the decision on gross negligence ideally should be left to the sector and to IVW rather than to the Public Prosecution Service.

There is also an urgent need to define the meaning and scope of the term 'gross negligence'. Considering the international dimensions of aviation and the risk of legal inequality, it would be advisable to at least achieve European jurisprudence in respect of the term 'negligence'. Support should therefore be given to initiatives to establish a European Aviation Tribunal consisting of specialist lawyers with aviation expertise. This Tribunal would have to decide, based on investigation, whether a case should be referred to the courts.

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<sup>14</sup> Secretary & Legal Adviser's Office Civil Aviation Authority, *Conduct of Prosecutions by the CAA as a Prosecutor*, London, February 2009

## 7 Recommendations

The main question in the discussion regarding the role of criminal law in respect of aviation incidents is what precisely society expects from criminal law. Safety management systems have undergone significant developments in recent years, and it is critical to ensure that criminal law adapts to those developments. This calls for recognition of the sector's responsibility for aviation safety.

The eight DEGAS recommendations aim to adapt the division of tasks and responsibilities to developments in aviation:

1. Collect, analyse and learn from incidents as soon as possible after the operation.<sup>15</sup> This is the responsibility of the organisation, e.g. the respective airline company or traffic control department. This also applies to the analysis of trends within an organisation.
2. Government is traditionally responsible for regulation, supervision and enforcement. Regulation also stipulates that a Safety Management System must be in place. The Inspectorate (IVW) is responsible for monitoring the Safety Management System. The Safety Management System must not only comply with the requirements, but also, and especially, function properly. The Inspectorate is therefore responsible for warning the respective organisation if the Safety Management System is not working properly or if recurring problems are not addressed. If such warnings are ignored repeatedly, the Inspectorate should not hesitate to impose an appropriate administrative law sanction.
3. The Inspectorate reports occurrences and incidents to the judicial authorities if intent is suspected.
4. If gross negligence is suspected, the Inspectorate reports the occurrence to a small committee of experts in which aviation expertise as well as legal knowledge is available. This structure could be a Dutch copy of the model used in the United States, although a European system would be preferable.

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<sup>15</sup> A DEGAS advice entitled Guiding Principles, expected by the end of 2009, will discuss this issue in more detail.

(Refer to Recommendation No. 8 below.) The committee<sup>16</sup> of experts will decide whether there is indeed a case of gross negligence and thus whether the case needs to be referred to the judicial authorities

5. Unless intent is suspected, the judiciary authorities will not get involved. However, regular case consultations about occurrences and incidents will have to be held, in which the judicial authorities will be involved in order to share knowledge and to build and maintain trust between all parties involved.
6. Upon his appointment, the special aviation officer will be familiarised with the operation of the Safety Management System.
7. A Safety Management System is a larger and more intricate safety net than criminal law could ever be. It is therefore advisable to adapt Section 5.3 of the Aviation Act so that it is in agreement with the Safety Management System.
8. In order to get a grip on the meaning and scope of the term 'gross negligence', it is advisable to join European initiatives that seek harmonisation of jurisprudence in this regard.

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<sup>16</sup> DEGAS is prepared to accept his task on an interim basis until such a body of experts is created

## 8 Persons interviewed

Name	Position	Organisation
Kate Staples	Head of Aviation & Commercial Legal Division	Department for Transport, UK
Peter Griffiths	Director, General Civil Aviation	Department for Transport, UK
John van Lieshout	Chief Inspector, Aviation Supervision Unit	Transport and Water Management Inspectorate (IVW)
Bart de Vries	Head of Flight Operations	KLM
Arthur Dijkstra	Flight Safety Department	KLM
Richard Putman	Head, Aviation Supervision Unit	National Police Services Agency (KLPD)
Job Brüggem	Safety Manager	Air Traffic Control the Netherlands
Harm Brouwer	Chairman, Board of Attorney-Generals	Public Prosecution Service
Bob Steensma	Chief Prosecutor, Haarlem	Public Prosecution Service
Bote ter Steege	Public Prosecution Service, Schiphol	Public Prosecution Service
Renée van Geloven	Deputy Chief, Administrative and Legal Affairs	Public Prosecution Service
George Middeldorp	National Public Prosecution Services' Office	Public Prosecution Service
Willem van der Ham	Chairman	Dutch Association of Medical Specialists
Erik Lagerweij	Senior Officer, Safety & Environment	Schiphol Group
Peter Aardenburg	Programme Manager, Schiphol Safety Platform	Schiphol Group
Renault Bosma	Member of the Board of International Affairs	Dutch Airline Pilots Association
Leo Hartman	Aeronautical Engineering Affairs Committee	Dutch Airline Pilots Association