

## Developments in whistleblowing protection in the Netherlands

### *Some introductory remarks*

The Dutch approach to regulation in practically all spheres of social life is a very pragmatic one: an issue is raised and debated, a consensus is sought, a policy is set out on a limited scale, after evaluation it gets implemented more broadly, and then it is evaluated and amended again. Whistleblowing is an issue that has been taken very seriously in the Netherlands and much debated over the last 15 years. The Dutch term for whistleblower, introduced by professor Mark Bovens<sup>1</sup> in 1987, is 'klokkenluider', meaning bell-ringer.

In the context of a debate on the theme "integrity of public administration", from the first half of the nineties of the last century, there is a gently increasing activity on whistleblower protection.

However, not until 1999-2000 the theme of whistleblowing has become the subject of ongoing political interest, in particular in response to an examination of the trade union Abvakabo FNV about loyalty problems among officials (1999) and to the whistleblower reporting line of the trade union confederation FNV (2000). This reporting line (11-13 April) was intended to identify the characteristics and dilemmas of the whistleblower issue in the Netherlands. And so it did, in scale and seriousness beyond all expectations. The line was opened by the chairman of the FNV and Fred Spijkers by literally ringing the bell of a church near the office of the FNV. Spijkers has become one of the most well-known whistleblowers in the Netherlands.

Both the Minister of the Interior (related to the public sector) and members of the House of Representatives (related to the public and the private sector) announced initiatives to provide better protection for whistleblowers.

### *Some legal protection for civil servants*

The initiative of the Minister of the Interior resulted in provisions in the Civil Servants Act<sup>2</sup> (Article 125quinquies), requiring procedures for civil servants to deal with suspected malpractices within the organisation where they are employed. A civil servant who reports a suspected malpractice in good faith in accordance with such a procedure may not suffer disadvantage as regards his legal status as a result of reporting his suspicions, either during the course of the procedure or afterwards.

A model procedure was published and updated several times.

Civil servants were given the opportunity to report to an internal Confidential Integrity Counsellor and to an external Committee for Government Integrity (CIO<sup>3</sup>). A decree opened ways for civil servants to find advice and receive information from the Office for Promoting Ethics and Integrity in the Public Sector (BIOS<sup>4</sup>).

Since 1 January 2010 whistleblowers who work for the central government and the police have received assistance in reporting malpractices of any kind under the Reporting of Suspected Malpractices Decree<sup>5</sup>. These provisions have been spread out to other areas of the public service since 1 January 2014. No decision which infringes the rights of the whistleblower can be made as a consequence of that person blowing the whistle. The decree emphasizes that management has the duty to ensure that the whistleblower is not hindered in any way to continue to perform in his function.

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<sup>1</sup> Mark Bovens studied Law, Political Science, and Philosophy at Leiden University (BA Law 1977; BA Political Science 1977; MA Law 1982, Phd 1990) and at Columbia University Law school in New York (LL.M. 1983).

<sup>2</sup> *Ambtenarenwet*.

<sup>3</sup> *Commissie Integriteit Overheid*.

<sup>4</sup> *Bureau Integriteitsbevordering Openbare Sector*.

<sup>5</sup> *Besluit Melden vermoedens Misstanden Rijk en Politie*.

It also specifies what infringement of rights means: dismissal, ending a temporary employment contract or not renewing it, refusing to transform a temporary contract into a contract of continuous employment, transferring or relocating or refusing to do so, issuing a sanction, taking a disciplinary measure, withholding salary, withholding opportunities for promotion and refusing holiday leave.

A new development is that a civil servant/ official can also blow the whistle on a malpractice in another department or organisation than the one in which he is employed. Also former employees can blow the whistle on their former organisation (up to two years after ending the employment). And there is an obligation for all civil servants/ officials within the organisation who are involved in handling a report of malpractice to protect the identity of the whistleblower if he so wishes.

#### *Some self-regulation in the private sector; case law*

The whistleblowing reporting line of the FNV was followed by research on the whistleblower issue, commissioned by the Minister of Social Affairs (*The path of the whistleblower: choices and dilemmas. Research on the whistleblower issue in the Netherlands*, IVA Tilburg, 2001.) One of the results of both the reporting line and the academic research was that both employers and employees were in need of guidelines for whistleblowing. Reported fraud in the construction sector by whistleblower Ad Bos in 2001 made the House of Representatives request the government to develop a policy to protect whistleblowers in the private sector. Some pressure of the Minister of Social Affairs had the effect that a draft of the FNV (being prepared in 2000, after consultation of some well known whistleblowers as Fred Spijkers and Paul van Buitenen) was transformed in a *Statement on dealing with suspected malpractices in companies*, published by the Labour Foundation<sup>6</sup> in 2003, with a Sample procedure for dealing with suspected malpractice (Hereafter: Sample procedure) attached.<sup>7</sup>

The Minister of Social Affairs predicted that this Statement would set the norm for dealing with suspected malpractices in companies in the private sector.

This prediction came true. In case law the effect of the Statement was immediately noticeable. While in a whistleblowing case (*Stiekema versus Organon*) the court of first instance [on a date before the Statement was published] declared that the whistleblower's behaviour wasn't that of a good employee, because he had violated his duty of confidentiality, the court of appeal [on a date after the Statement was published] declared that this violation was justified by an overriding interest, namely the interest of the patients involved. Later on several explicit references to the Statement have been made, also in a ruling of the Supreme Court.

In particular references are being made to the following principles of the Statement:

An employee can be said to be acting in good faith if he or she acts with due care in both the formal (procedural) and substantive sense.

The actual or potential whistleblower has acted with due care in the formal (procedural) sense when he or she:

- has first reported the relevant facts internally, if necessary up to the highest level, unless this cannot be reasonably expected of him or her or is contrary to the public interest;
- has made the facts known externally in an appropriate manner commensurate to the situation, provided that internal reporting is not required or does not lead to corrective action.

The actual or potential whistleblower has acted with due care in the substantive sense if:

- he or she has reasonable grounds for suspecting that the relevant facts are correct;
- reporting the malpractice (internally or otherwise) is or could be in the public interest;
- the public interest served by reporting the suspected malpractice externally takes precedence over the employer's interest in maintaining confidentiality.

A good employee can be expected to first report suspected malpractice internally. The company must be given the opportunity to address the problem itself, based on the internal report. Sometimes, however, employees cannot reasonably be expected to

<sup>6</sup> *Stichting van de Arbeid*.

<sup>7</sup> An update of this statement (2012) is attached to this paper.

follow the internal procedure, for example if an acute threat involving a serious and urgent public interest requires an immediate external report to be made, if the employee has good reason to fear reprisals if he reports the malpractice internally, if there is a clear risk that evidence of the suspected malpractice will be concealed or destroyed, if a prior internal report of, essentially, the same malpractice hasn't led to the desired effect or if the employee is obliged or empowered by law to immediately report the malpractice externally.

Consulting an expert in confidence is in itself not a violation of the duty of confidentiality.

An employee has in general the right to express his opinion (freedom of expression), also in front of his employer, and to report any malpractice, especially when a public interest is at stake.

The criteria applied by Dutch courts are essentially the same as the criteria the European Court of Human Rights applies in whistleblower cases (*Guja v. Moldova*, *Heinisch v. Germany*). Compared to the Dutch lower courts, the European Court imposes less stringent requirements on the gravity of the public interest. It may be expected that the lower courts will be less severe towards whistleblowers as a result of the relatively new European case law and the recent similar approach of the Dutch Supreme Court.

In addition to the Statement, in 2003 the Green Party (*GroenLinks*) proposed a bill to include provisions in the employment law, regulating the freedom of expression of employees, to protect whistleblowers. The scope of this bill was to protect employees, acting with due care, who report malpractices in the public interest, against dismissal, termination of employment and retaliation, with an explicit reference in the explanatory memorandum to the Statement. This bill didn't pass the House of Representatives. There was too much opposition against regulation of the freedom of expression as proposed in the bill.

After this several other proposals for a bill to protect whistleblowers in one way or another, launched by members of the House of Representatives, didn't make it.

In 2004 the Minister of Social Affairs requested the advice of the Social and Economic Council (SER<sup>8</sup>) on the creation of a committee for the private sector that would be comparable to the public sector's Committee for Government Integrity. Civil servants in central government can contact the Committee for Government Integrity when other means of disclosure fail. The SER doesn't believe there is reason to create such a committee for the private sector. Following the development by the Labour Foundation of a code of practice for the disclosure of malpractice in June 2003 (the Statement referred to), the SER believes that it is important that the relevant parties continue to develop guidelines for whistleblowing at a decentralised level, based on the example set by the code of practice. The SER feels it is as yet too soon after the establishment of the code of practice to present new proposals concerning the reporting of suspected malpractices, and recommends waiting until the Foundation's code of practice has been evaluated in 2006.

The SER is of the opinion that a situation should be pursued whereby all employees who suspect malpractice within the company they work for should be able to report this in a safe and satisfactory manner. The SER explicitly states that employees should be able to turn to an independent intermediary or organisation.

Commissioned by the Minister of Social Affairs, in 2006 ECORYS examined the effect of the Statement in practice. Ecorys concluded inter alia that approximately one out of ten of the Dutch enterprises has a whistleblower procedure. However, on closer examination most of these so-called whistleblower procedures turn out to be integrity codes, based on the Sarbanes-Oxley Act or the Dutch corporate Governance Code, containing rules for internally reporting certain categories of financial malpractice. Most of these enterprises miss in their scheme the aspect of the possibility of an external report, which is essential for a whistleblower procedure.

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<sup>8</sup> *Sociaal-Economische Raad.*

## *Recent developments in whistleblowing protection in the Netherlands*

In 2008 the Minister of the Interior presented the report *Evaluation whistleblower procedures public sector* (Utrecht University, Department Public Administration and Organisational Science) to the House of Representatives. The researchers (including Mark Bovens) concluded that the existing whistleblower schemes in the public sector were in fact no comprehensive whistleblower schemes, but merely schemes for internal reporting of malpractices. One of the recommendations was to replace the different existing procedures by a comprehensive system. In anticipation of this, a whistleblower support center could be set up, similar to the British charity Public Concern at Work, for whistleblowers in both the public and the private sector.

In order to increase the protection of whistleblowers in both the public and the private sector, the House of Representatives asked the Minister to draw up a concrete plan of action and to set up one recognizable independent whistleblower reporting point for both sectors, in collaboration with social partners.

The Minister consulted both the Council for Public Sector Personnel Policy<sup>9</sup> (representing social partners in the public sector) and the Labour Foundation (representing social partners in the private sector) about the idea of a whistleblower reporting point. In a common response social partners advocated an advice and support centre for both the public and the private sector and in addition to this an investigation centre for the public sector only.

This led to the establishment of the Advice Centre for Whistleblowers (*Adviespunt Klokkenuiders*) and to a new start of the Committee for Government Integrity as Public Integrity Board (*Onderzoeksraad Integriteit Overheid*), both on 1 October 2014.

The Advice Centre provides advice and support to whistleblowers in the public, semi-public and private sectors on the actions they can take to raise their concerns about wrongdoing. Its goal is for whistleblowers to be able to raise concerns about wrongdoing without suffering any negative effects themselves as a result. More information about the Advice Centre, its tasks and activities can be found in its Annual Report 2013, *Courage when it counts* (attached).

The Public Integrity Board investigates reports of suspected violations of integrity in government, including a number of autonomous administrative authorities, Police, Defence, Municipalities, provinces and water boards. For an honest government and for the protection of detectors.

Both organisations have been reviewed in July 2014 by the bodies under whose authority they operate. The evaluation report (*Veilig misstanden melden op het werk*) recommended to give the Advice Centre a permanent statutory basis and to reconsider the role and position of the Public Integrity Board.

In 2012 a bill, proposing the establishment of a House for Whistleblowers (Huis voor Klokkenuiders), was put forward by a political alliance of six political parties (later on seven) led by the Socialist Party. In short, the proposal was that there should be an institution where wrongdoing can be reported - a so-called House for Whistleblowers. It would be accommodated at the office of the National Ombudsman, where a substitute ombudsman would deal with whistleblowers. This proposal relied on the belief that the National Ombudsman is an independent Institute in which people have a lot of confidence. Employees in both the public and private sectors would be able to report malpractices to the House for Whistleblowers. The criteria would be: reasonable grounds to suspect wrongdoing or risks where the public interest is at stake (the House will not deal with workers with a personal labour dispute), and which occurs in the place where the whistleblower works or has worked.

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<sup>9</sup> Raad voor het Overheidspersoneelsbeleid.

The House for Whistleblowers should first determine whether the criteria for a report have been fulfilled. If so, it would inform the employer. On the request of the whistleblower, the House would have power to investigate both the abuse which the whistleblower has exposed and his employer's treatment of him.

There are circumstances where, even if the criteria are met, the House is not obliged to investigate. Those are if: the request is manifestly unfounded; the public interest, or the seriousness of the act of wrongdoing, is manifestly insufficient; a request concerning the same act of wrongdoing, is being dealt with by the House or was dealt with by the House; a high court has already irrevocably ruled about the act of wrongdoing, or if the applicant is, according to the House, insufficiently cooperative.

The House would complete a pre-investigation within six months and then, if there are sufficient grounds, proceed to a full investigation which should be completed in a year. The House would be empowered to make recommendations for the employer, following its investigation, but its recommendation would neither form a legal fact or a civil law responsibility in connection with an act of wrongdoing, nor a suspicion of guilt of any fact punishable by law.

An amendment to employment law would prevent whistleblowers, reporting malpractices to the House, from being dismissed on any ground during the investigation (though not during the pre-investigation, as long as that was not due to the whistleblowing). The idea appeared to be that they would work in the House for Whistleblowers, and be a party to any proceedings, though they would be forbidden to speak in public about the case during that time. The employer may not retaliate against the employee solely on the basis that the employee has reported, in good faith and properly, any suspected malpractice to the employer or to the House for Whistleblowers.

The House would be able to support whistleblowers who have incurred costs or suffered damages out of a special Fund. Benefits would be reduced or not paid at all if the whistleblower is partially to blame for the wrongdoing. Decisions on benefits would also take into account any fees paid to the whistleblower for making his report.

An expert group of whistleblowers has co-written the proposal. Members include Paul van Buitenen (the whistleblower whose revelations on fraud brought down the EU Commission led by Jacques Santer in 1999).

During the parliamentary proceedings some amendments have been passed. The House will no longer inform the employer when an employee has reported to the House. There will be no Fund for whistleblowers. There are some new provisions: the personal scope of the bill has been expanded (broad definition of employee, including self-employed); every employer, who is obliged to establish a works council, must establish a whistleblowing procedure; every employee has to report malpractices internally first, unless this cannot be reasonably expected; the House and the Prosecution should enter into agreement on collaboration and exchange of information and lay it down in a protocol. On 17 December 2013 the bill was passed in the House of Representatives.

However, on 20 May 2014 the bill didn't pass the Senate. The Senate asked for an amending bill. Being only able to reject or accept legislation, it stated that it would accept the bill if the House of Representatives would amend the bill as follows:

The House for Whistleblowers should not be hosted by the National Ombudsman.

The House shouldn't have an investigation task and an advice task at the same time. The Advice Centre for Whistleblowers should remain independent from the House.

The differences between public and private sector should be respected in the establishment of the House.

The relationship with other regulators should be carefully thought out.

Protection against retaliation should also be guaranteed if the whistleblower reports to another regulator than to the House.

The Senate urged the initiators of the bill to cooperate with the Ministry of the Interior.

Both the Labour Foundation and the Council for Public Sector Personnel Policy supported the position of the Senate. In July 2014 the initiators of the bill and the Ministry of the Interior cooperated to finish

the amending bill.

*Brief consideration of Dutch rules in the context of the recommendation of the Council of Europe*

It is very likely that the amending bill will pass both the House for Representatives and the Senate. In that case the Dutch approach, as mentioned in the introduction, will have led to a body of rules and regulations, combined with case law, that gives some protection to individuals who, in the context of their work-based relationship, report or disclose information on threats or harm to the public interest.

Recently, on 30 April 2014, the Committee of Ministers of the Council of Europe adopted a recommendation to the member states on the protection of whistleblowers. The appendix to this recommendation sets out a series of principles to guide member states when reviewing their national laws or when introducing legislation and regulations or making amendments as may be necessary and appropriate in the context of their legal systems.

To what extent, when introducing the bill, proposing the establishment of a House for Whistleblowers, member state the Netherlands was guided by these principles?

With regard to the *material scope* (principles 1-2): the House for Whistleblowers bill includes violations of law, as well as risks to public health and safety and to the environment (Article 1). Violations of human rights are just not explicitly included. Of course European and Dutch case law gives protection to whistleblowers reporting violations of human rights as does the Statement of the Labour Foundation and its Sample procedure (Article 1, implicitly).

With regard to the *personal scope* (principles 3-6): the House for Whistleblowers bill doesn't include voluntary workers (Article 1); the Sample procedure does (Article 1). Of course volunteers can also appeal to their freedom of expression. The House for Whistleblowers bill does also include individuals whose work-based relationship has ended; the Sample procedure doesn't.

With regard to the *normative framework* (principles 7-11): with a bit of good will and to a certain extent the House for Whistleblowers bill could be looked upon as a comprehensive and coherent approach to facilitating public interest reporting and disclosures. However, the bill is far from perfect and the effectiveness of the mechanisms for acting on public interest reports and disclosures remains to be seen.

With regard to the *channels for reporting and disclosures* (principles 12-17) and *confidentiality* (principle 18): as said, every employer, who is obliged to establish a works council, must establish a whistleblowing procedure. Proposals for a whistleblowing scheme need the approval of the works council. In contrast with the House for Whistleblowers bill, the Statement of the Labour Foundation describes what elements a suitable procedure for reporting suspected malpractice should consist of. One of these elements is the assurance of confidentiality. However, there is no obligation for small organisations to put in place a whistleblower procedure.

An odd provision in the House for Whistleblowers bill is Article 13 insofar as it says that when the House decides not to open an inquiry, it will report this to the employer. Permission of the employee involved is not required.

Finally, recourse isn't facilitated.

With regard to the *acting on reporting and disclosure* (principles 19-20): the House for Whistleblowers bill determines that the notification should lead to dealing with the malpractice within a reasonable term; both the Decree for the public sector and the Sample procedure for the private sector are more specific: the employee has to be informed about the conclusions within twelve and eight weeks respectively.

With regard to the *protection against retaliation* (principles 21-26): as said, under the House for Whistleblowers bill protection against retaliation is only guaranteed if the whistleblower reports to the

employer or to the House, but not if the notification is being made to another regulator (police, Public Prosecutor, inspectorate, supervisor and so on). Another weak point of the bill is that the notification has to be made in good faith. According to the Statement of the Labour Foundation an employee can be said to be acting in good faith if he acts with due care in both the formal (procedural) and substantive sense. Neither in the Statement, nor in case law the deeper motives of the employee are important.

Reversal of the burden of proof (principle 25) hasn't been made explicit in any regulation, but seems quite probable the outcome of legal proceedings.

Finally, with regard to the *advice, awareness and assessment* (principles 27-29): here is an important task for the Advice Centre. Periodic assessments of the effectiveness have been made and will be made.

#### *Finally: Publeaks*

On 9 December 2013 Publeaks.nl was launched by the Publeaks Foundation and a large number of Dutch media outlets. Publeaks.nl is a website for people to leak documents to the media securely and anonymously. The initiative is designed to protect whistleblowers, shed light on wrongdoings and encourage and support investigative journalism.

Publeaks is a secure channel. It facilitates safe leaking to the press: the sender remains completely anonymous and he or she can choose which of the participating media outlets receive documents, sound fragments or photographic material. Recipient media outlets can process these files in a protected environment.

Publeaks is based on the GlobalLeaks software package developed by the Hermes Center for Transparency and Digital Human Rights. The Publeaks organisation has no access to the leaked files, does not publish anything itself and has no means of identifying the informant. Participating media outlets have committed themselves to verifying the leaked materials, finding sources to support the content and hearing all sides before publishing anything. Journalists can put questions to the anonymous informant on a secure part of the site. The informant decides whether or not to answer them. Journalists who receive material through Publeaks will know which other media outlets have received the same material and can decide whether or not to undertake a collaborative investigation.

Rik van Steenbergen,  
Amsterdam, 8 August 2014

Appendices:

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