

Bulletin of Acts and Decrees of the Kingdom of the Netherlands

2011

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Decree of 27 September 2011 establishing the Whistleblower Advice and Referral Commission (Whistleblower Advice and Referral Commission Temporary Decree)

We, Beatrix, by the grace of God Queen of the Netherlands, Princess of Orange-Nassau, etc., etc., etc.

On the recommendation of Our Minister of the Interior and Kingdom Relations of 21 April 2011 (no. 2001-2000149103, DCB/CZW/WBI), made in conjunction with Our Minister of Social Affairs and Employment;

Having regard to article 89, paragraph 1 of the Constitution, section 125quinquies, subsection 1 (f) of the Central and Local Government Personnel Act, section 50, subsection 1 of the Police Act 1993, section 12quater, subsection 1 (f) of the Military Personnel Act 1931, section 2 of the Advisory Bodies and Committees (Allowances) Act and section 1a, subsection 1 (d) of the Government Information (Public Access) Act;

Having heard the Advisory Division of the Council of State (advisory opinion of 9 June 2011, no. W04.11.0145/I);

Having seen the further report of Our Minister of the Interior and Kingdom Relations of 23 September 2011, no. 2000273024 and no. 2011-2000285604, published in conjunction with Our Minister of Social Affairs and Employment;

Have approved and decreed:

§ 1. General provisions

Article 1

In this Decree:

- a) *Our Minister* means Our Minister of the Interior and Kingdom Relations;
- b) *the Commission* means the Whistleblower Advice and Referral Commission referred to in section 2;
- c) *personal data, processing of personal data and responsible party* have the meanings given to them in section 1 of the Personal Data Protection Act.

Article 2

1. There is a Whistleblower Advice and Referral Commission.
2. The Commission has its seat in The Hague.

§ 2. Task

Article 3

The task of the Commission is

- a) on request, to provide information and advice on and offer support with possible follow-up steps to anyone who suspects abuses detrimental to the public interest in:
 - a business or organisation where he works or has worked; or
 - any other business or organisation if he has obtained knowledge of the possible abuses through his work;
- b) to identify from the information available to it by virtue of its task as referred to at a) trends and patterns that cannot be traced back to an individual and to communicate its findings to the relevant organisations;
- c) to provide general information about dealing with suspected abuses.

§ 3. Confidentiality

Article 4

The Commission is responsible for the processing of personal data.

§ 4. Membership and legal status

Article 5

1. The Commission consists of three members, including a chairperson. Deputy members may also be appointed.
2. The members and deputy members are appointed by Our Minister for a term ending no later than 30 June 2015.
3. The Commission is to be consulted about the appointment of members and deputy members after supplying a profile of the candidate or candidates sought.

Article 6

The members and deputy members of the Commission are appointed on the basis of the expertise required for the proper performance of the tasks referred to in article 3 and on the basis of their knowledge and experience of society.

Article 7

1. A member or deputy member of the Commission may not perform any activities that are undesirable because they could jeopardise the proper performance of his duties or compromise his independence or confidence therein.
2. A member or deputy member of the Commission must notify Our Minister of his intention to engage in activities other than the performance of his duties.
3. The activities of a member or deputy member of the Commission other than in the course of his duties must be publicly disclosed. Public disclosure is made by depositing for inspection a list of these activities with the Commission and Our Minister.
4. The chairperson will divide the activities among the members and deputy members, taking account of the fact that a member may not perform activities that would be undesirable in terms of maintaining his independence or confidence in his independence.

Article 8

1. Our Minister may suspend and dismiss the members and deputy members of the Commission.
2. Suspension and dismissal will occur only on the grounds of unsuitability or incompetence for the task performed or for other compelling reasons related to the member or deputy member concerned. Membership or deputy membership may also be terminated at the request of the person concerned.

Article 9

1. The Commission has a secretariat.
2. The chairperson of the Commission directs the activities of the Commission and of the secretariat.
3. The staff of the secretariat work under the authority of the Commission and report solely to the Commission.

Article 10

1. The chairperson of the Commission receives a fixed monthly fee based on the maximum of salary scale 18 of Appendix B to the Civil Servants Pay Decree 1984, with a part-time factor of 0.4.
2. The members and deputy members of the Commission, with the exception of the chairperson, receive a fixed monthly fee based on the maximum of salary scale 18 of Appendix B to the Civil Servants Pay Decree 1984, with a part-time factor of 0.2.
3. The part-time factor for the deputy members may be varied by order of Our Minister in such a way that it differs from that for the members.

§ 5. Reporting

Article 11

Each year before 1 February the Commission sends the draft budget for the following year to Our Minister.

Article 12

1. The Commission reports annually before 1 April on its activities in the previous calendar year.
2. At the request of Our Minister the Commission draws up a report evaluating its performance.
3. The annual report and the evaluation report are sent to Our Minister, to both Houses of the States General, to the Labour Foundation and to the Council for Public Sector Personnel Policy.
4. Our Minister notifies both Houses of the States General of his position on the evaluation report within three months. If no position is adopted within the period referred to in the previous sentence, Our Minister must notify both Houses of the States General of the reasons.

Article 13

The Administrative Authorities (National Ombudsman Act and Government Information (Public Access) Act) Decree is hereby amended as follows:

The following section is inserted after section 1:

Section 1a The Whistleblower Advice and Referral Commission is excluded from the administrative authorities referred to in section 1a, subsection 1 (d) of the Government Information (Public Access) Act.

Article 14

This Decree enters into force on a date to be determined by Royal Decree and will lapse with effect from 1 July 2015.

Article 15

This Decree may be cited as the Whistleblower Advice and Referral Commission Temporary Decree.

We order and command that this Decree and the explanatory memorandum pertaining to it be published in the Bulletin of Acts and Decrees (Staatsblad).

The Hague, 27 September 2011

Beatrix

J. P. H. Donner
Minister of the Interior and Kingdom Relations

H. G. J. Kamp
Minister of Social Affairs and Employment

Published on 3 October 2011
I. W. Opstelten
Minister of Security and Justice

EXPLANATORY MEMORANDUM

1. Introduction

The object of this Decree is to supplement the whistleblower policy applied in the public and private sectors by setting up an independent advice and referral centre known as the Whistleblower Advice and Referral Commission. The Commission will act as a 'support centre' for whistleblowers and potential whistleblowers by providing them with information and advice on and support with possible follow-up steps. It will also use its practical experience to identify and flag up trends and patterns for organisations with a whistleblower policy to which this may be relevant, for example government bodies (including the supervisory authorities) and the social partners. Finally, it will also be the task of the Commission to furnish information of a general nature about whistleblowing, particularly to employers and employees in the public and private sectors. This Decree anticipates a decision on a centre for the investigation of breaches of integrity in the public sector. The question of how this investigative task, which is currently the responsibility of the Commission on Integrity in the Civil Service, is to be transferred to an investigation centre will be dealt with in a separate procedure.¹ This explanatory memorandum has been drawn up in conjunction with the Minister of Social Affairs and Employment.

2. Current whistleblowing policy

If abuses detrimental to the public interest occur within organisations, they should be identified and tackled promptly. Arrangements should be in place to ensure that any abuses can be safely reported by public and private sector employees within their organisations and are then tackled and resolved by those organisations. In the public sector, there are regulations governing cases in which public servants suspect abuses within the organisation for which they work. An example is the Reporting of Suspected Abuses (Civil Service and Police) Decree.² To supplement section 125quinquies, subsection 3 of the Central and Local Government Personnel

¹ Responsibility for investigating reported abuses in over 300 municipalities has now been assigned to the Local Authority Whistleblowers' Commission.

² Bulletin of Acts and Decrees 2009, 572. See also the Decree of 30 August 2010 amending the General Military Personnel Regulations and the Ministry of Defence (Civilian Staff) Regulations in connection with an order on reporting suspected abuses (Bulletin of Acts and Decrees 2010, 706) and the Amended Model Set of Regulations of the Association of Netherlands Municipalities on Reporting AVT12/BZK106686

Act these regulations (known as ‘whistleblowers’ regulations’) also contain provisions for the legal protection of persons who report a suspected abuse. For the private sector the Labour Foundation has drawn up a declaration on dealing with suspected abuses in businesses, which includes a recommendation to businesses and industries to ensure that employees can adequately and safely report any suspected abuses in the business in which they work. An appendix to the declaration contains a model set of regulations for dealing with suspected abuses.³ The government wishes the declaration to be fully implemented through self-regulation and has called on the Labour Foundation to promote its implementation.⁴ The principle of good employment practice as set out in article 7:611 of the Civil Code means that the legal status of an employee who reports suspected abuses in good faith and with due care should not be prejudiced in any way whatever on account of this report.

3. History of the legislation

On 4 December 2007 the House of Representatives passed the Van Raak motion (Parliamentary Papers, House of Representatives 2007/08, 31 200 VII, no. 29), which requested the government to set up a fund for whistleblowers. By letter of 18 December 2007 the then government informed the House of Representatives that the establishment of a fund for whistleblowers by government would add little to the protection already provided, which was considered adequate. It stated that the establishment of a fund for whistleblowers was not the answer to the question raised by the proposer of the motion, namely how could the authorities ensure that more people would have sufficient confidence to report abuses. According to the then government, the answer should instead be sought in what it termed good ‘front-end’ measures such as the appointment of confidential advisers in the private sector as well. In this context it announced that it would examine whether the establishment of a whistleblower advice and referral centre along the lines of the British non-governmental organisation Public Concern at Work could be an important aid for actual and potential whistleblowers in the Netherlands.⁵

Suspected Abuses.

³ Labour Foundation 24 June 2003, publication no. 6/03, updated version 3 March 2010, publication no. 1/10.

⁴ Parliamentary Papers, House of Representatives 2008/09, 28 844 no. 32, p. 5.

By letter of 15 April 2008 the Minister of the Interior and Kingdom Relations presented the Public Sector Whistleblower Regulations Evaluation Report (covering abuses in public administration, the police and the defence sector). The report evaluated the regulations drawn up in the different sectors and made various recommendations, for example that a support centre for whistleblowers should be established. It stated that the sole function of such a centre would be to provide advice and referrals, not to deal with reports of abuses.⁶

In response to the presentation of the evaluation report and letters of 15 April and 22 May 2008, a motion (the Heijnen motion) was passed following a meeting of the parliamentary committee concerned with the Minister.⁷ This motion requested the government to draw up a specific plan of action not only for the public sector but also (in cooperation with employers and employees) for the private sector. The motion expressed the House's wish to have a single, recognisable and independent whistleblower reporting point for both the public and the private sectors.

The then government sought the opinion of the Labour Foundation and the Council for Public Sector Personnel Policy (ROP) about the idea of setting up an independent reporting point that would also have an advisory and referral function. The Labour Foundation was not in favour of a central reporting point with powers of investigation. It saw no need for an authority that could investigate suspected abuses independently, either with or without the police and the courts, the Labour Inspectorate, the Social Information and Investigation Service, the Fiscal Information and Investigation Service, the Netherlands Competition Authority and so forth. In the Labour Foundation's view, confusion could easily arise about the powers of a reporting point which could independently investigate suspected abuses and compel businesses to provide information. Moreover, such a centre could be an obstacle to contacts between the employee and mainstream law enforcement authorities. The Labour Foundation also pointed out that a reporting point of this kind would be at odds with the character of the private sector, which consists of a wide variety of independent private businesses. It objected that granting far-reaching powers of investigation, such as the right to demand all relevant information and to hear

⁵ Parliamentary Papers, House of Representatives 2007/08, 28 244 and 31 200 VI, no. 116.

⁶ Parliamentary Papers, House of Representatives 2007/08, 28 844, nos 13 and 14.

⁷ Parliamentary Papers, House of Representatives 2007/08, 28 844, no. 17.

witnesses, could have a radical impact on the functioning of businesses and hence also curb their freedom to conduct their business activities as they see fit.

By contrast, the ROP was in favour of establishing a central reporting point with investigative powers for breaches of integrity in the public sector along the lines of the present Commission on Integrity in the Civil Service and the Local Authority Whistleblowers' Commission (CKGO). The Labour Foundation and the ROP were able to find common ground, however, in the idea of having a single national whistleblower advice and referral centre for both the public and the private sector, inspired by the British charity Public Concern at Work.

The then government regarded this as meaningful progress in the joint efforts to introduce a whistleblowing scheme, as requested in the Heijnen motion. By letter of 10 July 2009 it therefore announced the establishment of a whistleblower advice and referral centre. The intention was to set up a foundation for this purpose.⁸ Following an exploratory study carried out under the responsibility of the then Minister of the Interior and Kingdom Relations a discussion arose about the positioning of the advice and referral centre.⁹ This resulted in a second Heijnen motion, in which the House of Representatives requested the government to establish the whistleblower advice and referral centre (and the centre for the investigation of breaches of integrity in the public sector) as part of the Office of the National Ombudsman.¹⁰ This request was not supported by either the Labour Foundation or the ROP.¹¹

Finally, the government decided that since it viewed sufficient support from the social partners as crucial to the success of the advice and referral centre it would establish an independent advice and referral commission by means of this Decree.

4. Whistleblowing

The Decree does not contain a definition of an abuse. However, it does provide that abuses must be detrimental to the public interest (article 3 (a)). The Commission can use the standard definitions of suspected abuses as guidance. The model set of

⁸ Parliamentary Papers, House of Representatives 2008/09, 28 844, no. 37.

⁹ Parliamentary Papers, House of Representatives 2009/10, 28 844, no. 40.

¹⁰ Parliamentary Papers, House of Representatives 2009/10, 28 844, no. 39.

regulations of the Labour Foundation defines suspicion of an abuse as follows: a suspicion, based on reasonable grounds, which has arisen in the organisation where the reporter works and which concerns the public interest, of a) an actual or potential criminal offence; b) an actual or potential breach of rules; c) an actual or potential risk to public health, public safety or the environment; d) the deliberate provision (or potential provision) of incorrect information to public bodies; e) actual or potential waste of public funds; or f) the deliberate withholding, destruction or manipulation (potential or otherwise) of information about such abuses.

The Reporting of Suspected Abuses (Civil Service and Police) Decree contains the following definition: 'a suspicion, based on reasonable grounds, of 1. a breach of statutory regulations or administrative rules; 2. a risk to public health, public safety or the environment; 3. an improper act or omission which jeopardises the proper functioning of the public service in the organisation at which the reporter works or has worked or in another organisation if he has come into contact with that organisation and learned of the abuse in his official capacity.' The General Military Personnel Regulations and the Ministry of Defence (Civilian Staff) Regulations contain an identical definition of a suspected abuse. The model set of regulations for the municipal authorities and water boards has its own definition, namely 'a suspicion, based on reasonable grounds and relating to the municipal organisation in which the official works, of a criminal offence, a breach of statutory regulations or administrative rules, the misleading of the criminal justice authorities, a risk to public health, public safety or the environment, or the deliberate withholding of information about such abuses.'

As various definitions exist, it was decided not to define the concept of abuses in this Decree as the inclusion of a definition might unnecessarily restrict the Commission's remit. As the Commission has only an advisory role and has no investigative powers a definition is not necessary, unlike, for example, in the Reporting of Suspected Abuses (Civil Service and Police) Decree. The Commission's principal task is to advise persons (mainly private-sector employees, public servants, temporary staff and self-employed persons without employees) who report or wish to report actual or suspected abuses of which they have knowledge through their work. The

¹¹ Letter of 12 March 2010 to the Minister of the Interior and Kingdom Relations and the Minister of Social Affairs and Employment, House of Representatives 2010/11, 28 844, no. 45.
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Commission also has a number of other tasks that are described in section 5 below.

5. Object and tasks of the Commission

The object of the Commission is to help prevent abuses by advising and informing actual and potential whistleblowers about the procedure they should follow and by identifying trends and patterns on the basis of past experience and passing this information to the authorities and social partners. Where possible, the Commission will take preventive action to avoid unjustified harm to the whistleblower and the employer.

For this purpose the Commission will have the following three tasks (see article 3 of the Decree):

1) Furnishing information and advice to actual and potential whistleblowers and assisting them in possible follow-up steps.

This involves assessing whether there are suspected abuses and, if so, deciding with the potential whistleblower whether all possibilities for discussing the matter internally with the employer have been exhausted. If this is the case, the Commission may advise the person concerned on how to report the matter to the competent authorities such as the Commission on Integrity in the Civil Service, the Public Prosecution Service, the supervisory authorities and the inspectorates. If necessary, the Commission may help the whistleblower to lay out the facts in such a way that the law enforcement authority concerned can act upon the report. However, the person concerned always remains in control of his own case. The Commission will not act as a legal representative in any proceedings.

The Commission's advisory and supporting task may involve the following activities:

- advising and assisting the whistleblower with the procedure to be followed;
- acting as a willing listener and, on request, monitoring the procedure;
- advising on the possibility of mediation;
- advising on how the matter should be reported to the competent authority;
- advising on after-care.

Not all these activities will apply in the case of every whistleblower. What action

would be useful and desirable must always be decided in consultation with the person concerned.

2) Identifying trends and patterns from its own experience and passing this information to relevant organisations (e.g. government bodies, including the supervisory authorities, and the social partners) for their whistleblowing policy.

3) Providing general information about dealing with suspected abuses.

It is important for whistleblowers, potential whistleblowers, employees and employers to be aware of the existence of the Commission and how to contact it. The Commission should also be easily accessible and should inform these target groups about relevant regulations, authorities, publications and good practices. To this end the Commission:

- will publicise its existence and work, and ensure that it is firmly embedded in society;
- will maintain an informative website containing particulars of relevant regulations, authorities, cases, good practices, instruments and publications.

The Commission does not have any powers under public law since these are not required for its advisory and referral tasks.

6. Confidentiality and secrecy

The Commission does not pass on data to other authorities. For this purpose data are deemed to be not only particulars such as the name and address of a potential whistleblower but also data concerning the case, for example evidence. It remains the responsibility of the whistleblower himself to open and update his case file and pass on any data from it to third parties. However, potential whistleblowers who request advice often give their name and a description of their case. In this way the Commission can come into possession of confidential data. It is then responsible for the processing of these data (article 4).

The Commission is an administrative authority by virtue of section 1:1, subsection 1 (a) of the General Administrative Law Act. It follows that section 2:5 of that Act applies to all members of the Commission. This section provides that anyone who is

involved in the performance of the duties of an administrative authority is bound not to disclose information which he knows or should reasonably know is of a confidential nature.¹² This creates a general obligation for an administrative authority (or part of an administrative authority) or anyone who works for such an authority (in no matter what legal capacity) not to disclose confidential information which comes into its or their possession. Specifically, this means that the Commission may not disclose the identity of a whistleblower or potential whistleblower, the name of the business or organisation for which he works or the identity of the person suspected of the abuse.

Under article 272 of the Criminal Code a term of imprisonment or a fine may be imposed for a breach of the duty of secrecy. It follows that the Commission may not disclose confidential data (relating to whistleblowers, businesses or organisations) to third parties other than in very exceptional cases determined by Act of Parliament. If it were to do so it would infringe the duty of secrecy. The information given to the Commission will almost always be of a confidential nature. The majority of the data in the Commission's possession constitute personal data as defined in section 1 (a) of the Personal Data Protection Act. When processing personal data the Commission is bound by the provisions of the Personal Data Protection Act. This means, for example, that where it has personal data in a form which allows the data subject to be identified they may not be kept for any longer than is necessary in order to achieve the purposes for which they were collected (section 10, subsection 1 of the Personal Data Protection Act). However, the Commission may keep data for the purposes of analysis provided that they have been anonymised.

Since the Commission has a duty of secrecy under section 2:5 of the General Administrative Law Act, under section 9, subsection 4 of the Personal Data Protection Act personal data may not be processed further. The Commission does not therefore supply third parties with any confidential data (i.e. data that can be

¹² Section 2:5 of the General Administrative Law Act:

1. Anyone who is involved in the performance of the duties of an administrative authority and in the process obtains access to information which he knows or should reasonably know is of a confidential nature and who is not already subject to a duty of secrecy by virtue of his office or profession or by statutory regulation is bound not to disclose such information, unless he is obliged to disclose the same by virtue of any statutory regulation or in consequence of his duties.

2. Subsection 1 applies to institutions and persons belonging to them or working for them which are involved by an administrative authority in the performance of its duties, and to institutions and persons belonging to them or working for them which perform a duty assigned to them by or pursuant to Act of Parliament.

traced back to persons and organisations). It follows that information about any trends and patterns communicated by the Commission pursuant to article 3 (b) may not be capable of being traced back to individuals.

Under article 162, paragraph 1 of the Code of Criminal Procedure public servants have a duty to lodge a criminal complaint concerning indictable offences that are classified as public office offences or as offences in which public servants abuse their position. Under article 162, paragraph 2, the Public Prosecution Service may apply to the Commission for information about criminal offences. Members and staff of the Commission are not expected to lodge criminal complaints concerning public office offences that come to their knowledge in the course of their duties: instead the whistleblower or potential whistleblower has an obligation to do so. To enable the Commission to maintain confidentiality and secrecy the Public Prosecution Service (Board of Procurators General) has indicated that it will not request information from it.

7. Organisation and membership

The Commission consists of three members, who are independent and authoritative and inspire confidence (article 5, paragraph 1 and article 6). Deputy members may also be appointed, for example in the event of the lengthy absence of one of the members or if special expertise is required (article 5, paragraph 1). The members and deputy members are appointed by the Minister of the Interior and Kingdom Relations for a term ending no later than 30 June 2015 (article 5, paragraph 2). This is the date on which the temporary Decree will lapse. If new members or deputy members have to be appointed before that date the Minister will consult the Commission about the job profile and the candidate or candidates before making the appointment. The members and deputy members may not perform any activities that would be undesirable because they could jeopardise the proper performance of their duties or compromise their independence or confidence therein. The members and deputy members also have a duty to notify the Minister of their intention to engage in activities other than the performance of their duties and to publicly disclose other activities of this kind by depositing for inspection a list of these activities with the Commission and the Minister (article 7, paragraph 3).

The Commission is not an advisory body within the meaning of the Advisory Bodies Framework Act as it does not provide advice on generally binding regulations or central government policies. Although the Advisory Bodies Framework Act does not therefore apply, the provisions of the Decree on the membership and organisation of the Commission are based as far as possible on the Act. The membership should be such that the Commission as a whole has due experience of the private and public sectors and public administration, knowledge of integrity issues and resources, broad legal expertise and communication skills. The individual members should also have the requisite competencies such as vision, empathy, social awareness, networking skills and political sensitivity. The members may not hold any job that could detract from the independence and impartiality of the Commission. The Commission is expected to be familiar with the procedures of the law enforcement authorities and supervisory authorities and to operate with due care and expertise.

The Commission has a secretariat for which it is itself responsible (article 9). This article corresponds to section 16 of the Autonomous Administrative Authorities Framework Act, which is not directly applicable because the Commission does not exercise public authority. The secretariat as a whole must have wide-ranging legal expertise and knowledge of integrity issues and resources and communication. The competencies required by the staff of the secretariat are empathy, social awareness and political sensitivity. The staff are accountable only to the Commission for the work they perform for it. No one else may give them instructions or directions about their work. As in the case of the Electoral Council and the Data Protection Authority, provision will be made in a mandate order for the chair of the Commission to be given a mandate, power of attorney and authorisation to take decisions on certain managerial matters. The Commission does not have legal personality, but is part of the State which is itself a legal entity.

8. Finances, reporting and evaluation

The Commission reports annually on its activities in the previous calendar year. (article 12, paragraph 1). The annual report is sent to both Houses of the States General and to the Labour Foundation and the Council for Public Sector Personnel Policy. The Commission also prepares an evaluation report at the request of the Minister (article 12, paragraph 2).

The Commission is part of the State and, in budgetary terms, is no different from any other budget heading at a government ministry. Its budgeted expenditure is included in one or more articles or sub-articles of the budget of the Ministry of the Interior and Kingdom Relations and the Ministry of Social Affairs and Employment in accordance with the relevant internal procedures. The Commission must submit a draft budget before 1 February of each year so that this can be taken into account by the Minister (article 11).

The setting up of the Commission will not increase the administrative burden since the Commission does not actively request data, but merely provides information and advice at the request of actual or potential whistleblowers. There is a chance that the Decree may take effect on a date other than one of the standard commencement dates for legislation¹³ since the target group would benefit from its introduction at the earliest possible opportunity and considerable time has already been spent in consultation (article 14).

9. Practical procedure

The Commission will have its seat in The Hague (article 2, paragraph 2) and during office hours whistleblowers and potential whistleblowers will always be able to reach it by telephone. They can also contact the Commission by e-mail. The Commission has its own telephone number. The telephone (the front office) must be operated by staff who have sufficient legal knowledge of integrity issues and resources. They must be able to identify cases that require immediate attention and also deal with potential 'complainants'.

The initial contact is therefore through the front office. Cases are first assessed there in accordance with the Commission's instructions. Afterwards the matter is passed to a member of the staff of the secretariat (an adviser) who generally plays a central role in the advice, support and referral process and acts as the whistleblower's contact. Depending on the issue at stake a Commission member may also be involved at a subsequent stage.

¹³ Parliamentary Papers, House of Representatives 2009/10, 29 515, no. 309.
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The Commission is responsible for ensuring that integrity resources and regulations which whistleblowers may encounter are properly identified in order to enable the secretariat to carry out its duties properly.

The Commission may hire outside agencies to provide the requisite expertise and will guarantee confidentiality and secrecy. It is important for the Commission to quickly identify the issue and carefully preserve possible evidence. Security and data protection are therefore governed by strict criteria. In view of the required confidentiality, this applies not only to office accommodation, ICT, telephone and mail, but also to the necessary secretarial services.

10. Basis and relationship with other legislation

The Commission is an administrative authority by virtue of section 1:1, subsection 1 (a) of the General Administrative Law Act: this is because it is an organ of a legal entity (the State) established by public law. It follows that the General Administrative Law Act and the National Ombudsman Act are applicable to the Commission.

As the Commission is an administrative authority, it is in principle subject to the Government Information (Public Access) Act. It is essential for whistleblowers to have absolute certainty that any data which they supply to the Commission will remain confidential. Without absolute secrecy and confidentiality it is impossible for the Commission to function and carry out its duties properly. An exception to the Government Information (Public Access) Act is therefore necessary and proportionate. For this purpose a provision has been added to the Administrative Authorities (National Ombudsman Act and Government Information (Public Access) Act) Decree to the effect that the Government Information (Public Access) Act does not apply to the Commission. However, unlike the other exceptions in that Decree, the National Ombudsman Act does apply to the Commission.

As the Commission does not make decisions within the meaning of the General Administrative Law Act the applicability of that Act is limited. However, the Commission is bound by the general provisions on dealings between individuals and administrative authorities (chapter 2 of the General Administrative Law Act). Section 6 above dealt with the applicability of section 2:5 of the General Administrative Law

Act and also examined the operation of the Personal Data Protection Act in relation to the Commission.

As noted in section 7 above, the Commission is not an advisory body within the meaning of the Advisory Bodies Framework Act. Nor is it an autonomous administrative authority within the meaning of the Autonomous Administrative Authorities Framework Act as it does not exercise public authority.

The basis of the present Decree for the public sector is formed by the Central and Local Government Personnel Act, the Police Act 1993 and the Military Personnel Act. The basis for the private sector is article 89, paragraph 1 of the Constitution. This Decree is in part an 'independent' order in council, in other words one that does not derive from an Act of Parliament. Article 89, paragraph 1 of the Constitution provides that the government is competent to adopt such orders in council. However, article 89, paragraph 2 limits this power in respect of regulations to which penalties are attached. The latter may be laid down only by Act of Parliament. The government makes sparing use of the power to adopt 'independent' orders in council since it introduces them only in exceptional situations and by way of temporary provision. In the present case, the aim is to create a much-needed, independent provision, with all the necessary safeguards, for the advice and support of people wishing to report suspected abuses detrimental to the public interest. The government believes it very desirable to set up an independent commission without delay and therefore chooses to achieve this by the clear and acceptable path of an order in council, since the introduction of fully fledged legislation would certainly take a number of years. In the government's opinion, such a delay would be unacceptable. The Decree is a temporary provision and will lapse as of 30 June 2015. This date has been chosen to enable the Commission to be evaluated after two years and the findings to be taken into account in the drafting of an Act of Parliament establishing the Commission, which can then enter into force on or before 1 July 2015.

11. Consultation and advisory opinions

In a joint advisory opinion of the Labour Foundation and the Council for Public Sector Personnel Policy (ROP) issued on 21 March 2011, the social partners

amplified the ROP's advisory opinion of 2 April 2009 and the Labour Foundation's opinion of 3 April 2009 and their joint letter of 12 March 2010 addressing such points as the object, remit, functional criteria and funding of the whistleblower advice and referral centre. Both the Labour Foundation and the ROP endorsed the desirability of an independent, easily accessible whistleblower advice and referral centre for the public and private sectors. The Labour Foundation emphasised that its declaration on dealing with suspected abuses in businesses should form the basis for the provision of information and/or advice to potential whistleblowers. It is important that the suspicion of abuses should, in principle, first be raised within the business itself. The ROP referred in this connection to the sectoral legislation applicable in the public sector which sets out the procedure to be followed in reporting abuses. Here too priority should be given to the internal path.

The Commission will be tasked with providing advice, information and support and will proceed on the basis that abuses should be first be raised in the business or organisation concerned.

The Labour Foundation and the ROP identified two important preconditions which the advice and referral centre must satisfy:

1. it must guarantee confidentiality and secrecy to both the individuals concerned and the business or organisation; it is therefore important for the Commission to have the right of privileged communication;
2. it must leave it to the potential whistleblower to keep in touch; in other words, after receiving the information and/or advice the potential whistleblower himself must determine whether to proceed and, if so, what action to take.

Confidentiality and secrecy are properly safeguarded by means of the Personal Data Protection Act, the secrecy provision in section 2:5 of the General Administrative Law Act and the exception to the Government Information (Public Access) Act. At the request of the Labour Foundation and the ROP section 2:5 of the General Administrative Law Act is quoted in full.

The initiative remains with the whistleblower at all times: the Commission is merely charged with the task of advising and providing information and, if necessary, support: it is always up to the whistleblower to decide what to do with the information

or advice.

The Labour Foundation and the ROP considered that, ideally, responsibility for funding the advice and referral centre should rest with the government as the protector of the public interest.

The Commission is being funded for the time being from the public purse.

The Labour Foundation and the ROP requested that the question of the name should be considered. They proposed that the name should provide the greatest possible clarity about the remit of the Commission in order to avoid confusion with existing whistleblower schemes. They therefore recommended that in the present Decree the proposed Commission should be named the Whistleblower Advice and Referral Centre / Commission.

This suggestion has been adopted by replacing the name 'Whistleblower Commission' in section 2 by the name Whistleblower Advice and Referral Commission.

The Labour Foundation and the ROP considered that the definition of the Commission's task in article 3 is too vague. They therefore recommended that the definition of the tasks in the advisory opinion of 3 April 2009 should be incorporated in full in the Decree. They also feared that the scope of the duty of identification is too broad since it could extend to information capable of being traced back to an individual and/or a request for advice. This could breach the precondition that control must always remain with the whistleblower or potential whistleblower. They also point out that arranging mediation is not a task for the Commission (section 5: object and tasks of the Commission). The Commission could, however, advise on the possibility of mediation, but this is the limit of its remit.

The duty of identification described in article 3 now states that the 'trends and patterns' to be identified from the information should not be capable of being traced back to individuals. The explanatory memorandum now includes the literal text of the core elements of the tasks defined in the advisory opinion of 3 April 2009, such as 'acting as a willing listener' and 'on request, monitoring the procedure'. Arranging

mediation has also been replaced by the words 'advising on the possibility of mediation'.

The Labour Foundation and the ROP advocated a separate evaluation provision, namely that a number of topics will be evaluated no more than two years after the setting up of the Commission, for example the fact that the Commission is an administrative authority within the meaning of the General Administrative Law Act and to what extent this helps or hampers its functioning and what role the right of privileged communication plays. After this initial evaluation, certain topics could be evaluated periodically, for example every four years, in addition to the regular evaluation dates. The evaluation provision could also regulate the involvement of the social partners through the ROP and the Labour Foundation.

Article 12, paragraph 2 provides that at the request of Our Minister the Commission will draw up a report evaluating its performance. Article 2, paragraph 3 provides that the evaluation report should also be sent to the Labour Foundation and the ROP. The advice and referral centre is a new initiative that must be given time to evolve. The Ministries of the Interior & Kingdom Relations and of Social Affairs & Employment will monitor the advice and referral centre with interest and evaluate its performance after two years. In doing so they will also take into account the involvement of the social partners meeting in the ROP and the Labour Foundation. Among the matters that will be considered in the evaluation are the implications of how the Commission has been structured, the funding and manner of funding and also the code of conduct adopted by the Board of Procurators General on the right of privileged communication.

The Labour Foundation and the ROP requested additions to the Explanatory Memorandum on a number of points. Almost all these additions have been made.

In its advisory report published on 17 March 2011 the Whistleblowing Expert Group emphasised the need for a professional helpline and investigating organisation for the reporting of abuses in both the public and the private sector. This is one reason why the expert group does not believe that setting up a Whistleblower Advice and Referral Commission will have added value or will improve the weak position of whistleblowers. The expert group has doubts both about whether the Commission

can achieve its object of helping to prevent abuses and about the Commission's independence.

As noted in the introduction to this Explanatory Memorandum, the Commission is being established in anticipation of a decision on a centre for investigation of breaches of integrity in the public sector. The question of how the investigative task currently assigned to the Commission on Integrity in the Civil Service would be transferred to a centre for investigation of breaches of integrity in the public sector will be dealt with in a separate procedure. Nonetheless, the Whistleblower Advice and Referral Centre can provide a useful service by acting as a helpline for whistleblowers and potential whistleblowers, notably by providing them with information and advice on possible follow-up steps.

The object of helping to prevent abuses must be viewed mainly in the light of the Commission's identification task. The Commission is expressly given the job of identifying trends and patterns from the information in its possession and communicating its findings to the organisations for which this is relevant. This means government bodies, including the supervisory authorities, and the social partners. The Commission's identification task can foster policy on whistleblowers and certainly help to prevent abuses. Advising and supporting whistleblowers and providing general information can also help to prevent further escalation and fresh instances of abuses. Naturally, any abuses that have already occurred cannot be reversed.

The Commission's independence is safeguarded by the decision to establish it as an independent entity with its own secretariat which works under the authority of the Commission and reports solely to the Commission.

The Public Prosecution Service (Board of Procurators General) published an advisory report on 31 March 2011, indicating that to enable the Commission to maintain confidentiality and secrecy, the Public Prosecution Service will not request information from it.

Piet Hein Donner
Minister of the Interior and Kingdom Relations