

Note on the new whistleblowing scheme for public officials in the Netherlands

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For Whistleblower Netzwerk

The Dutch way of policy making

The history of whistleblower protection in the Netherlands is a long one. The public debate has been going on since the early 1990s and since the end of that decade there has been a lot of experimentation with different schemes and measures. The scheme which was implemented nationwide in the early 2000s had been tested in Amsterdam. This is a general pattern in the Netherlands. Their 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 get implemented more broadly, and then it is evaluated and amended again.

We can see the same when it comes to whistleblowing. It is noteworthy to mention that, in the Netherlands labour unions (through the FNV – Federatie Nederlandse Vakbewegingen – and STAR – Stichting van de Arbeid) have always supported and even lobbied in favour of whistleblower protection legislation and internal whistleblowing schemes. The discussion at national level (in the Tweede Kamer) in 2003-2004 was a very wide one, examining different routes (including remunerating whistleblowers) and wide coverage (including private sector). However, the discussion in parliament was unable to draw clear conclusions on the path to be followed. The result was that the Amsterdam scheme was to be implemented at national level, covering public sector, whereas the private sector would be encouraged to develop a policy through self-regulation.

Typical for policy making in the Netherlands is that this does not mean the discussion has died a quiet death. Rather, the issue was actively followed up, both by members of parliament, the FNV and STAR, and the minister of internal affairs. Thus, the new whistleblowing policy for public officials (literally translated 'for the sectors Government and Police') endorsed by the Queen on 15 December 2009, is based on an evaluation of the self-regulation within the private sector, on an evaluation of the workings of the public sector scheme, and on advice from different stakeholders including STAR (Stichting van de Arbeid).

The decision includes a widening of whistleblower provisions, and also implies a restructuring of the institutional landscape around the whistleblowing issue. These restructurings have started on 1 January 2010, but my guess is it will be at least another year until they come into effect. I will sketch out the wider whistleblower provisions and the new institutional structure in the following sections.

New whistleblower provisions

The decision is published as: Decision 572 (2009), published in *Staatsblad 2009 -572. Besluit van 15 december 2009, houdende een regeling voor het melden van een vermoeden van een misstand bij de sectoren Rijk en Politie*)

Also relevant is: the letter from the Minister of internal affairs, G. ter Horst to parliament (Tweede Kamer): *Voortgangsbrief klokkenluiderdossier, 10 December 2009*.

1. No decision which infringes the rights of the whistleblower can be made as a consequence of that person blowing the whistle. The decision now emphasizes that management has the duty to ensure that the whistleblower is not hindered in any way to continue to perform in his/her function. The decision now also specifies what 'infringement of the rights' means:
 - a. Dismissal of the whistleblower
 - b. Ending a temporary employment contract or not renewing it
 - c. Refusing to transform a temporary contract in a contract of continuous employment
 - d. Transferring or relocating or refusing to do so
 - e. Issuing a sanction
 - f. Taking a disciplinary measure
 - g. Withholding salary
 - h. Withholding opportunities for promotion
 - i. Refusing holiday leave
2. The whistleblower can raise concern internally with his line manager, or with an organisational confidant (officially appointed), or externally with the Commission Integrity. New is that one can also blow the whistle on a malpractice in another department or organisation than the one in which one is employed. Also new is that former employees can blow the whistle on their former organisation (up to two years after ending the employment)
3. Regarding the internal route:
 - a. If the concern is raised with the Confidant, he/she is required to keep the identity of the whistleblower confidential, unless the whistleblower does not want that. This means that all communication back to the whistleblower will go through the Confidant. The scheme therefore also provides protection for the Confidant.
 - b. Any feedback to the whistleblower about the progress and findings of the investigations (this must happen within 12 weeks) must include further steps the whistleblower is able to make.
4. Regarding the external route:
 - a. Concerns can be raised with the Integrity Commission (independent but appointed by the Minister of internal affairs), if the findings of the internal investigation is not satisfactory, if it takes unreasonably long (+12 weeks), or *if there are good reasons to do so* (my translation of 'indien daartoe aanleiding bestaat'). It is not stipulated what these good reasons should include.
 - b. The Integrity Commission must keep the identity of the whistleblower confidential, unless the whistleblower does not want that.
 - c. The Integrity Commission must investigate the concerns. Costs of the investigation will be charged to the organisation about which a concern is raised.
 - d. The Integrity Commission must provide, based on its investigation, an advice to correct malpractice to the body in charge of the organisation (about which the concern was raised).

5. New and important is that the whistleblower or the Confident who wishes to object to the findings of the internal or external investigation, and take matters further to court, will be partly reimbursed for costs made during these procedures, for example to get legal assistance. It is not stipulated how big the 'partly reimbursement' will be, and a number of conditions apply, but this seems an important improvement.

The new institutional structure

During the parliamentary debate in 2003-2004 no agreement could be found whether or not whistleblower protection legislation should also cover the private sector. The debate was closed with a decision to urge the private sector to develop some self-regulation and this would then be evaluated. The evaluations took place but were very disappointing. There is little knowledge about the issue and the implementation of internal whistleblowing schemes is not a spreading practice in Dutch private sector companies.

Another path taken by the Dutch government was to seek input from FNV and STAR on how to improve whistleblowing practice in the private sector. One idea was to open the Integrity Commission to concerns from the private sector. STAR was opposed to that because the mandate would be too wide and the investigations would lose strength because of that.

Instead STAR proposed to install a national advice centre on whistleblowing, accessible to everyone: public and private sector employees, managers, and employers. The Minister of internal affairs has taken up this idea but also took the point of view of the ROP (Raad voor het Overheidspersoneel – Committee for Public Officials) that there should also be a body mandated to investigate.

Thus, the Minister of internal affairs took the decision (10 December 2009) to create an Advice Centre and independent from that reshape the Integrity Commission (it will be renamed into OIO – Onderzoekspunt Integriteitsschendingen Overheid – Investigatory body for Integrity breaches in Government).

Reshaping the Integrity Commission aims at making it able to operate the amended scheme (as I described in the previous sections). The interesting bit is however the Advice Centre.

The advice centre does not have a mandate to investigate issues. The tasks of this advice centre are:

- a. To give information and advice to potential and actual whistleblowers on how to raise concern, how to avoid juridical difficulties and pitfalls. It will check whether there are ways left to raise the matter internally and if not it will assist the whistleblower to prepare the issue to be brought to an external agency.
- b. To give information and advice also to employers. The centre aims to play an important role in preventing escalation when someone tries to raise a concern internally.
- c. To gather and distribute knowledge and expertise about whistleblowing.
- d. To do general awareness raising among employers and employees about whistleblowing.

The advice centre will have a steering committee composed of experts from different industries in the private sector, from the public sector, from integrity advisors, from academia, and will also include someone who has whistleblowing experience.

Some concluding thoughts

There are a number of interesting aspects about this new scheme:

1. Widening the accessibility of different recipients for whistleblowing as well as allowing whistleblowing by ex-employees and also on other organisations than ones direct employer are things to be applauded, but only because the previous restrictions were too narrow. So in a sense we only see the correction of a mistake here.
2. What is very positive in this scheme is that we see the sense-making around the issue of whistleblowing slowly shifting from a focus on the whistleblower to a focus on the duties of management to prevent escalation when a concern is being raised. I see in this an acknowledgement of the assumption that people who raise a concern are not out to rock-the-boat, but are simply trying to raise a genuine concern.
3. Another positive element in the new scheme is that costs made by the whistleblower to enter and run through the whistleblowing procedure should not be on the whistleblower. The scheme only provides a partly reimbursement, but at least this is a new element that could be an example for policy review in other countries. And it shows that at last we might be starting to learn from the case studies. Once whistleblowers enter formal procedures, they become the object of the investigation – did they follow the right procedure and if not they don't have a case. Paying for the costs of the procedure for the whistleblower, even when the investigation shows there was no wrongdoing and thus the whistleblower was mistaken, is a first step in acknowledging that the concern should not die in the procedure (don't shoot the piano player).
4. Linked to that is the enormous value the Advice Centre can play for whistleblowers. We know this from the work of Public Concern at Work (which is mentioned in the letter from the Minister of internal affairs). The difference with that UK organisation is that the Dutch Advice Centre would be operating as a public institution, which means it will be funded by the tax payer. Important is that it has the explicit task of providing whistleblowers with advice on how to raise a concern internally and how to prepare oneself to take external steps if necessary. This is another acknowledgment that too often in the past, genuine concerns have been slaughtered and made ridicule by a procedural nitty-gritty. If the Dutch Advice Centre is a public institution, it might be able to send out stronger signals to judges than PCaW can – although perhaps we should also draw lessons from the UK on the limits that any advice centre faces.

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