

4 Reporting¹ malpractices in the dutch public sector

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Introduction

Employees can play a valuable role in identifying and reporting misconduct in the workplace. Reporting malpractices such as fraud, corruption and abuse of powers is necessary for the competent authorities to be able to address these serious breaches of integrity. Conduct of this kind and coverage in the media undermine confidence in the government. There is also awareness on an international level of this important role of employees, and of the fact that ‘reporters need effective protection.’² What is the situation regarding reporting of malpractices and protection of reporters in the public sector in the Netherlands? In this contribution, we outline how reporting is organised within the government.

We first explain why a reporting procedure was introduced within the government. We then discuss the objectives and principles of the regulations, followed by a brief discussion of the procedure itself. We explicitly devote attention to a specific officer in the reporting procedure, the confidential integrity counsellor. Secondly, we discuss the external reporting/integrity landscape in the Netherlands. Here we outline the picture of the number of integrity institutions that have grown over the years. We also describe the potential consequences of the adoption by Parliament of the amended ‘House for Whistleblowers’ Bill for the reporting landscape. We then conclude with some reflections on the Dutch reporting system.

Development and operation of the procedure for reporting malpractice

A survey of employees conducted in 1999 by a large trade union (FNV, 2000) showed that they did not feel free and secure enough within their own organisations to report suspicions of potential malpractice. This outcome made the government aware that it was missing potential opportunities to halt malpractice occurring in the public sector at an early stage. The government therefore set itself the goal of preventing malpractice as far as possible, more than in the past, and if it nevertheless arose, to identify and halt his quickly. In order to achieve this, it was necessary to create

an environment that invited reporting. A sense of security is essential here, and the central government therefore decided to set up a reporting procedure in 2001 that should protect its employees, as potential reporters of malpractice, (more effectively) against the potential negative consequences of reporting. In contrast to the present reporting procedure, this regulation was directed solely at regulating and reporting *serious* abuses.

The first reporting procedure was quickly followed up nationwide, as most of the lower tiers of government embraced the reporting procedure and introduced it within their own working environments. The reporting procedure has developed further over the years. New insights and evaluations have led to adjustments. There may be differences at a local level, because Dutch decentralised tiers of government have the freedom to draw up their own regulations. However, in most cases these are the same as the national reporting procedure, as in essence they all have the same aim: encouraging internal reporting of malpractice, so that the organisation can take adequate controlling action.

The reporting procedure therefore contains provisions to protect the reporter from the adverse consequences of reporting suspicions of malpractice. A reporter who is nevertheless dismissed as a consequence of his or her report, or who receives less salary, misses a promotion or suffers other negative effects can invoke the protection provisions of the reporting procedure. In this way, a reporter who has to defend himself or herself against the adverse effects of a report can claim financial compensation to cover the costs of legal proceedings. If the court decides in favour of the reporter, he or she can also count on compensation for legal fees in excess of the statutory minimum.

The reporting procedure only protects reporters acting in good faith. The report must be aimed at drawing attention to the (suspected) malpractice. A reporter with malicious motives cannot invoke the protective effect of the regulations. This is the case if a reporter makes a report for the purpose of deliberately harming another person or because he or she disagrees with the (political) choices of his or her organisation. The regulation not only protects civil servants in active service. Civil servants who leave the organisation can still make use of the reporting procedure and the associated protection for up to two years after the termination of their employment contracts.

The reporting procedure also provides for the appointment of a confidential integrity counsellor. This is an officer with whom employees can discuss and to whom they can report undesirable forms of behaviour and integrity matters in confidence. The confidential integrity counsellor plays an important role in Dutch reporting procedures and is regarded as a success factor for a reporting procedure that works well. The roles, tasks, conditions and the added value of confidential integrity counsellors are discussed in more detail later in this paper.

The reporting procedure also describes what can be reported, by whom, to whom, as well as what the procedure and terms for settlement are. What can be reported according to the regulations has already been mentioned as an aside. Primarily, this concerns suspicions of malpractice. The term ‘malpractice’ itself implies that this does not concern trifling matters. Malpractice is conduct that involves a violation of a law or regulation or failure to comply with policy. However, matters that are not laid down in law or regulations can also give rise to malpractice, for example if this creates a risk to health, safety or the environment or jeopardises the proper functioning of public service. In these cases, potential reporters are explicitly invited to report this internally.

Internal reporting of malpractice (Internal Reporting Mechanism)

The reporting procedure is designed to promote internal reporting of suspicions of malpractice. In order to make the barriers to this as low as possible, potential reporters are offered a number of reporting options. This can take place openly to the employee’s own supervisor, confidentially to a confidential integrity counsellor or a designated external party, or anonymously via a special national telephone reporting centre. The first option is the most preferable and will be at issue primarily in a healthy organisation. In this context, a ‘healthy organisation’ is an organisation where malpractice can be reported without fear of repercussions. However, it is possible that a potential reporter will have good reasons not to report his or her suspicions to his or her supervisor (yet) or to one of the supervisor’s superiors. A good reason for the latter could be that the supervisor himself or herself is involved in the malpractice. Larger organisations also sometimes have a specially created reporting centre (see for example Chapter 9 or 10 for some examples). This name can cover many different activities. Sometimes it is no more than a telephone number on which employees can report suspicions of malpractice. In practice, this is sometimes combined

with investigative activities, but it should also come as no surprise if the reporting centre is deployed for preventive tasks. But if a potential reporter still has doubts about whether to report suspicions of malpractice, he or she can first request a meeting with a confidential integrity counsellor.³

The confidential integrity counsellor

Confidential integrity counsellors are usually employees of the organisation who make themselves available for this specific role in addition to their regular duties. Questions and doubts about possible undesirable behaviour by colleagues and integrity matters can be discussed in confidence with a confidential integrity counsellor. An employee who is struggling with an integrity dilemma can therefore also contact the confidential integrity counsellor. As the name suggests, a meeting with the confidential integrity counsellor is always confidential. A confidential integrity counsellor never discloses the names of the person with whom he or she holds meetings, including to the employer, if this is requested. The confidential integrity counsellor offers employees who suspect malpractice support in taking a decision. The counsellor does this by listening, asking questions and outlining the options open to the employee. The potential reporters decide for themselves whether and, if so, which steps to take and so retain control over what happens. A confidential integrity counsellor is not a mediator or a coach and is certainly not an investigator. A confidential integrity counsellor who does not follow these principles becomes too closely involved in the case. He or she then runs the risk of becoming the problem owner or personal service provider for his or her ‘client’.

It is possible that, during a meeting with a confidential integrity counsellor, a potential reporter realises that he or she wishes to make a formal report on his or her suspicions of malpractice. In that case, the confidential integrity counsellor is also authorised to receive the report. This possibility was deliberately included in the reporting procedure in order to avoid potential reporters from failing to make reports because they are reluctant to tell their story yet again at a new reporting centre.

The task of the confidential integrity counsellor as a reporting centre is limited to taking receipt of the report and immediately handing this to the competent authority. The report must contain the most concrete description possible of the suspicions. The reporter’s name does not appear in the

report. A report is always made in confidence, unless the reporter waives this right. The competent authority is required to provide the reporter with proof of receipt of the report. This requires the intermediary of the confidential integrity counsellor, who, after all, is the only person who knows the identity of the reporter. At a later stage, when the report is investigated by the organisation in more detail and settled, the competent authority may ask the reporter for additional information or report him or her on the process via the confidential integrity counsellor.

Confidential integrity counsellors play a prominent role in the reporting procedure. This role will only truly come into its own if the organisation devotes serious attention to this. Research (De Graaf, 2008) has revealed that potential reporters do not take the step of actually making a report lightly. The confidential integrity counsellor is there especially to support potential reporters in this process. In order to be able to offer that support, the access barriers must be low. Through the historic development of the confidential work, we still often see this work being performed by employees associated with an HR department. This executive department is closely involved in implementing labour law measures such as suspension and dismissal. This package of tasks means that employees primarily regard this department as an extension of (senior) management.

This positioning of confidential integrity counsellors places pressure on the sense of confidentiality, which is so important for these meetings. For this reason, careful selection of confidential integrity counsellors is necessary. A confidential integrity counsellor must be accessible and, in addition to listening, must be able to conduct a pleasant and constructive conversation. Interviewing and listening skills are among the basic skills required and must therefore be mastered. Precisely because trust and integrity are key concepts for this work, the selection and appointment procedure must also take place correctly. For example, any suspicion of an 'old boys network' or preferential treatment of a candidate confidential integrity counsellor is already disastrous.

An organisation that is providing for confidential work would be wise to appoint two or more confidential integrity counsellors. This ensures continuity and if one counsellor is absent or a potential reporter does not have confidence in that counsellor, he or she can make use of the alternative. We also increasingly see that organisations not only appoint their own

employees as confidential integrity counsellors, but also deliberately opt to hire (external) counsellors. Employees who wish to discuss a problem but who feel that confidential integrity counsellors are too close to their own organisation can then contact someone who stands at a greater distance from themselves or the organisation. Often, this is also an attractive option for the organisation. It allows more flexibility in terms of capacity deployment and the construction means that it does not have to deal with the obligations it has in relation to its own employees.

Once the appointment has been finalised and the roles, tasks and positioning of the confidential integrity counsellor are established, the organisation must be familiarised with the phenomenon of a confidential integrity counsellor. Who is this, and what does he or she mean for colleagues and for the organisation in general? The individual confidential integrity counsellor plays an important role in this. A proactive attitude is necessary, because the work of the confidential integrity counsellors primarily takes place out of sight of their colleagues. In the Netherlands, confidential integrity counsellors are therefore encouraged to join team talks or meetings on a regular basis. In this way, confidential integrity counsellors not only increase their own familiarity and visibility, but can also explain the frameworks within which they must work. We also advise government organisations to use the time of appointment, which is followed by taking the official oath, as a natural moment at which to discuss the values and responsibilities of the office accepted and to point out the support that can be obtained from the confidential integrity counsellor.

It is important to define the frameworks for confidential work, because the job title of confidential integrity counsellor creates certain expectations.

It is possible that an employee or a confidential integrity counsellor, in the performance of his or her duties, comes across serious situations

- involving the taking of a life (murder, manslaughter et cetera);
- involving a serious offence committed by a civil servant while in office;⁴
- that creates a risk to persons, the environment or health, or jeopardises the proper functioning of the service.

Everyone who works in the public sector in the Netherlands has a statutory duty to inform the competent authority of their organisation of serious offences of this kind if they become aware of them. An employee who shares this information with a confidential integrity counsellor and does not wish to report it formally must be aware that the confidential integrity counsellor has a similar responsibility. In that case, the confidential integrity counsellor is required by law to report the confidential information. In the first instance, this suspicion will be reported only to the competent authority of the counsellor's own organisation and the counsellor will protect the identity of the source. If the seriousness of the suspicions leads to the involvement of the Public Prosecution Service, the confidential integrity counsellor will ultimately also have to reveal the identity of his or her source. The field of tension between confidentiality and mandatory disclosure means that the confidential integrity counsellor could come into direct conflict with his or her employer. Partly for that reason, according to the provisions of the reporting procedure, the confidential integrity counsellor enjoys the same protective regime as the reporter.

External reporting of malpractice (External Reporting Mechanism)

The preceding paragraph explained that the principle for the reporting procedure is that reports are made internally. It is foreseeable that an internal report may not always be settled to the satisfaction of the reporter, or that a potential reporter will have no confidence that an internal report will be settled securely and with due care (for example because he or she believes that the management to which the report must be made is itself involved in the matter). For that reason, the reporting procedure contains a supplementary and an alternative reporting possibility. The reporter can submit the case to an external, independent institution: the Council for Integrity Investigations in the Public Sector (OIO).⁵

The Council handles reports for the central government and for decentralised tiers of government, such as municipal and water authorities. Reports to the Council are handled in confidence. The reporter's name is not disclosed, but is protected from the outside world. In principle, the Council must complete handling of a report within twelve weeks. It does this by issuing an advisory report to the competent authority of the organisation concerning which the report was made.

Other reporting institutions

Although the OIO is an external body, reports made to it are still subject to the (internal) reporting procedure. There are also a number of other institutions for (potential) reporters or government employers. These are listed below, with a brief explanation.

Confidential Line for reporting breaches of integrity

Civil servants and citizens can call the Confidential Line, which is part of NL Confidential,⁶ to report breaches of integrity committed by government officials. Via the Confidential Line, reports can be made anonymously. There may be reasons not to make a report to a supervisor or confidential integrity counsellor, for example because the perpetrator is a direct colleague of the reporter or because the reporter fears dismissal. The Confidential Line is then an alternative. The Confidential Line service will not investigate the report itself, but anonymous reports are passed on in confidence to the organisation responsible for further handling. The Confidence Line therefore serves as a ‘last resort’ in the reporting system.

Advice Centre for Whistleblowers (APKL)

The Advice Centre for Whistleblowers (APKL) was launched on 1 October 2012. This arose through a critical evaluation of the operation of the reporting procedures within the public sector (USBO, 2008). This independent body was set up to advise (potential) whistleblowers in the private and public sectors on request, in complete confidence, and to offer them support with potential follow-up steps if they consider making a report. Everyone who encounters suspected malpractice with a public interest via their work can contact the APKL. This not only includes regular employees, but also, for example, contract workers or trainees. The APKL does not conduct investigations itself. It has no powers or instruments for this.

Other relevant parties in the ‘reporting landscape’

In addition to the organisations mentioned above, still more parties operate within the reporting landscape. Although they are not formally part of the reporting procedure, these organisations operate on the fringes of this.

National Ombudsman

The National Ombudsman investigates the conduct of the government. As a ‘second-line’ service, the Ombudsman handles complaints about the government from members of the public. This means that people with

complaints must first make use of the complaints regulations of the government organisation itself. As a complaint from a member of the public about treatment by a government body is not the same as a report of malpractice, the Ombudsman is not formally an integrity institution and does not form part of the reporting landscape. However, it is possible for a report of malpractice to be ‘packaged’ as a complaint, which is then submitted to the Ombudsman. For this reason, and because the Ombudsman formed part of the House for Whistleblowers legislation, the Ombudsman is discussed in this chapter, albeit as an aside.

Whistleblowers Expert Group

A number of (former) whistleblowers formed the Whistleblowers Expert Group in June 2010. The tasks that this non-governmental organisation (NGO) has set itself include acting as a reporting, advisory and referral centre for whistleblowers reporting (social) malpractice. In general, the Whistleblowers Expert Group acts as a lobby group for whistleblowers, in particular with regard to raising awareness of their protection.

Publeaks

On 9 September 2013 the Netherlands was informed of the launch of a website for whistleblowers. Via this website (Publeaks.nl), an initiative of a large number of national media, people wishing to raise malpractices can come into contact with the press in a safe manner. Via this medium, people can publicise large amounts of information anonymously and simply, without personal contact with a journalist. This initiative concerns a low-barrier instrument, Publeaks has so far produced 40 relevant reports.

Some reflections on the Dutch reporting system

Anonymous reporting

The Dutch government does not advocate anonymous reporting, because the facts cannot be verified with the person making the report, but also because malicious motives could play a role. For that reason, the reporting procedure does not provide for the possibility of anonymous reporting. In order to avoid valuable signals from being lost for that reason, the government has opened the Confidential Line as a national telephone reporting line.⁷

If the report concerns a serious criminal offence, it will be passed on to the police for investigation. Other matters are reported to the organisation at

which the suspected malpractice takes place. The recipient organisation then has an opportunity to take adequate action. More information on anonymous reporting is provided above, under the heading ‘Confidential Line for reporting breaches of integrity’.

Success factors

Creating a safe environment by formulating a reporting procedure with assurances is an important first step. Interim evaluations and scientific research (De Graaf, 2008) have shown that there are several factors that determine whether employees actually report malpractices. Employees who report misconduct, for example, are not only concerned about their own safety. Research has shown that whistleblowers are also concerned about the consequences of their report for the person involved. After all, their report may lead to someone losing their job and facing financial and social problems. For that reason, reports of suspected malpractice must be addressed quickly, investigated with care, and must lead to a fair and just settlement. Failure to address reports without stating the reasons, unnecessary use of invasive investigation methods, disproportionate penalties and failure to penalise misconduct all inhibit reporting. This is demonstrated by research.

The study by G. de Graaf and T. Strüwer (2013) *Aard en omvang van integriteitsschendingen binnen de Nederlandse overheid (Nature and scale of breaches of integrity within the Dutch government)* showed that half of the officials who reported suspicions of malpractices were dissatisfied with the handling of the report. In their view, reporting had little or no noticeable effect, they feel they were not taken seriously, and the feedback and progress of the process were also perceived as inadequate.

Potential reporters must therefore have confidence in the entire process, Not only for themselves, but also for the person seen as the potential offender. Furthermore, the entire process, from reporting to legal settlement, is based on the philosophy of ‘self-cleaning’ capacity, which only comes into its own if the organisation has the will to provide public services in a proper, open and transparent manner. Good internal and external communications in integrity incidents are crucial here. The privacy of those involved must be respected, but cannot form a reason not to communicate. This form of openness and transparency sometimes appears to conflict with the principles of good reputational management. Rightly or wrongly, administrators are afraid that the media will explicitly pick out

integrity incidents and that they will be left to deal with the negative consequences. For this reason, administrators have a tendency to keep quiet about incidents or to belittle them. They desperately try to keep the internal ranks closed, but ultimately, the truth, or part of it, nevertheless comes out or is cast into doubt. In the long term this approach is certainly counter-productive: it undermines trust in the government.

Protection of reporters

In the Netherlands the reporting system is based on the ‘self-cleaning’ capacity of organisations. That system comes into its own to best effect if reporting of malpractice is regarded as a welcome sign for the organisation concerned. The organisation concerned must address the report adequately and halt the malpractice as quickly as possible. If the report leads to a personal investigation, this must be conducted justly and with due care. Unfortunately, in practice we still see too often that reporters face negative consequences from their report and are sometimes even threatened by their own employers. It quite often leads to dismissal, breakdowns in marital and other relationships and other personal suffering. New forms of communication mean that reporting on conflict situations of this kind and the suffering caused reach a wide public with increasing speed. In cases of this kind, due to their news value, the media certainly make themselves heard. They primarily report on cases where things go wrong. The disclosure of this one-sided picture does not encourage future reporters to report suspicions internally. The question arises of whether the protective measures in the reporting procedure are sufficient, or whether this undesirable effect should be addressed in a different way.

A reporter who has to defend himself or herself in court against his or her own employer due to dismissal or other measures will certainly regard the limited compensation provided via the reporting procedure as a shortcoming. The question is whether higher compensation would have prevented the employer’s behaviour. The problem appears to lie primarily with the senior management that receives a report on suspicions of malpractice. Senior managers who conspicuously renege and harm the legal position of a reporter acting in good faith should be publicly corrected by the supervisory authorities. If there is an abuse of power or other dereliction of duty, the most senior manager will also have to be prosecuted under labour law. Obviously, any prospect of a golden handshake will then be unlikely.

New developments and their consequences for the landscape

On 14 May 2012 a member of the House of Representatives submitted a Bill intended to offer advice and support and better protection for (potential) reporters of malpractice. This Bill arose through the concerns of a number of members of the House of Representatives regarding what they see as slow progress in replacing the existing reporting provisions within the government, after an evaluation in 2008 showed these to be inadequate and insecure.

In order to solve the problems observed, the original Bill provided for the creation of a ‘House for Whistleblowers’. This House was to implement a number of ambitious elements, such as the creation of a fund for benefits at the request of whistleblowers. That element was rejected at an early stage of the Bill’s passage through Parliament. The section on combining an advisory and investigation function in a single body (the ‘House’) was also rejected. The proposal to position the House at the National Ombudsman suffered the same fate, since in that case, the National Ombudsman would also have a say with regard to the private sector.

In the amending Bill (‘nouvelle’) which is currently before the Senate, the members who submitted it have met the requirements of the Senate to some extent. The House will no longer be placed with the National Ombudsman, but will be set up as an independent administrative body (ZBO). The Advice and Investigations departments within the House will also be set up separately and specific investigative powers will be introduced for the public and private sectors. In view of the changes, it seems as if the Bill, which has now been amended several times and in which the initiators have abandoned the aforementioned ambitions, will finally make it to the finishing line.

In the first instance, this means that a new body will join the already saturated and, consequently, not always equally transparent reporting landscape. However, on closer consideration, a modest reorganisation of the landscape is possible. If we look at the text of the Bill, we see that the House will consist of an *Advice* and an *Investigations* department. There then appears to be scope to integrate these departments with the APKL and the OIO. If these existing integrity institutions are indeed transferred to the ‘House’, the landscape would become a little more transparent and thus the ‘patchwork’ picture presented by the existing reporting landscape could be corrected somewhat.

There are also calls for still further upscaling, with prevention and repression being brought under one roof. In a structure of that kind, BIOS should be given a place within an umbrella ‘Integrity Institute’. In our view, BIOS should then be transferred to such a setting with its existing package of tasks (prevention) and its current functional independence based on Article 6 of the UN Convention Against Corruption.

Notes

- 1 In this article, the authors use the term ‘reporting’ and derivative words instead of the term ‘whistleblowing’ since this contribution describes mainly the internal reporting system, not the situation in which an employee is leaking internal information to the media.
- 2 We refer here to Articles 32 and 33 of the United Nations (UN) Convention Against Corruption (Bulletin of Treaties 2004,11) and Recommendation CM/Rec (2014)7 of 30 April 2014 from the Committee of Ministers to Member States on the protection of whistleblowers and also to the EU Anti-Corruption Report from the European Commission of 3 February 2014, COM (2014) 38 Final.
- 3 The Advice Centre for Whistleblowers (APKL) described in Chapter 4 plays a similar role and can also be consulted by employees.
- 4 Criminal offences that can be committed only by civil servants, such as abuse of power.
- 5 Two circumstances provide grounds for a report to the OIO. The reporter disagrees with the substance of the conclusion of the competent authority regarding the report. For example, the competent authority may find that the report is unfounded. Or there may be a procedural argument: the settlement of the report takes longer than the procedure prescribes.
- 6 An organisation that acts as a reporting centre for several fields in relation to crime and crime control.
- 7 www.devertrouwenslijn.nl

Literature

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- Graaf, G. de (2008). Wat er over ambtelijk melden valt te melden (*What can be reported on official reporting*). *Bestuurswetenschappen*, 62(2), 13-31.
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