SECURITY AND HUMAN RIGHTS MONITOR

Homecoming for Wandering Dutch Whistle-blowers?

Chris Moll[1]*
Founder and current Director, Lexchange

c.moll@lexchange.org

DOI: 10.1163/18750230-02404017

1 * The author's organization is a not-for-profit entity, providing training and exchange with a focus on accountability, transparency and participation in regulatory governance and reform in pre-accession countries (EU), countries in transition and developing countries. www.lexchange.org.

Abstract

In many European countries, whistle-blowers are perceived in a negative light. However, whistle-blowers have increasingly played a critical role in the recent disclosure of covert governmental programmes, private sector economic criminal offenses and redesigned risk management strategies. Real change requires effective legal shielding for whistle-blowers. Most legal frameworks in Europe fall short of providing genuine legal protection due to reluctant public authorities and private sector actors. The exception proves the rule, as currently illustrated in The Netherlands. A group of MPs is creating a House for wandering Dutch whistle-blowers, but runs the risk of 'design failures' by not actively seeking valuable 'construction advice'.

Keywords

whistle-blowers; legal protection; legislation; Europe; The Netherlands

1. Introduction

Whistle-blowers play a vital role in exposing corruption, fraud and mismanagement and in preventing disasters that arise from negligence or wrongdoing. Wikileaks' Julian Assange and Edward Snowden generated shock waves worldwide with their respective disclosures on diplomatic cables and the near unimaginable dimensions of the NSA surveillance programme. Other whistle-blowers revealed the cover-up of SARS and other dangerous diseases that threatened millions of people in China; they disclosed corruption and nepotism in the European Commission; they helped to avoid environmental hazards and, last but not least, brought large-scale fraud by Bernard Madoff and other criminal offences in the financial sector to the surface.

In most known cases, whistle-blowers expose themselves to high personal risks in order to protect the public good. When speaking out against their bosses, colleagues, business partners or clients, they risk their jobs, their income and security. Nevertheless, rather than being heard and praised for their courage, most whistle-blowers face indifference or mistrust and their reports are not properly investigated. They often end up in years of legal litigation, fighting for their own rights or for the case they have disclosed to be adequately investigated. The result can be health problems, depression and early retirement. At the same time, the value and importance of whistle-blowing in the fight against corruption is increasingly recognized. International conventions[2] commit the signatory countries to implementing appropriate legislation, and an increasing number of governments are willing to put related regulations in place. Ever more companies, public bodies and non-profit organizations put whistle-blowing mechanisms in place for effective risk management and to ensure safe and accountable workplaces.

Attitudes towards 'whistle-blowers' varies from country to country. The term is associated with being an informant, a traitor, a spy or a snitch in, for instance, Estonia, Hungary, Latvia and Lithuania.[3] In countries such as Ireland and Italy, there seems to be a general mistrust of public authorities and an emphasis on not speaking out against one's neighbour or colleague. In other countries under Soviet rule, these negative perceptions of whistleblowing are the result of years of authoritarian regimes and the existence of secret

2 The UN Convention against Corruption (UNCAC), the Council of Europe Civil Law Convention and the OECD Anti-Bribery Convention are amongst the most prominent legal frameworks to encourage whistle-blowing. Other regional agreements and conventions may contain similar relevant provisions.

3 Anja Osterhaus, Craig Fagan et al, Alternative to Silence, Whistle-blower Protection in 10 European Countries, Transparency International Secretariat (2009), p. 7. The report covers research carried out in Bulgaria, the Czech Republic, Estonia, Hungary, Ireland, Italy, Latvia, Lithuania, Romania and Slovakia. In addition, it takes existing whistle-blowing legislation and best practice into account. The report identifies weaknesses, opportunities and entry points to introduce stronger and more effective whistle-blowing mechanisms in these countries.

police networks. Individuals provided the authorities with information, often secretly, on neighbours, co-workers and family members. In countries with small populations such as Estonia, Latvia and Lithuania the close-knit nature of communities can pose a significant challenge for whistle-blowing mechanisms, particularly in terms of encouraging disclosures and assuring the confidentiality of whistle-blowers who come forward.

Legal frameworks can be essential in supporting this practice, provided they ensure full protection for the whistle-blower as well as an adequate and independent follow-up to the disclosure. Given that whistle-blowers are in most cases insiders who are the first to detect any wrongdoing, functioning internal whistle-blowing systems are excellent tools for effective risk management in organisations.

However, there is a general lack of any will to pass and effectively enforce whistle-blowing legislation.

The act of reporting may be superseded by other laws which prohibit the release of information, and in many countries, libel and defamation regulations deter whistle-blowers from making disclosures. While there is a legal duty to disclose corruption, fraud and other criminal acts, insufficient protection, and the absence of adequate follow-up mechanisms often create a dilemma for the individual who suspects wrongdoing. Existing legal provisions do not properly protect whistle-blowers. They are inadequate in terms of outlining processes, establishing appropriate channels for disclosure, enforcing protection and setting out follow-up procedures for disclosure. They also fail to ensure the effective sanctioning of reported wrongdoing. Where there are protection mechanisms, these are often drawn from labour codes. However, relying on questions of national labour laws means that only formal workers have some form of recourse. Consultants, contractors, third parties, suppliers and other individuals are typically outside the law. Policies regarding compensation for retaliation vary widely between countries: While they are mostly limited to compensation in cases of dismissal, some countries have included rewards for the disclosure of wrongdoing in their legislation. Although internal reporting mechanisms are available both for public sector workers and employees in private companies multinationals and state-owned companies in particular tend to have whistleblowing mechanisms in place there is little information about their procedures, effectiveness and results. Where the related codes and provisions are known, the reporting mechanisms tend to be limited to internal channels and they often fail to stipulate the body or office that is to receive the reports. When disclosures are reported anonymously, they are rarely pursued.[4]

A recent survey has mapped the legal provisions in place for the protection of whistle-blowers. It concluded that despite the well-documented value of whistle-blowers in exposing and preventing corruption, only 4 countries in the European Union have legal frameworks for whistle-blower protection that are considered to be advanced: Luxembourg, Romania, Slovenia and the United Kingdom. Of the other 24 EU countries, 16 have partial legal protection for employees who disclose misconduct. The remaining 7 countries have either very limited or no legal frameworks. Moreover, many whistle-blower provisions that are currently in place contain loopholes and exceptions. The result is that employees who believe that they are protected from retaliation

4 Anja Osterhaus, Craig Fagan et al., Ibid, p. 4.

could discover, after reporting misconduct, that they actually have no legal recourse ('cardboard protection').[5]

Fortunately, several EU countries have in recent years strengthened their whistle-blower laws to various degrees. including Austria, Belgium, Denmark, France, Hungary, Italy, Luxembourg, Malta, Romania and Slovenia. Countries that have published proposals or have announced plans for proposed laws include Finland, Greece, Ireland, and Slovakia.[6]

This progress has been attributed to a range of factors, from growing activism by non-governmental organizations and pressure from international organizations, to scandals that have triggered governments to act. In other cases progress has been the result of the political work of individual MPs, who have proposed a private Bill, as has happened in the Netherlands. After some years of preparation, a group of Dutch MPs chaired by Ronald van Raak (Socialist Party) submitted the long-awaited draft proposal for the Bill 'House for the Whistle-bowers' in 2012.[7] The proposal aims at a comprehensive approach to the guidance and protection of whistle-blowers in the Netherlands.

This article provides an overview of the context of the Dutch culture of integrity (perceived as 'the building site'), the first developments to a degree of whistle-blower legal protection in the past decade (the 'early works'), as well as an overview of the current state of affairs of this legislative initiative (the 'building project').

How did this 'building project' evolve? And what preceded it? And to what extent does its features align with the 'European meta structure', as outlined above?

2. An overview of 'the building site': the culture of integrity in the Netherlands

In 2012, Transparency International in the Netherlands conducted a national integrity assessment of the country.[8] In this account, the organization observed that the Netherlands has a relatively strong National Integrity System (NIS) with apparently sufficient 'checks and balances' in place. However, the national integrity system is incomplete. Currently there is no systematic relationship between the public and private sectors or, for that matter, civil society for improving integrity and curbing corruption. It is notable that one is quicker to speak of integrity and transparency than corruption in the Netherlands, and on discussing integrity, it seldom has to do with one's own integrity or that of direct colleagues. Reference is often made to other pillars'[9] integrity or, better said, behaviour that lacks such integrity. For example, the Tweede Kamer[10] points out the unethical behaviour of the Executive, NGOs focus on unethical behaviour within the business sector and the media concentrate on the unethical methods of possible other media, the business world or politics. The

5 Mark Worth et al., Whistle-blowing in Europe: Legal Protections for Whistle-blowers in the EU, Transparency International Secretariat (2013), p. 6-7. The report is an overall assessment of the adequacy of the whistle-blower protection laws of 27 member countries of the European Union (EU). The report covers a range of political, social and other factors that promote or discourage whistle-blowing in the workplace, and that enable or inhibit the enactment of whistle-blower laws in EU countries. (NB: this report was commissioned before Croatia became the 28th EU member).

6 Mark Worth et al. Ibid, p. 9.

7 Kamerstukken II, 2011-2012, 33258, nr. 1: Voorstel van Wet houdende de oprichting van een Huis voor klokkenluiders.

8 W. Slingerland et al., National Integrity Systems Netherlands, Transparency International Netherlands (2012).

9 Ibid, p. 17. 'Pillar' is a reference to the institution(s) that play a key role in preventing corruption. The NIS consists of the following pillars; Legislature, Executive, Judiciary, Public Sector, Enforcement Agencies, Electoral Management Body, Ombudsman, Anti-Corruption Agency, Political Parties, Civil Society and Business.

10 The Dutch House of Representatives.

conclusion seems justified that mechanisms at the 'pillar' level generally work well and unethical behaviour is usually mutually exposed between pillars and corrected. Internal correction mechanisms form an important component of the level of the necessary 'checks and balances'; however, these function only partially. This has nothing to do with any shortage of rules or procedures. Other than the several exceptions already described, for most NIS pillars formal provisions are indeed present, otherwise there is a question of acting without integrity.

The foremost reason why internal correction mechanisms which lead to effective prosecutions function in such a limited way is due to the taboo of "addressing someone". It is perceived to be important that things should always be weighed and discussed and that questions of power and influence should be dealt with in the right way. This is precisely in the Netherlands, where the so-called 'polder model' prevails.[11] The challenge for the Netherlands is to have integrity become a self-evident component of network lobbying and doing business. Only when one's own integrity is no longer a taboo subject can there be talk of an NIS that is truly ready for the future. Improvements in the sense of more cooperation between the sectors should be sought. Another major conclusion that can be drawn is that top level decision makers both in the public and private sector should become more accountable towards each other as to their own integrity. The well-known tone from the top should be complemented with the correct tone at the top. This has to coincide with the possibility to safely report abuses within, but also outside of an organization. As such, there should be no difference between a governmental or private sector entity. A last major conclusion is that the checks and balances regarding promoting and fighting corruption have to be materialized.[12]

In the light of its findings, the authors of the National Integrity System Assessment more generally recommend the public sector, the private sector and CSOs to cooperate in efforts to reduce corruption and improve the importance of integrity. Individual cases of corruption should be centrally registered and monitored to enable more effective prosecutions.[13] As a means of guarding the general interest, a more protected environment for potential whistle-blowers both in the private and the (semi-)public sector ought to be assured. Laws on whistle-blowing protection in the private sector must be strengthened. Employees should be able to obtain advice and counselling as whistle-blowers when necessary to breach existing confidentiality and loyalty obligations without being penalized, as part of the necessary documentation of their case.[14]

This last recommendation by the National Integrity System Assessment leads us to look more closely into the development of existing 'early structures' containing provisions for the protection of whistle-blowers in the Dutch public and private sector.

11 The Dutch polder model is characterized by the tripartite cooperation between employers, the labour unions and the government. These talks are embodied in the ongoing dialogue in the Social Economic Council (Sociaal Economische Raad, SER). The SER serves as the central forum to discuss labour issues and has a long tradition of consensus, often defusing labour conflicts and avoiding labour unrest.

12 W. Slingerland et al., National Integrity Systems Netherlands, Transparency International Netherlands (2012), p. 22-23.

13 Ibid, p. 23, Recommendation 3.

14 Ibid, p. 24, Recommendation 16.

3. 'Traveaux préparatoires': early whistle-blower[15] regulations

Triggered by a report by the public sector trade union AbvaKabo,[16] providing more insight into existing loyalty conflicts of public sector employees, and a number of related incidents,[17] led the Government to acknowledge that 'whistle-blowing' as an issue requiring attention. It issued a provision containing a procedure to report on significant misconduct[18] and it anticipated an amendment to the Civil Servants Code.[19]

Next, in 2003, several regulations concerning the (legal) position of whistle-blowers were made part of the terms and conditions of employment. In its advice, the Council of State showed some hesitance in establishing legal protection for disclosing public sector employees. It wondered who would really benefit from such provisions, as whistle-blowers in the Netherlands were virtually non-existent. The Council was of the opinion that a regulation would not be necessary for public sector organizations that showed themselves to be sensitive to critics and would respond to this appropriately. In organizations where criticism was experienced as threatening, such protection would only work in the short term. In the long term, the reporter would have no illusions about his or her career.[20] On balance, the time for legal intervention would not be right. Self-regulation would be appropriate: public sector employers were to arrange for a procedure to deal with the suspicion of misconduct and additionally to arrange for legal protection for the reporting public sector employee. However, the Civil Servants Act was amended so that it allowed public sector employees to report internally, although under strict conditions. If not successful, the employee could refer his or her case exclusively to the Public Sector Integrity Commission.[21]

A survey in 2001 made clear that employers' organizations and trade unions were united in their desire for a code of conduct on how to follow a procedure for the reporting of misconduct.[22] At the request of the Government, the partners in the Labour Foundation agreed on a joint regulation. This Labour Declaration[23] contained 'building blocks' for the development of a procedure for handling a suspicion of misconduct. This document is to be valued as a code of conduct for development. Intentionally, the social partners would implement the joint regulation in the context of collective labour agreements. The Social Economic Council was of the opinion that the code of conduct should be adopted by the social partners. It also stated that it did not favour a commission for the referral of potential whistle-blowers.[24]

15 In the Netherlands, whistle-blowers are referred to as 'klokkenluiders' (bellringers). This apparently typical Dutch reference to whistle-blowers was introduced in 1990 by M. Bovens, in: Verantwoordelijkheid en organisatie: beschouwing over aansprakelijkheid, institutioneel burgerschap en ambtelijke ongehoorzaamheid (Zwolle, 1990).

16 G. van Donselaar et al., Resultaten opinie-onderzoek loyaliteitsproblemen bij ambtenaren, AbvaKabo (1999).

17 Ad Bos revealed widespread corruption in the building sector, as a result setting 'whistle-blowing' prominently on the public agenda.

18 Regeling procedure inzake het omgaan met een vermoeden van een misstand, (Staatscourant 2000, 243, p.8.).

19 Nota Integriteit van het openbaar bestuur, Nota Vertrouwen in verantwoordelijkheid, in: Kamerstukken II, 1999-2000, 26806, nr. 1.

20 Kamerstukken II, 2000-2001, 27602B, p. 1.

21 E. Lissenberg, Klokkenluiders en verklikkers (2008), p. 13. The pillar society of the Netherlands may explain the fact that generally information is kept, but also kept 'amongst us'. 'Us' as ever changing, depending on the subject and context, Ibid, p. 14-15.

22 Juliette Vermaas et al, De weg van de klokkenluider: keuzes en dilemma's, (2001).

23 Verklaring inzake het omgaan met vermoedens van misstanden in ondernemingen, Stichting van de Arbeid, Publicatienr. 6/03, (24 June 2003).

24 SER Advies nr. 04/14, Klokkenluiders (22 December 2004), p. 7.

3.1. *'Lot A': the public sector*

The Ministry of the Interior commissioned an evaluation of whistle-blower regulations in the public sector in 2008.[25] In brief, the evaluation concerned two main questions. To what extent do existing regulations contribute to the internal reporting and tracking of misconduct? And: do existing regulations provide sufficient (legal) protection for public sector employees?

As for the first question (contributing to internal reporting and tracking), the researchers noted that in the majority of cases a suspicion of misconduct is reported. Actually, 67.5% of public sector employees indicated (in the event of misconduct) that they would report to a integrity officer, and 51.3% indicated that they have faith that the matter would be taken up effectively. Of those who in fact had a suspicion of misconduct (12.8%), two-thirds (8.5%) of all public sector employees confirmed that they had reported this internally. Only 31% of the respondents knew of an existing whistle-blower regulation, and a modest 5.9% indicated that they had acted upon having knowledge of the existence of a whistle-blower regulation.[26]

Despite 31% being aware of the provision itself, the regulation was well appreciated. However, many respondents indicated that they valued the provision merely as an instrument. On balance, the culture in which suspicion can be reported without a fear of negative consequences is decisive. The integrity officers fulfil a useful role when they have sufficient authority and autonomy within the organization and de facto can offer confidentiality. If these conditions are not met, the respondents assessed the officer to be of little value.[27] However, the survey showed that one-third of respondents with a suspicion of misconduct (4.3%) indicated that they did not report this. The main reason is a fear of negative consequences, a disbelief that reporting will lead to effective action, and a lack of confidence in the assigned officer.[28]

The existing whistle-blower regulations have considerable limitations. The circle of potential applicants (reporters) is limited to public sector employees in active service, and they can only report about the organization they work for. Thus excluding those who have left the civil service, or have knowledge of misconduct in another organization. A strict definition of 'misconduct' is yet another barrier for potential reporters. Part of the regulations require an indication of 'considerable' violations, 'grave' danger and 'serious' dysfunctioning, leaving the interpretation to the reporter. Finally, the reporting procedure proves not to be free of flaws, such as a lack of anonymity and confidentiality, the gap between internal and external reporting and the lengthy investigation following a report. Respondents indicate that these are the reasons for not reporting.[29]

As for the second question (regulations provide sufficient (legal) protection) the researchers were very outspoken in their judgments. The existing regulations do not offer any legal protection to public sector employees. This lack of protection proves to be an important reason not to report misconduct. In the case of 'serious' misconduct, involving senior level or management, only those reporters who self-assess that they will be able to bear the possible negative consequences will push their case forward and report.

25 M. Bovens et al., Evaluatie klokkenluidersregelingen publieke sector (2008). The survey was conducted in the sectors Government, Provinces, Municipalities, District Water Boards, Defencse and Police.

26 M. Bovens et al., Ibid, p. 7.

27 M. Bovens, Ibid, p. 8.

28 M. Bovens, Ibid, p. 8.

29 M. Bovens, Ibid, p. 8.

Most regulations do not offer any legal protection for the reporters of misconduct, except for the general provision that reporters will not suffer negative consequences as a result of reporting. On balance, this provision is not backed up by any concrete form of legal protection. The Public Sector Integrity Committee does not oppose retaliatory action by senior level or management. The Committee neither interferes with nor intervenes in any action affecting the public sector employee concerning his individual terms and conditions of employment as a result of his or her reporting. Moreover, the Committee does not have any power to offer legal protection, neither formally nor materially.[30]

The researchers concluded that the label 'whistle-blower regulations' is not an accurate reference to the regulations at stake. The provisions are merely procedures on how to handle a suspicion of misconduct. The regulations are primarily focused on the promotion of internal reporting and not on the protection of whistle-blowers. If genuine protection for whistleblowers is the aim, then more and effective protection should be arranged. As for useful practice, reference is made to the UK's Public Interest Disclosure Act.[31]

Recommendations included the amendment of existing regulations, resulting at least in abolishing the limitations as mentioned, as well as the broad introduction of the possibility of confidentially reporting, prohibiting workplace sanctions, shifting the burden of proof, the introduction of the right to claim damages or compensation and replacing the Public Sector Integrity Committee with an organization that has more investigative knowledge and capacity.

Finally, the researchers recommended that a Whistle-blowing Support Unit be set up, comparable to the British Public Concern at Work (PcaW).[32] A unit of this kind will be able to fulfil a number of functions on behalf of employees in the private sector and the public sector. Ideally, whistleblowers could be given assistance with information and advice, and (not-for-profit) organizations could provide advice in designing whistle-blower provisions and preventing whistle-blowing in general. In addition, the Whistle-blowing Support Unit can engage in public campaigns and advise politicians on the development of policy and law making.

What effects did the findings of this evaluation have?

The Council for Public Sector Employment Policy and the Labour Foundation[33] endorsed the suggestion of constituting an entity for advice and referral for whistle-blowers in the public and the private sector combined. However, the Foundation objected to the independent status of such an entity. The Council was in favour of establishing a central entity for integrity breaches in the public sector.[34] Efforts were made to come to a unified whistle-blower regulation for some domains in the public sector. Furthermore, some improvements were made regarding the circle of potential reporters, the definition of misconduct, the circle of organizations and the possibility to refer to the Public Sector Integrity Committee. Finally, the legal protection offered to a reporter was

30 M. Bovens, Ibid, p. 9.

31 M. Bovens, Ibid, p. 10. The Public Interest Disclosure Act 1998 (c.23) is an Act of the UK Parliament that protects whistle-blowers from detrimental treatment by their employer.

32 Public Concern at Work (PCaW) is an independent authority (a UK charity), which seeks to ensure that concerns about malpractice are properly raised and addressed in the workplace (www.pcaw.org.uk).

33 Raad voor het Overheidspersoneelsbeleid (ROP) resp. Stichting van de Arbeid (StAr).

34 A. Belling, Klokkeluidersregelingen: nuttig, maar niet afdoende, een reactie, in: Jaarboek Integriteit (2010), p. 48.

(slightly) reinforced, and some basic financial compensation was arranged for acknowledged whistle-blowers.[35]

1.1. *'Lot B': the private sector*

Prior to the evaluation of the whistle-blower protection provisions in the public sector, a similar survey was conducted in the private sector. This evaluation[36] project was commissioned by the Ministry of Social Affairs and Employment. Central to the evaluation was determining the extent to which whistle-blower regulations occur, their content, the use of the provisions and their effect. Finally, the degree of protection offered by the regulations was another topic addressed in the evaluation.

The survey[37] brings to the surface that 12% of employers and 8% of employees indicate that a regulation is present within the walls of their organization. Researchers estimate that from the overall results some 10% of employers' organizations have whistle-blower protection provisions in place.[38] The bigger the organizations, the more likely the presence of a whistle-blower procedure becomes. A mere 2-3 % of employers anticipate that they will develop a regulation in the near future. However, most employers in the survey indicate that they have neither contemplated the idea, nor do they consider such provisions to be necessary for their organization. Employers' organizations, trade unions and regulators do not expect all employers' organizations to develop a whistle-blower regulation. But they do expect organizations to handle the report of misconduct with prudence. It is essential that organizations prepare for the eventuality of a report of misconduct.[39]

The survey also focused on the effect of whistle-blower procedures. Most organizations with a whistle-blower procedure confirm that they apply it in the case of an (eventual) report of misconduct. Other organizations only develop a procedure when a report of misconduct has taken place. Organizations with a procedure already in place tend to implement more elements of the Declaration than organizations without such a procedure.[40] Employees demonstrate that they are hesitant when it comes to reporting misconduct. In organizations with a whistle-blower regulation, employees tend report cases of misconduct slightly more. More in particular, this concerns internal reporting. This observation is in line with the purpose of whistle-blower procedures. Respondents confirm the fact that a whistleblower procedure in an organization is not a conditio sine qua non for reporting misconduct. The culture of an organization, experience with other colleagues and personal fear play a decisive role. Many employees judge the reporting of misconduct to be a risky affair, with a potentially less than happy ending. Even in environments with a whistle-blower procedure in place, many employees are hesitant in reporting misconduct. Respondents confirm that (potential) whistle-blowers may experience negative consequences in their career development. Although a whistle-blower procedure deals with an employee 'with care', his or her position in the workplace will very often be damaged.[41]

35 A. Belling, Ibid, p. 50. 51.

36 C. Zoon et al., Evaluatie zelfregulering klokkenluidersprocedures (2006).

37 The research comprised of an inquiry, resulting in a response by 900 employers and 900 employees. In addition, 19 personal interviews were conducted with employers, employees, stakeholder organizations and regulators. Respondents in the building sector and the financial services sector were well represented in comparison to the other sectors.

38 C. Zoon et al., Evaluatie zelfregulering klokkenluidersprocedures (2006) p. 9.

39 C. Zoon, Ibid, p. 10.

40 C. Zoon, Ibid, p. 11.

41 E. Lissenberg, Commentaar op voorstel van wet Huis voor klokkenluiders (2012), p. 1.

Where did this evaluation lead to?

The social partners in the Labour Foundation showed themselves to be rather content with the current state of affairs. The Foundation rejected the suggestion of a whistle-blower regulation as being imperative. This would not be advantageous for a climate in which reporting would be free from fear.

Moreover, the Foundation considered that the Government is responsible for issuing a regulation offering sufficient safeguards for (potential) whistleblowers against disadvantages and resignation. Self-regulation should be supported by a good publicity campaign, to be managed by the Government.[42] The picture that emerges out of the aforementioned evaluations of the self-regulatory experiment in the public sector and the private sector in the Netherlands is slightly bleak and fragmented. One observation is that the regulations appear to be present in a specific area (the public sector), while being virtually non-existent elsewhere (the private sector). Another observation is that, although some improvements have been made as a result of the evaluation (the public sector), considerable limitations are still in place (the private sector). On balance, the regulations merely contain procedures on how to handle a suspicion of misconduct. They are primarily focused on the promotion of internal reporting and do not provide for effective legal protection for whistle-blowers. As a consequence, employees in both sectors do not experience the regulations as a safe passage for reporting disturbing eventualities. Actually, the provisions do not qualify as 'whistleblower' regulations. If genuine protection for whistle-blowers is the aim, the shortcomings should be addressed, and more and effective protection should be arranged.

More noticeable activities on 'the building site' would follow in 2012, as a group of MPs took an encouraging initiative aimed at a more comprehensive approach to the legal protection of whistle-blowing in the Netherlands.

4. 'A new building project': a House for the Whistle-blower

In May 2012, a group of MPs chaired by the Socialist Party representative Ronald van Raak submitted a draft bill for establishing a House for Whistleblowers.[43] In anticipation of the bill for a House for Whistle-blowers, the Government took the initiative to establish a 'Temporary Advice and Reference Point for Whistle-blowers in the Netherlands'.[44]

The proposal for a House for Whistle-blowers aims at extending the support and extension of whistle-blowers in the public and the private sector. It stipulates that organizations with more than 50 employees can establish a procedure for the proper handling of misconduct. A House for Whistleblowers will be accommodated with the National Ombudsman and it will help whistle-blowers and investigate reported suspicions of misconduct. A Fund for Whistle-blowers will be established and it will render financial support. Finally, the legal protection of whistle-blowers against dismissal and other forms of disadvantage will be extended. The House will be evaluated after a period of five years.

42 Kamerstukken II, 2006-2007, 30636, nr. 2, p. 1.

43 Kamerstukken II, 2011-2012, 33258, nr. 1.

44 Tijdelijk advies en verwijspunt klokkenluiders. This commission is to advise whistleblowers and to refer them to existing organizations. This commission neither engages in investigations, nor does it offer the reporter legal protection or financial assistance. It will expire on 1 January 2015. http://www.adviespuntklokkenluiders.nl/international.

There is almost unanimous praise for the initiative, but the proposal is under intense debate. Organizations and authors have issued substantial comments on the draft bill. Amongst the most dominating issues in the debate are the definition of a reporter, what 'misconduct' should entail, the issue of anonymity, the conduct of the investigation, and the legal protection regime for whistle-blowers. The current status of the debate on these issues will be illustrated in some more detail below.[45]

1.1. *On 'regular' employees, 'serious cases' and 'noble motives'*

The draft proposal is aimed at employers and employees, including those with a former status. Judges and members of the Public Prosecution Service and the Supreme Court do not fall within the scope of this proposal.[46] The authors of the draft bill have opted for a narrow definition of whistle-blowers: (former) employees. It is advised to widen this circle, as other contracted individuals should be entitled to proper legal protection and compensation for damage from the Fund.[47] Persons other than 'regular' employees, i.e. consultants, interns, detaches, possibly board members and volunteers, should be entitled to report as well.[48]

The Council of State has pledged to limit the application of the draft bill to the most serious cases, in which the societal risks are such that that they justify a special legal protective provision for whistle-blowers, and an internal procedure has failed.[49] TI advocates 'less serious' cases of misconduct to be taken into account as well. The impact of the misconduct would be a better criterion. In addition, lesser forms of misconduct quite often prove to be symptomatic of larger problems. On balance, it would make sense not to limit misconduct in its meaning in legal provisions. The development of whistle-blower regulations would have to be compulsory for all organizations.[50] Introducing rules for the reporting of (very) serious cases of misconduct to the House makes this draft proposal incomplete. This implies that most whistle-blowers those with assumed 'normal' cases of misconduct will not be welcome in the House, leaving them with no other option than to refer to the principles of 'good employership' and 'good employeeship'.[51] Practice shows that references to these principles result in a 'chilling effect': potential whistle-blowers will remain silent.[52] The limited definition of what constitutes misconduct is noted as a serious flaw. There has to be 'a reasonable suspicion', but what is that?[53]

What about the whistle-blower's motive for reporting? Who defines what noble motives are? It is impossible to establish if whistle-blowers act out of self-interest or have altruistic motives. 'Good faith' has be assumed, unless the opposite has been proven. The draft bill should stipulate that the employee has a right to legal protection, unless it is proven that he or she has reported out of 'bad faith.[54]

45 The inventory covers the (ongoing) debate and the comments until September 2013.

46 F.C. van Uden, Klokkenluiden: Verder van huis met het Huis (2), in: Arbeidsrecht 4, April 2013, p. 13.

47 E. Lissenberg, Commentaar op voorstel van wet huis voor klokkenluiders (2012), p. 3.

48 C. Raat et al., Discussienota wetsvoorstel huis voor Klokkenluiders, Transparency International Netherlands (2013), p. 2-3.

49 Kamerstukken II, 2011-2012, 33258, nr. 5, p. 7.

50 C. Raat et al., Discussienota wetsvoorstel huis voor Klokkenluiders, Transparency International Netherlands (2013), p. 5.

51 Art. 7:611 obliges the employer and the employee to act as a good employer and a good employee.

52 F.C. van Uden, Klokkenluiden: Verder van huis met het Huis (1), in: Arbeidsrecht 3, April 2013, p. 20.

53 C. Raat, Hoera een klokkenluiderswet. Maar waar is de klepel?, in: NRC, 18 May 2012

54 E. Lissenberg, Commentaar op voorstel van wet Huis voor klokkenluiders, (2012), p. 4.

1.2. *On 'anonymity'*

The anonymity of the reporter was introduced as a result of the evaluation in 2008. It was noted to be one of the most important reasons for not reporting a suspicion of misconduct. Existing regulations do not cater for that. In line with this advice, the Council advises not to mention the name of the reporter to the employer, unless the reporter has agreed to this.[55] In the draft bill, the anonymity of the reporter is not guaranteed. The reporter should remain anonymous as long as possible and this is a reason to legally arrange that the National Ombudsman will guarantee the relative anonymity of the reporter.[56] The draft bill seems to be targeted more towards the public sector than the private sector, certainly concerning the protection of confidential company data. Just as the employee, the accused (employer) should be shielded to a certain extent. The report can also be evaluated without knowing the name of the organization involved, at least until it is assessed that the request is sufficiently grounded and the investigation can go ahead.[57] All (Dutch) studies on whistle-blowing indicate that anonymous reporting could be imperative. TI urges the possibility of anonymity at all phases of the investigation, the initial conversation, reporting, and (preliminary) investigation. To guarantee this, each organization or branch should have an integrity officer who is adequately established and able to operate independently from the organization. It is important that the person or organization can remain in contact with the reporter. The 'accused' (the person or organization) deserves to be shielded from unwanted publicity. Only after an external investigation, in case misconduct has been found, will the disclosure of the organization where the misconduct took place be made public, but in a proportional way.[58]

1.3. *On 'investigation'*

Concerning the investigation: first a preliminary investigation will take place. During this investigation it is assessed if one is here dealing with with misconduct with serious societal implications, if legal norms have been violated, if the misconduct poses a danger to health and safety or the environment. It could also concern acting improperly or negligence, with consequences for well functioning public services. During the preliminary investigation, use can be made of external expertise. The House aims to conduct a preliminary investigation within a period of 6 months. In case the outcome would indicate that the matter does not amount to misconduct, but a labour dispute, the House will refer the applicant.[59]

After the preliminary investigation, the House is able to launch an independent fact-finding investigation, preferably to be terminated within a period of one year. In the course of the investigation, the House is mandated to hear witnesses and to check documents. The mandated powers of the House in this respect coincide with the powers of the National Ombudsman. The preliminary investigation will not be made public. The fact-finding investigation will result in a report issuing a judgment as well as recommendations that will be made public. Both the employer and the employee will be given the opportunity to comment on the findings in the report. The House will not submit an opinion if there is a question of a criminal offence having been committed. It is up to the General Prosecution Service to judge if the fact-finding results provide a basic reason to start a criminal investigation. The House will refrain from investigative action if a (criminal) investigation or a court ruling is pending.[60]

55 Kamerstukken II, 2011-2012, 33258, nr. 5, p. 11.

56 E. Lissenbeg, Commentaar op voorstel van wet Huis voor klokkenluiders (2012), p. 2.

57 E. Lissenberg, Ibid, p. 5.

58 E. Lissenberg, Ibid, p. 2.

59 Kamerstukken II, 2011-2012, 33258, nr. 7, p. 3.

60 Ibid, p. 3.

The Council of State stresses the importance of internal reporting in case of suspicions of misconduct. The integrity officer, the works council or a supervising body would be suitable options. The draft bill will contain a legal obligation to establish such an internal procedure. If it proves to have been internally unsuccessful, the misconduct can be reported to an external supervisory body or inspectorate, or criminal charges can be instigated. In any event, the report will not be made available to the media. If this is still without result, and it concerns misconduct in which the public interest is clearly identifiable, the reporter can turn to the House. The House will first establish if the aforementioned steps have been taken. If not, the House has to refer the case, save in exceptional circumstances. If other steps have proven inadequate, the House will have to start an investigation of its own accord.[61] The Council acknowledges the possibility of external reporting, but only in the most serious cases in which the public interest is at stake, a direct involvement of the public sector is justified and internal reporting options have failed. The design of a regulation should be a matter for the employer, or a collective of employers in a special branch, as long as the regulation meets the legal requirements.[62]

Furthermore, the Council of State is not in favour of making the results of the preliminary investigation public. If the report is insufficiently grounded, the public interest will not be served. However, if it does concern the public interest, the House will investigate and record its findings in a final report. These findings could be contrary to the published preliminary findings.[63] The Council stresses in this context the importance of internal reporting.[64] More fundamental criticism followed on the position of the proposed investigative actor: the National Ombudsman. The Minister for the Interior requested advice on this particular issue.[65] In his findings, a renowned constitutional expert confirmed that it would be unconstitutional to task the National Ombudsman with extended powers as an investigator in the private sector.[66] The Ombudsman would be operating well beyond his or her mandate, which could potentially have repercussions for his or her profile and authority.[67] Many of the problems could be avoided by aligning the House for the Whistle-blowers with the Institute of the National Ombudsman. A House for the private sector could be made part of the Social Economic Council (SER). Both Houses could cooperate, while being distinct.[68] This constitutional objection posed a serious challenge for the initiators. They amended their draft, limiting the investigative powers of the House to the public sector, as the National Ombudsman has no mandate for the private sector.[69] In a following reconsideration, the House has been detached from the National Ombudsman altogether, its status being amended to that of an independent administrative body,[70] and the Government has been requested to consult the employers' organizations and the trade unions on the establishment of legal provisions for the protection of whistle-blowers in the private sector.[71]

61 Kamerstukken II, 2011-2012, 33258, nr. 5, p. 10.

62 Ibid, p. 6.

63 Ibid, p. 11.

64 Ibid, p. 5.

65 Kamerstukken II, 2013-2014, nr. 16. Brief Ministerie van Binnenlandse Zaken en Koninkrijksrelaties, 13 november 2013, Ingewonnen adviezen over initiatiefwetsvoorstel Huis van de Klokkenluiders.

66 D.J. Elzinga, P.A. Kingma, Preadvies BZK-Wet Huis voor de Klokkenluiders, p. 23, sub d. The proposal is assessed to be at odds with art. 78 Constitution.

67 D.J. Elzinga, P.A. Kingma, Ibid, p. 25, sub h.

68 D.J. Elzinga, P.A. Kingma, Ibid, p. 26, sub l.

69 Kamerstukken II, 2013-2014, 33258, nr. 20; Kamerstukken II, 2013-2014, 33258, nr. 25.

70 Kamerstukken II, 2013-2014, 33258, nr. 24. The House as 'Zelfstandig Bestuursorgaan (ZBO)'.

71 Kamerstukken II, 2013-2014, 33258, nr. 22.

1.4. *On 'legal protection' and 'the Fund'*

Today, only persons who have reported misconduct according to the (current) regulations will be protected against dismissal. However, there could be circumstances where the misconduct is so serious and equally urgent that (anonymous) disclosure to the press should serve as a basis for legal justification, because the formal procedures do not safeguard the importance of informing the public and the prevention of damage.[72]

The Council of State considers the protective regime to be (financially) abundant. This could potentially encourage employees with a suspicion of misconduct to report to the House, even if the suspicions are insufficiently clear and concrete, a disguised labour conflict, or in case the misconduct has little societal implication. It would also be a trigger for reporting at the House, without internal reporting taking place.[73] Others claim that the scope of the legal protection should be widened to cover reporters of all misconduct. The prohibition on imposing disadvantages seems to be justifiable; the prohibition on dismissal in all circumstances may prove to be a bridge too far.[74] TI endorses legal protection in case the employee is dismissed. However, the employee would also have to be protected against demotion, harassment, being transferred etc. [75]

Another point of concern is that the prohibition on dismissal or imposing disadvantages only apply to serious misconduct, concerning only those cases that have been brought to the attention of the House. It is not clear why whistle-blowers who report 'normal' misconduct, or reporters who opt for the regulator or an alternative channel would be exempt from legal protection, other than the basis in the Dutch Civil Code. On balance, the House claims a monopoly. It is not unthinkable that a whistle-blower refers to the House, but finds little progress in his or her case handling. Those who seek a solution elsewhere will lose their legal protection.[76]

The constitution of the Fund is to be applauded. One imagines situations in which normal legal protection falls short of expectations, for instance in the 'winner's defeat': the whistle-blower who cautiously blows the whistle, but finds himself or herself without a job at the end of the day. This is all the more appropriate if the report concerns a serious public matter. It is reasonable for the reporter to be given (supplementary) financial compensation. The draft bill only allows for compensation once the reporter has turned to the House, which seems unjustifiable.

The other point is that 'wealthy' whistle-blowers have to deal with the damage themselves. This seems unjust and will discourage the better-off whistle-blowers from reporting.[77] The Fund apparently distinguishes between those who are entitled to an allowance, and those who are not. Not all employees are equal; only those in desperate need would qualify for an allowance. This limitation is also unjustified, as the financially more able will generally be highly positioned in organizations and will have access to a great deal of information, but simultaneously run a high risk.

72 Kamerstukken II, 2012-2013, 33258, nr. 5, p. 6-7.

73 72 Kamerstukken II, 2011-2012, 33258, nr. 5, p. 10.

74 F.C. van Uden, Klokkenluiden: Verder van huis met het Huis (2), in: Arbeidsrecht 4, April 2013, p. 15.

75 Kamerstukken II, 2012-2013, 33258, nr. 5, p. 7.

76 F.C. van Uden, Klokkenluiden: Verder van huis met het Huis (2), in: Arbeidsrecht 4, April 2013, p. 15.

77 Ibid.

The Fund will be governed, but it is unclear who will appoint the Chairperson and the members. The Fund would be better served with a Board whose members would be nominated by employers, employees and the Labour Foundation and financed in a tripartite way.[78] There are no criteria for giving allowances and arrangements have not been made for legal protection in case of refusal. It would be reasonable if the House would award immediate compensation, once misconduct is established in an investigation and the reporter has suffered damage.[79]

One of the most notable amendments so far, concerns the erasion of the Fund, as the initiators question if the costs attached to constituting the Fund would be proportional to its aims.[80]

On balance, the current draft proposal has witnessed a number of amendments regarding the definition of a reporter, what 'misconduct' should entail, the investigation and the Fund, with no indication that the debate is diminishing.[81]

5. A House, but a Home too?

It takes craftsmanship to build a House for the Whistle-blower that aims to offer comprehensive guidance, support and effective legal protection for whistle-blowers in both the public and the private sector. The overview of the developments in the past decade shows that the required skills for such a project are either scarce, difficult to master, or difficult to put into practice. In any event, progress has been modest.

The surveys[82] make clear that in many European countries the legal protective regime is sub-optimal. Furthermore, they indicate that there are many (political and cultural) constraints affecting the development of effective legal provisions. The Netherlands does not prove to be an exception, both in a formal and a material sense.

In a formal sense, the displayed lack of urgency in arriving at satisfactory legal protection for whistle-blowers has been suggested to have 'its foundations' in the Dutch integrity culture.[83] Neither successive coalition governments (as a legislator and an employer) nor employers in the private sector seemed to be extremely keen on arranging a comprehensive legal solution for the reporting of misconduct. The lack of will in proposing and effectively passing and enforcing whistle-blowing legislation has been evident. It forced the MP Ronald van Raak & co to eventually opt for an alternative route: submitting a private Bill.

In a material sense too, the refuge of self-regulation in 2003 is exemplary. Neither the modest results of the evaluation in the public and private sector, nor 'the modifications' in response are entirely surprising. The regulations covered primarily the procedural aspects, strongly aimed at internal reporting, but never touching on effective legal protection, thereby providing a poor or no basis at all for financial compensation.

78 Kamerstukken II, 2011-2012, 33258, nr. 5, p. 10.

79 C. Raat, Hoera een klokkenluiderswet. Maar waar is de klepel?, in: NRC, 18 May 2012.

80 Kamerstukken II 2013-2014, 33258, nr. 18.

81 Kamerstukken II, 2012-2013, 33258, nr. 10; Kamerstukken II, 2012-2013, 33258, nr. 12; Kamerstukken II, 2012-2013; 33258, nr. 15; Kamerstukken II 2013-2014, 33258, nr. 16-27.

82 See footnotes 2 and 4.

83 Elisabeth Lissenberg observes a suffocating and threatening interdependence of employees who share secrets and control each other accordingly. E. Lissenberg, Klokkenluiders en verklikkers (2008). p. 15; W. Slingerland et al., National Integrity Systems Netherlands, Transparency International Netherlands (2012).

The outlining of processes is currently being debated, and the establishment of appropriate channels for disclosure is 'in progress', to put it mildly. The legal protection and financial compensation are subject to discussion, and (even) seem to have been downgraded in the course of the debate. The draft Bill does not provide for the effective sanctioning of reported wrongdoing. Alhough the protection mechanisms are not drawn from the labour codes, the do rely on them. However, the question of formal workers being exclusively protected by the provisions of the Bill has been addressed, and might (still) be resolved in a satisfactory way.

On balance, the features of this 'building project' align quite well with those of the 'European Meta-structure' of whistle-blower legal protection. However, this observation is not necessarily to be applauded.

It is essential that the architects/the MP Ronald van Raak & co use the current momentum for the development of comprehensive whistle-blower legal protection in the Netherlands as best as possible. The actual state of affairs of the draft Bill is sub-optimal, as underlined by many experts. The initiators have shown considerable courage by submitting their draft proposal and deserve praise for that. However, they will now have to demonstrate an openness to invaluable 'construction' expert suggestions and advice in order to benefit the momentum as best as possible. The need for this susceptibility has been clearly shown in the ongoing debate on the draft proposal. Failure is not an option, but legislative misfortune is certainly not ruled out.[84]

There is still a great deal of 'critical designer work' to do before the 'actual construction' can start. The House for Whistle-blowers will (evidently) be of a 'unique design' and built just once. It is a single window of opportunity.

But if and when constructed, it will be a fully functional House, meeting the demands of whistle-blowers as best as possible. Providing the reporters of misconduct with genuine legal protection and cover.

Offering Wandering Dutch Whistle-blowers a real Home.

84 The Minister for the Interior 'discouraged' the current draft Bill in the Tweede Kamer. The proposal for a House for Whistle-blowers would be premature; it would unite the incompatibilities of advice and investigation; it would be at odds with the Constitution and insufficiently debated with the regulators. Kamerstukken II, 2013-2014, Plenary Debate nr. 35, 13 December 2013. However, the draft Bill was submitted by the Tweede Kamer to the Eerste Kamer (Senate) on 17 December 2013. Kamerstukken I, 2013-2014, 33258, A. It is nevertheless widely expected that the Eerste Kamer will review the current draft Bill and return it to the Tweede Kamer for reconsideration, due to its current shortcomings.

This article was first published with Brill | Nijhoff publishers, and was featured on the Security and Human Rights Monitor (SHRM) website.

Security and Human Rights (formerly Helsinki Monitor) is a journal devoted to issues inspired by the work and principles of the Organization for Security and Cooperation in Europe (OSCE). It looks at the challenge of building security through cooperation across the northern hemisphere, from Vancouver to Vladivostok, as well as how this experience can be applied to other parts of the world. It aims to stimulate thinking on the question of protecting and promoting human rights in a world faced with serious threats to security.

Netherlands Helsinki Committee
Het Nutshuis
Riviervismarkt 4
2513 AM The Hague
The Netherlands

www.nhc.nl