

## EPK COUNTRY REPORT 2020 - THE NETHERLANDS BAR

In 2019 the Netherlands Bar has focused on various issues, the most significant of which are highlighted in this report.

### Legal Aid

The government has decided to redesign the legal aid system in the Netherlands. The proposals have serious implications. The new system should focus more on finding people centered solutions for clients and less on the notion that access to justice is a right to be enforced in legal procedures. Furthermore, the new system should involve other legal and non-legal professionals.

Academics, the judiciary and the Netherlands Bar have criticized the plans repeatedly: (1) The government puts itself in a conflict of interest. On the one hand the government determines which form of Legal Aid is required. On the other hand, the government is party in 60% of the Legal Aid-cases. (2) Clients will no longer have immediate access to a lawyer because they are required to try to find a (non-lawyer) solution first. (3) The financial contribution for legal aid will increase because the client no longer pays for individual services, but for legal aid packages that (may) include several services. (4) the likelihood of a decrease of quality in legal aid when new professionals are admitted to the system who are – in contrast to lawyers - not subject to supervision and disciplinary law.

Another concern is that the proposals focus on the long term (2024 and beyond) and not on short term problems. In 2017 an independent commission concluded the remuneration of legal aid lawyers should be recalibrated because the current remuneration per case (a flat rate) dates back to the year 2001. As a result legal aid lawyers are underpaid and it is no longer profitable to maintain a legal aid practice. More and more law firms are forced to cease providing legal aid services. The Dutch government persists that the present budget for legal aid is sufficient: for the current system and for the new system as well. The Netherlands Bar strongly disagrees. However, at end of 2019 the minister and the Netherlands Bar reached an agreement for increasing the remuneration for legal aid lawyers for the period 2019-2021. In total the minister has made available around € 60 million (€ 73 million including VAT). It is a temporary measure, the Netherlands Bar maintains the position that the structural problems with the level of remuneration remain unsolved and that calibration of the remuneration along the lines of the independent commissions report is imperative.

### Pilot project Legal Aid: Cooperation in the provision of first-line legal aid

On 1 March 2020 the Netherlands Bar, in cooperation with the Legal Aid Board, the Legal Service Counters and other relevant partners will launch a pilot project "Cooperation in the provision of first-line legal aid". The pilot aims to provide an easily accessible, low threshold access for citizens to effective legal aid and sustainable solutions within the legal aid system. The pilot will provide useful information on whether intensifying the involvement of legal aid lawyers in the provision of first-line legal aid, with their specific expertise and knowledge, provides added value to the already available knowledge and expertise. The pilot will focus on practical measures which will improve the cooperation between first-line and second-line and result in more effective legal aid and a fair remuneration for legal aid lawyers.

### **Legal professional privilege/professional secrecy**

On 12 July 2019 a draft version of the legislation implementing DAC6 was sent to Parliament. In the draft legislation lawyers are considered to be intermediaries but the principle of legal professional privilege/professional secrecy is respected by declaring the relevant article (article 53a) of the General Tax Law applicable.

In 2017 the Ministry of Finance announced the intention to redraft/clarify article 53a of the General Tax Law. At present it is still unclear what the ministry has in mind. In the case the scope of legal professional privilege/professional secrecy is limited, this will have consequences for the notification obligation under the legislation implementing DAC6.

In September 2019 the Netherlands Bar sent a letter to Parliament regarding the principle of professional secrecy. In this letter, the Netherlands Bar explains the concept and scope of the principle of professional secrecy and non-disclosure rights. The Netherlands Bar deemed this necessary because in various publications in the Dutch media incorrect assumptions, amongst others from the tax investigation service and the prosecutors' office, were made about the principle of professional secrecy and the right of non-disclosure. The Netherlands Bar values above all a public debate on this issue based on facts, and will continue to draw attention to this important subject.

### **Divorce proceedings/ law on experiments in judicial procedures**

In February 2018 a report was published on the effects of divorce on children. The report contains 45 recommendations which are followed up in a government program. The program is called "Scheiden zonder Schade" (Divorce without Damage).

For lawyers one proposal is particularly relevant: a new procedure for divorce which aims to keep conflicts related to divorce proceedings out of court as much as possible. In cases where former spouses should wish to present their case to court, contentious elements should be removed from the procedure as much as possible.

To test the new procedure the Ministry of Justice plans to work together with the judiciary in applying a new law which will make it possible to carry out such experiments. This law is currently pending in Parliament. The draft law contains provisions to establish new judicial procedures for the purpose of experiments by order in council, which differ from the regular judicial procedures. The government plans to draft such an order in council for divorce proceedings, by which, amongst others, the principle of mandatory representation of a lawyer can be side-lined.

Such an order in council will also pave the way for experiments with a joint document (instead of a separate application and statement of defense), and for the involvement of a so called family representative (which can be a lawyer or mediator but possibly also other professionals).

The Netherlands Bar is aware that these developments might infringe the principle of partiality but is willing to be involved in the discussions. It has however taken strong position against a possible abolishment of the mandatory representation in divorce cases.

### **Digitalization of court proceedings**

The basis plan "digital accessibility" of the Judiciary replaces a previous, cancelled program for digitalization of the judiciary. The basis plan focuses at present only on simple digital accessibility for litigants and professional parties in civil and administrative law cases. The deadline for these plans, which was set for July 2019, has not been met by the Council for the Judiciary. The Judiciary has previously announced it needed more time to develop the plans and to have them tested by a Bureau for ICT (BIT). This bureau assessed the risks and chances of success of any ICT project set up by government and self-regulatory bodies in the Netherlands. Proposals were submitted to

BIT in January 2020, findings are expected in the summer. The speed at which the plans will be implemented depends on the results of the assessments and available budget. First stage of implementation (in civil cases) is expected for autumn 2020.

In criminal cases, over 90% of cases that go to trial are digitalized. The Council for the Judiciary and the prosecutor's office aimed to raise that percentage to 96% by the end of 2019. Since 2016 the Supreme Court provides a web portal for submitting written statements in the pre judicial procedures brought before the Tax Chamber. Digital litigation in civil cases brought before the Supreme Court is mandatory since 2017. Since 2018 digital litigation is possible on a voluntary basis in criminal cases and forfeiture cases. Digital litigation in tax will be mandatory from 15 April 2020. Litigants in asylum cases pending before the Council of State can make use of a digital procedure on a voluntary basis since June 2018. The Council of State is working towards mandatory digital litigation but is in that regard dependent on the progress made by the Council for the Judiciary (see above).

### **Quality Management**

On the basis of (the new) article 26 of the Dutch Act on Advocates the Netherlands Bar is responsible for the execution of quality control on lawyers and has the power to set rules concerning quality control in a bye-law, which means that the choice of instruments for the actual performance of quality control is left to the legal profession. On 1 March 2020 a system of quality assessment will become compulsory for lawyers. The lawyer can choose from three forms of structured feedback (i) peer review (ii) Intervision (iii) structured inter-collegial consultations. Furthermore from January 2019 lawyers must register in the so called legal area register of the Netherlands Bar. The register contains 33 main legal areas and a number of sub categories. The lawyer has to register for at least one main legal area with a maximum of 4 main legal areas. Registration is compulsory for lawyers after they have finished their vocational training. This public register will make it easier for clients to assess the fields of expertise of a lawyer and to verify that the lawyer has fulfilled the continuous training obligations.

### **Self-assessment**

The Netherlands Bar is in the process of developing a self-assessment tool through which a lawyer will gain insight in his functioning as a lawyer. The self-assessment will be voluntary and there are no "right or wrong" answers. The emphasis lies on self-reflection and self-development. On content the focus is on ethics. The project will start with a pilot, results are expected mid 2020.

### **Vocational Training**

The Netherlands Bar is in the process of developing a consistent, future proof vocational training for lawyers. The new training will start in March 2021. The curriculum will focus on practical skills, ethics and the application of legal knowledge.

The new training scheme aims to train trainee-lawyers to become lawyers who are able to practice independently, on the basis of proper knowledge, skills, ethical awareness and the ability to keep learning.

Ethics, the proper conduct of a lawyer and awareness of the role of lawyers in the rule of law, forms an important part of the new curriculum. The new curriculum focusses on practical skills through a strong emphasis on learning and practicing the skills a qualified lawyer needs to possess. The Netherlands Bar is currently working on the preparations for the implementation of the new scheme (building a new curriculum, enhancing the involvement of the Bar, accreditation of training providers).

### **Evaluation legislation concerning the supervision of lawyers**

In 2015 legislation entered into force regarding the supervision of lawyers and the role of lawyers with regard to the proper administration of justice.

It was agreed that the new rules would be evaluated by government after four years. This evaluation is currently being carried out and is expected to be finalized mid-2020. The experiences gained so far have been positive, the new supervisory system works in practice. The new legislation has made the supervisory system for lawyers independent, transparent, uniform, proactive and effective. The system provides important guarantees and protection for citizens seeking access to justice because the independent position of lawyers is guaranteed.

At the same time the Netherlands Bar recognizes that there is room for improvement and in that context has sent several proposals to the Ministry of Justice. The proposals mainly concern the strengthening the position of the local Bar Presidents' assembly (local Bar Presidents being the supervisory body for lawyers), improving the organization of the local Bar Presidents' assembly and the local bars, funding and certain supervisory competences.

### **Confidential information holders' number**

The Netherlands Bar played a major role in the introduction of a number recognition system in 2011. The number recognition system ensures that phone numbers belonging to lawyers are being recognized automatically by investigative services so that there will be no surveillance for those numbers. Lawyers, including persons with derived lawyer-client privilege, provide telephone and fax numbers to the Netherlands Bar by secured electronic means. The Netherlands Bar passes such numbers on to the Dutch National Police, which processes them in its "telephone numbers of privileged persons" database. These numbers are subsequently recognised automatically. The National Police is then no longer able to monitor conversations using those numbers, either in real time or afterwards.

In addition to the system being operated by the national police, a similar system is in place at the Custodial Institutions Agency (DJI). Lawyers can pass on telephone numbers to this department's number recognition system on a voluntary basis. The Netherlands Bar advises lawyers to do this.

End of 2018 it emerged that a conversation between a lawyer and a client detained at a detention center, had been monitored. At the insistence of the Netherlands Bar an independent commission looked into this severe breach of confidentiality and the system of phone number recognition. The report of the commission was published at the end of 2019.

The report identifies two main faults in the software. These faults have been in the system from the introduction in 2013 and have been rectified. Further findings are that not all prisons use the system. The report contains a number of recommendations which the Netherlands Bar agrees with:

1. Ensure a whole chain approach with all stakeholders;
2. Ensure the list of numbers is accurate and up to date;
3. Review and adjust the procedures regarding recording of conversations;
4. Reconsider the retention period for recordings;
5. Take steps to ensure more privacy when inmates make phone calls.

Unfortunately the Minister has announced he will follow up on most of the recommendations, but will not act on the recommendation to review and adjust existing procedures regarding recording of conversations. This is a concern of the Netherlands Bar.