

## **Introduction**

In this article about legal aid from a Dutch perspective I want to discuss a number of recent developments in the system of subsidised legal aid in the Netherlands which occurred in the period 2015-2017. What is changing?

Legal aid has received quite a lot of attention in politics in recent years. I will address this subject first. The intended budget cuts to legal aid were blocked by the upper house of Parliament at the beginning of 2015. The Senators asked the Government to conduct research into what is behind the increases in expenditure and to come up with alternatives for the budget cuts. This led to setting up an investigative commission that brought forward suggestions for safeguarding a durable system for legal aid.

The second development I will discuss concerns strengthening legal aid for suspects in criminal procedures. Finally, I will consider developments regarding 'Rechtwijzer, the Signpost to Justice'.

But before I begin I want to take a moment to mention Peter van den Biggelaar, who took his leave of the Legal Aid Board on 29 March 2016. Peter is well known to everyone in the International Legal Aid Group (ILAG). Peter has been internationally active in stimulating legal aid for the financially less able, including his role as member of the ILAG steering committee. At his farewell symposium, Alan Peterson praised Peter for his vision, his interest in continual renewal, and the important role he played, including his role as ambassador for legal aid.

In all his activities, Peter always had his sights set on the ordinary citizen. He advocated making law less complex and easier to understand, and was always looking for just solutions for disputes between citizens. In this way he brought law closer to the ordinary citizen. On account of the great gains he made for legal aid, nationally as well as internationally, Peter was honoured with a royal decoration.

Peter van den Biggelaar will be followed at the Legal Aid Board by Hans Gerritsen, the new CEO.

## **Towards a Durable System for Subsidised Legal Aid**

In February 2015, the Government of the Netherlands set up the Commission for Subsidised Legal Aid, chaired by Aleid Wolfsen. The Netherlands has a good system of legal aid. It satisfies the requirements of European treaties and regulations. But the question remained whether it could be done in a better, more durable way, and if so,

how? Better for those who need legal aid, for the lawyer, for other legal aid providers, and for the justice system as a whole.

On 30 November 2015, the Wolfsen Commission delivered its report entitled 'Reassessing Legal Aid—Towards a Durable System for Subsidised Legal Aid' to the Dutch Minister of Security and Justice. The Commission indicated that reassessment of the system is in fact necessary so that the right legal aid provider can be assigned the right work, citizen access to the law can be improved, and tax revenues can be allocated in a more targeted way. In order to achieve these things it is important to strengthen the administration of the system and to take care of problem points.

### *Benchmarks for a more Durable System*

The Wolfsen Commission made standardised basic principles of priority in their reassessment of the system of subsidised legal aid. In order to achieve this, the Commission used the Dutch Constitution, European treaties, and rules that establish minimum standards. According to the Commission, the standardised basic principles are the following:

1. Those financially challenged citizens seeking legal aid can turn to government-financed first level assistance for information, advice and the handling of straightforward problems, delivered by people who have the knowledge and skills that match the problem, the actual need, and the legal aid client's question or dispute.
2. An independent, administrative authority with a director's role is responsible for good coordination between first and second level assistance, and also makes decisions about whether an application for legal aid will be granted. The interests of the legal aid client are taken as the determining factor.
3. Differentiation and a customised approach are necessary—both at the system level and at the level of the legal aid client's request for assistance.
4. Legal aid providers receive appropriate remuneration in accordance with a balanced and up-to-date remuneration system.
5. The quality of legal aid providers is guaranteed.
6. Government expenditures on legal aid are predictable, to the extent possible.
7. The system promotes a targeted allocation of the financial means.

The Commission based its proposals on these benchmarks. The underlying idea is that the proposals are cohesive and mutually reinforcing; therefore, they cannot be seen as separate items. Taken altogether they will ensure a better and more durable system of subsidised legal aid.

### *System-wide Problem Analysis*

In its report the Wolfsen Commission analysed a broad range of causes behind the developments in expenditures for subsidised legal aid. Based on these findings, the Commission pointed out a number of weak points in the system, including the lack of proper coordination; flaws in the exchange of information between different parties and authorities; and the systemic failure of lawyers when it comes to collecting the personal contribution from their legal aid clients. The Commission referred to the

number of those actively offering legal aid within the system as 'generous' in relation to demand. Regarding quality, the Commission noted that there is a very large group of highly dedicated legal aid providers who are delivering the so often indispensable legal aid at a qualitatively high level to those who are financially challenged. Nevertheless, the Commission received signals from different quarters that the level of quality is often still variable or sometimes even below par.

### *Possibilities for Improving the Quality of Legal Aid*

The Wolfsen Commission pointed out the tremendous importance of providing high quality legal aid and recommended areas for improvement. The task for the Netherlands Bar Association (Nederlandse Orde van Advocaten, 'NOVA') and the Legal Aid Board (LAB) is to jointly provide for proper quality requirements within the system. Expertise requirements in the different specialised areas of law have to be brought up to a higher level all across the board. The Commission also recommended, in consultation with the Bar, to restrict the number of specialised areas in which lawyers can accept cases, and to implement a peer review process all across the board, as well as periodic independent investigations into the quality of lawyers. A high quality system deserves a proper and up-to-date system of remuneration. The Wolfsen Commission therefore recommended a re-evaluation of the fixed-fee system and a slight increase in the awarding of points.

### *Strengthening the Administration of the System of Legal Aid*

Strengthening of the system, according to the Wolfsen Commission, cannot be achieved without strengthening the administrative direction of the system. Administration is what makes awarding the right work to the right legal aid provider possible. Therefore the Commission recommended a stronger role in the direction of the system for the LAB. The LAB must offer a more customised approach, particularly for citizens with many interrelated problems and for those in divorce proceedings. To this end, the Commission recommends an orientation interview with a general expert prior to the assignment of a lawyer for divorce proceedings. This general expert provides proper information about what citizens can expect and explains the advantages of an amicable settlement.

According to the Wolfsen Commission, more checks must be made than is currently the practice as to whether citizens can apply to legal expenses insurance, a union or another organisation of which they are members, prior to the decision granting legal aid. The LAB ought to award the application for legal aid, according to the Commission, only if legal aid is reasonable and necessary, and in answering this question alternatives must be taken into account, for example, when looking for solutions for multiple problems. Multiple problems, by their very nature, cannot be solved, or at least completely solved, within the system of legal aid. These problems require a broader approach, beyond the scope of the system of legal aid. In addition to legal guidance, assistance will nearly always be required from partnering organisations outside the system, mostly from those in the social welfare field. Better cooperation and exchange of information between legal aid providers is a precondition for early stage recognition and analysis of multiple problem situations. There must be an investment in agreements with first level partners in a broad sense, such as social counsellors and municipalities, about the referral of those seeking legal assistance to the most appropriate agency. The (potential) litigant who wants to

be eligible for legal aid will be required to expend the energy needed to find a solution to the structural problems which are causing recurrent conflicts. This means that cooperation in achieving such a structural solution is not an option if he/she wants to have access to legal aid for the legal aspects of the conflict.

### *Improvements to the Administration: merging of the Legal Aid Board and the Legal Service Counter*

In the Dutch system the LAB has direction over administering the work at the first level as well as over the Legal Service Counter (LSC), the first level service providing authority. The Commission recommended an intensifying of the collaboration between LAB and LSC. In order to rectify 'the current fragmentation of the system' and to promote a 'uniform direction', the Commission recommended merging these two organisations while retaining their 'strong brand names'. By strengthening the role of direction the personal contribution that a citizen has to pay for legal aid can be reduced by approximately one quarter, according to the Wolfsen Commission.

### *Cost Management for a Long-term System*

The Ministry of Security and Justice's expenditure on the system increased from €329 million in 2002 to €469 million in 2013. The cost increase is primarily the result of a growth in the number of cases for which legal aid is awarded, the Commission observed, from approximately 289,300 cases in 2002 to approximately 407,800 in 2014, an increase of about 41%.

In accordance with the standardised basic principles, the financing of legal aid, according to the Wolfsen Commission, must remain an open-ended scheme. Nevertheless, better cost management will make the system more resilient in the long term.

The Commission maintains that the proposals in the report improve access to the justice: 'in the new system the person seeking legal aid receives the legal assistance, as well as other kinds of assistance, that is most appropriate to the problem and matches the actual need'. The proposals make legal aid more durable and more balanced. Furthermore, the Commission expects that they will ensure a more targeted allocation of expenses to the system.

### *Follow-up*

In May 2016, the Minister of Security and Justice reported to the Parliament of the Netherlands that he would be adopting most of the recommendations of the Wolfsen Commission. In February 2017, a draft legislative proposal for amendment of the Legal Aid Act was submitted for consultation.

Specific elements of the draft legislative proposal that can be named here, in addition to those listed above, are the inclusion from now on of the equity of any owned residential property in the financial check for legal aid, and the evaluation of total family income in cases of divorce. Currently, marital partners are only evaluated with regard to their individual income. According to the Minister, the underlying idea here is the shared responsibility for carrying the costs of legal aid by the divorcing partners. From now on the LAB will also have the task of collecting the personal contribution for the costs of legal aid from their legal aid clients.

## **Strengthening the Rights of Suspects in Criminal Procedures**

As of 1 March 2017 a legislative proposal entered into force in the Netherlands implementing the directive of the European Union allowing suspects who are being detained for an offence to consult a lawyer prior to police interrogation at no charge. Those accused of crimes also have a right to the assistance of a lawyer during the interrogation by the investigative service.

Remarkably, the Dutch Supreme Court did not want to await the date of the law's entry into force and in a decision of 22 December 2015 held that the Government had to institute the provisions facilitating the allocation of interrogation assistance to adult suspects as of 1 March 2016. This was already arranged in practice for minors in 2009. The time pressure presented by the sudden two-month deadline for processing these provisions by the Legal Aid Board and Public Prosecution Service was tremendous. But with an excellent collaboration the partners involved were nonetheless able to do what was needed.

The announcement of the frugal amount of reimbursements for interrogation assistance led to serious worries and protests from the legal profession as 1 March 2016 approached, and from this same legal profession a court appeal was launched against these amounts, but to no avail. Fortunately, as it turned out, job actions (strikes) only took place on a small scale and were restricted to the north of the country. In the meanwhile, the provisions are solidly on track and the legal profession has been complimented on its cooperation. A very limited number of lawyers have withdrawn their services from the duty solicitor schemes. On the other hand, applications are always being received from new duty lawyers.

The question of whether the amount of the reimbursements that lawyers receive for interrogation assistance is appropriate will be definitively answered by the Minister based on research that is being currently conducted into the average time commitment required of lawyers for this type of assistance.

In addition to criticism of the frugal amount of reimbursement, the Dutch Bar Association has indicated that the role allotted to lawyers during the interrogation is too limited, because the regulations preclude more active participation by lawyers during the interrogation. The lawyer's authority has been too narrowly restricted to maintaining oversight over any possible infringement of the prohibition of exerting undue pressure on suspects by the investigative services officer, and to interventions in the interview based on these. This criticism from the legal profession, however, has not attained the majority support of members of Parliament.

## ***Rechtwijzer*: Signpost to Justice**

Provisions and information in digital form are also receiving their place within legal aid. With the approval and a subsidy from the Dutch Ministry of Security and Justice, the LAB has been engaged in recent years in developing *Rechtwijzer* 1.0 into *Rechtwijzer* 2.0.

Although *Rechtwijzer* 1.0 offered citizens a platform for all kinds of legal information and the possibility of receiving an assessment regarding the potential solutions to legal problems, the bar has been placed much higher for *Rechtwijzer* 2.0. The target was to provide possibilities for direct online dialogue between legal aid clients

involved in divorce and landlord-tenant problems, the ultimate goal being a settlement agreement as the solution to a legal dispute.

In order to develop the Rechtwijzer 2.0 platform, the LAB entered into a collaboration agreement with HiiL (expertise) and Modria (IT). These two parties developed Rechtwijzer 2.0 for a fixed fee that was arranged in advance, as well as investing by themselves in Rechtwijzer. The collaboration agreement entails that, after the 2-year period of warranty, HiiL and Modria will only receive fees from users, and will cover management costs and further developments based on these. This three-party agreement has delivered an innovative divorce platform—Rechtwijzer Divorce—that has now been online for more than 2 years and receives good client satisfaction ratings from those seeking legal aid. People can handle their own divorces at their own speed and for a transparently low cost.

Rechtwijzer has received much interest and praise internationally, but the number of countries that wanted to participate in investing and sharing the costs remained unfortunately very limited, as also was the case for the international spin-off.

The three-party agreement expired in March 2017 and was not renewed for several reasons. In the meanwhile, the development of Rechtwijzer 2.0 has demonstrated that the potential for online dispute resolution is worldwide. A group of Dutch private investors is going to follow up in order to make the divorce platform possible. Thus the continuity can be safeguarded and the investments of the parties involved (as well as the innovation subsidies from the LAB and the Ministry of Security and Justice) will maintain their value. This dovetails with the new vision of the LAB, in which the LAB is not the developer, key investor or owner of the provisions behind Rechtwijzer, and therefore cannot be involved as carrying any financial risk any more.

In the new vision, the Board is catalyst and facilitator of innovations that are developed, brought on the market and exploited by others, which will potentially lead to reduced costs for legal aid.

In the new vision, the LAB provides, among promising and proven alternatives for the current offerings, a place for Rechtwijzer, such as Rechtwijzer Divorce and MagOntslag. In this way, the LAB would like to create a level playing field for innovative solutions, with a varied, well matched and cheaper range of (legal) assistance.

The LAB is exploring the possibilities of keeping Rechtwijzer Debts. There has been insufficient potential for continuing the platform Rechtwijzer Rental Cases.