

The future of legal aid in the Netherlands

The Netherlands has a long tradition of legal aid (i.e. subsidised legal help). The Dutch constitution enshrines the principles that all citizens should have access to justice and a right to legal representation and legal aid¹. For many decades these fundamental rights have been regulated in specific legislation and delegated legislation. A new Legal Aid Act (*Wet op de rechtsbijstand*) came into force in 1994, thereby replacing a former statute for the provision of legal aid to the indigent or people of modest means. The present system is contained in the new Act.

Decisions are at present being taken on proposals to modernise the system. This article explains the proposals. In order to enable the reader to understand the intended improvements, I will first outline the present system and the background to the political decision-making.

The Dutch legal aid system consists of various provisions which can, generally speaking, be divided into two categories: a first-line service (i.e. the initial contact with members of the public) and the extended/full service. An important principle is that legal problems should be tackled at an early stage. In this way they can be nipped in the bud, thereby avoiding the possibility of escalation and minimising the social costs and personal damage. The first-line service plays an important role in this connection: it should provide easy access to the legal aid system as a whole and have a sufficiently high profile to ensure that potential litigants are aware of its existence and know how to contact it at an early stage. Many problems can be resolved through the provision of immediate legal advice and assistance by the first-line contacts. Where this is not possible, litigants can be passed on to the extended/full service, which can offer them the expertise needed to engage in protracted proceedings.

First-line service

The first-line service (i.e. initial legal advice and assistance) is provided principally by the Legal Aid, Advice & Assistance Centres (*Bureaus Rechtshulp*), which are independent, publicly funded bodies. They provide a 30-minute free consultation during which professional lawyers provide information, give advice or refer the clients to specialised legal aid staff.

This initial contact also helps to funnel and sift out the cases. Publicity for the system is generated by means of communication through the mass media and contacts with intermediaries. During the initial consultation the lawyers can assess whether:

- the problem is indeed a legal problem and, if so,
- whether it comes within the statutory criteria (not all legal problems are eligible for legal aid) and
- which service provider is best placed to solve the problem.

At this stage the clients can also obtain information about the chances of success, the lead time and the costs of the subsequent procedure. On this basis they can weigh up their own

¹ Art. 17: 'No one may be prevented against his will from being heard by the courts to which he is entitled to apply under the law'. Art. 18 '(1) Everyone may be legally represented in legal and administrative proceedings. (2) Rules concerning the granting of legal aid to persons of limited means shall be laid down by Act of Parliament.'

interests and decide whether they wish to proceed with the case.

Extended/full service

If a legal problem cannot be resolved by the first-line staff during the initial consultation, the client is referred to the extended/full service. If the client pays a contribution of € 13.50, the staff of the Legal Aid, Advice & Assistance Centres can provide a further three hours' free legal assistance if they consider that this would solve the problem concerned. This provision is known as an extended consultation.

If the extended consultation too is insufficient, application may be made for legal aid (i.e. subsidised legal advice, assistance and representation). The attorney or staff lawyer completes standard forms explaining the legal context of the problem and the client provides information about his or her income and financial position (once again by completing model forms and standard procedures).

These data are then sent to one of the five Legal Aid Boards (*Raden voor de Rechtsbijstand*), which assesses:

- whether the legal problem fulfils the statutory criteria;
 - whether the financial means of the client come within the statutory limits;
 - how much the income-related contribution of the client should be;
 - whether the attorney meets the quality criteria for participation in the system.
- At the end of the legal proceedings the attorney claims the costs from the Legal Aid Board, which determines and pays the fee on the basis of the rules and regulations.

The greater the financial means of the client the more he or she is in principle required to pay. As this contribution is an effective incentive for clients to weight their interests carefully, it helps to control the costs of the system.

Although the staff lawyers of the Legal Advice & Assistance Centres can act for a client on the basis of an assignment (*toevoeging*), the work is mainly carried out by attorneys in private practice (330,000 cases). The number of cases conducted by the staff lawyers is relatively small (8,500).

Asylum

A separate system has been created for the provision of legal advice and assistance to asylum-seekers. Part of this legal advice and assistance is provided by three Asylum-Seekers Legal Advice Foundations, which are also responsible for the organisation of this legal service. They too are financed by the Legal Aid Boards. In addition, specialised attorneys in private practice provide legal assistance to asylum-seekers. This is arranged by virtually the same procedures (i.e. by assignment) as ordinary legal aid.

Legal Aid Boards

The Legal Aid Boards are responsible for organising and supervising legal aid, including not only such aspects as the provision of information, the control of supply and demand, the quality of the service, research, policy development and alternative forms of legal assistance such as mediation, but also the monitoring and control of the system.

The Legal Aid Act was first evaluated in 1998. The main conclusion was that the monitoring and control of the system had been brought up to standard since the introduction of the Act in 1994.

Outlook

This conclusion meant that attention could be focused on the more substantive aspects of the provisions. In 2000 the Legal Aid Boards gave instructions to identify relevant trends and expectations. This survey was carried out by the Verweij Jonker Institute, a socio-scientific research institute, and formed the basis for further research and discussion. Important conclusions regarding the development of supply and demand have been drawn from the various surveys carried out in recent years.

Demand

As regards demand for legal advice and assistance, it was concluded that:

- over half of the target group² were unaware of the service and were therefore unlikely to make use of legal aid;
- the demand for legal aid is more likely to increase than to decrease, owing to:
 - globalisation
 - the ‘juridification’ of society
 - the fact that citizens are becoming assertive and aware of their rights.

Supply

As regards supply it became clear that:

- the Legal Aid, Advice and Assistance Centres had increasingly shifted the emphasis from the first-line service to the extended/full service, expecting in this way to increase the volume of the business they handle and fulfil the personal ambitions of their staff lawyers;
- the Legal Aid, Advice and Assistance Centres had also started to engage in other activities, sometimes even *contra legem*. For example, some Centres had started providing legal advice and assistance to paying clients, which was contrary to the Legal Aid Act. In addition, this had created unfair competition because the subsidies enabled the Centres to operate with lower overheads than their market competitors whom they could thus undercut. Furthermore, the first-line service enabled the Centres to siphon off interesting cases for themselves. These developments had not been conducive to transparency for citizens or for the government in its role of financier;
- the number of attorneys in private practice willing to undertake legal aid work would decline in due course because legal aid rates were lagging behind and the sector had a dubious image;
- there was an increasing need for visible and assured quality.

Facts

The decline in above all the first-line service was regarded by many people as an undesirable trend, since this easily accessible and cheap service formed the jewel in the crown of the Dutch system. This assertion can be supported by various facts:

- 457,000 initial consultations (consultation and telephone contacts) in 2002 resulted in over 216,000 consultation hour cases at the Legal Aid, Advice and Assistance Centres; (for the figures for previous years see the analysis of the production data of the Legal Aid

² Survey of ‘Under-use of legal aid services’, September 2001, carried out by Ms E. van Hoof as part of her graduation assignment at the Brabant College of Higher Education.

- Foundations 1999-2001, October 2002³);
- 80% of these 216,000 cases⁴ were disposed of free of charge within half an hour;
 - 36,000 cases⁵ could be completed within an average of 2.3 hours by means of the extended consultation procedure, for which the client was required to pay a contribution of € 13.50;
 - 8,500 assignments⁶ for Legal Aid and Advice Centres.

Proposals

In its survey of future developments (2001) the Verweij-Jonker Institute⁷ made proposals for the establishment of a future system on the basis of the above data. These proposals were as follows:

1. introduce a Legal Services Counter in order to ensure that the legal aid system remains accessible and to guarantee the transparency of the market;
2. enhance the quality of the service still further;
3. introduce demand-driven control of the system.

1) Legal Services Counter

The recommendation for the introduction of a Legal Services Counter caused much commotion within the sector, mainly because it would entail a repositioning of the Legal Aid, Advice and Assistance Centres. In view of the interests at stake and the differences of opinion, the then State Secretary for Justice requested an independent committee to analyse the advantages and disadvantages of such a repositioning of the Legal Advice and Assistance Centres and the institution of a Legal Services Counter, taking account of the need to ensure the accessibility, continuity and affordability of legal advice and assistance and the interests of those seeking legal help.

The Committee (known as the Ouwerkerk Committee after its chairman) considered that it was particularly regrettable that in the existing situation such a large proportion of the people in most pressing need of legal advice and assistance made no use of the first-line services of the Legal Aid, Advice and Assistance Centres, partly because they were unaware of the existence of the service. At the same time the Legal Aid, Advice and Assistance Centres were concentrating more and more on providing the extended/full service and less and less on the first-line service. Against this background there was no reason to suppose that the under-use of the system would diminish.

On this basis the Committee arrived at the core of its recommendations⁸:

- create a Legal Services Counter which provides information, clarifies issues, answers questions, makes referrals and arranges for consultations lasting not more than one hour;
- give the Legal Services Counter the possibility to invest in the provision of information, in order to publicise the system and reduce under-use;

³ The Centres had 430,000 first-line contacts in 2001, 448,000 in 2000 and 377,000 in 1999.

⁴ The number of consultations had dropped steadily from 255,000 in 1997 to 235,000 in 1998, 212,000 in 1999, 210,000 in 2000 and 212,000 in 2001; the 2002 figure therefore represented a slight rise.

⁵ The number of extended consultation cases is rising slightly each year (33,959 in 1999 and 36,262 in 2001).

⁶ The number of assignments too is rising year by year (6,262 in 1999 and 7,107 in 2001).

⁷ *Toekomstverkenning Gefinancierde Rechtsbijstand* (Survey of the Future of Legal Aid), January 2001, Dr R.A.L. Rijkschroeff et al.

⁸ Advisory Report of the Committee on the Future Organisation of the Legal Aid System, February 2002.

- distinguish clearly between public and private functions;
- expressly designate the Legal Services Counter as belonging in the public domain; the authorities are emphatically responsible for effectuating the fundamental right of access to justice, but also have an interest in preventing the escalation of problems and hence high social costs by providing legal advice and assistance at an early stage;
- arrange for extended/full legal advice and assistance to be handled completely by the private sector on the basis of assignments;
- switch part of the present first-line service (namely the provision of a maximum of 3 hours' advice and assistance at the Legal Advice and Assistance Centres after the free consultation) to the extended legal service; this would enable attorneys in private practice and other providers of legal services to offer and implement the service. The litigants could be eligible for this service by means of a (simplified) assignment of the kind used for other legal aid activities. However, the Committee does recommend the adoption of a stronger price incentive than the present contribution of € 13.50;
- take measures to guarantee the availability of sufficient qualified staff; this could be done by means of careers policy, staff exchanges, growth opportunities, training facilities and ICT support, which would also help to strengthen the image of the sector.

2) Quality

Measures to enhance quality had already been taken. At national level this had resulted, for example, in an agreement in 2002 between the Bar, the Legal Aid Boards and the State Secretary for Justice⁹ on the payment of a merit allowance for proven quality. Selected attorneys were trained as auditors in order to assess the quality of law offices by reference to agreed criteria. Law offices which met the criteria were eligible for higher remuneration for legal aid work. The great majority of attorneys in private practice are now taking part in this system. From 1 January 2004 onwards the Legal Aid Boards will admit only audited attorneys to the system. Other important quality measures have been taken by the joint Asylum-Seekers Legal Advice Foundations and by various Legal Aid, Advice & Assistance Centres.

The Legal Aid Board in the court district of 's-Hertogenbosch found law offices that were themselves prepared to invest substantial sums in achieving integral quality. These law offices founded the Viadicte Foundation, which took a variety of quality measures with the support of the Legal Aid Board. Ultimately this resulted in the establishment of a far-reaching quality audit. Law offices which pass the audit are entitled to carry a special quality hallmark. This quality hallmark was assigned to the first five law offices on 3 April 2003.

3) Demand-driven approach

It was initially thought that a demand-driven approach could be achieved by arranging for legal aid vouchers to be provided by the Legal Services Counter. Litigants themselves could then choose an attorney and exchange the voucher. For the time being, however, this procedure is considered neither necessary nor feasible.

A demand-driven approach will therefore be achieved through the Legal Services Counter in other ways. First of all, the Counter must reduce under-use and, as it were, generate demand. Changes in demand can be properly monitored by means of adequate registration. The Counter will then refer litigants to certified or audited and specialised service providers, with whom agreements have been made beforehand about the number of cases they will handle.

⁹ A state secretary is a junior minister.

Improvement

In line with the recommendations of the Verwey-Jonker survey, this advisory report also regarded the introduction of the Legal Services Counter as the main instrument for providing the public with adequate information and helping them to find their way in the legal field.

From the perspective of litigants and prospective litigants the introduction of the Legal Services Counter would be a definite improvement for the following reasons:

- within the Legal Services Counter attention could be fully concentrated on the provision of legal advice and assistance during the initial consultation (the jewel in the crown of the Dutch system); there would no longer be any internal link with the extended/full legal service;
- the measures to combat under-use (a problem identified by all the reports) would be a definite aim of the Legal Services Counter, which could give this problem its undivided attention since the first-line service would be its core activity;
- the service provided by the Legal Services Counter would remain free of charge and would even be extended by half an hour to a full hour; the great majority of questions could therefore be dealt with by the Counter;
- in addition, the service would be boosted by telephone access, online access ('virtual counter') and other modern forms of service; this would therefore expand the services to litigants and the choices available to them;
- a national network would be created, thereby ensuring that the service provided to litigants is based on the same concept everywhere;
- the Legal Services Counter could make an appointment with certified attorneys in private practice; a potential disadvantage is that this would result in extra referrals, although research by Intomart shows that litigants would have no objection if they were referred an extra time by the Counter to a specialised provider of legal services;
- at the same time, the Legal Aid Boards are making far-reaching improvements to the administrative procedures; from mid-2004 onwards financial means will be determined by reference to the income for tax purposes on the basis of data supplied by the tax authorities (*Belastingdienst*); this will substantially reduce the administrative burden for the litigants and hence facilitate access to the system.

The Legal Services Counter could also have a positive effect on the development of supply:

- as matters stand at present, Legal Aid, Advice and Assistance Centres can refer interesting cases to themselves from the first-line legal service or acquire a strong position in the market for commercial legal services by using their government subsidy to undercut their competitors. This is hardly conducive to the image of the sector with the Bar. The problem could be resolved by making a sharp distinction between public and private functions and by the introduction of the Legal Services Counter. It is expected that the Bar may then show greater interest in legal aid work again;
- this effect could be enhanced by making arrangements for referrals from the Legal Services Counter, in which more specific agreements are made about, say, legal areas, numbers of cases, accessibility and quality assurance;
- the Legal Services Counter would provide the authorities with an instrument for controlling quality of the service through control of the quality of supply (i.e. the legal service providers); for example, the Counter could preferably - or perhaps even exclusively - refer clients to certified providers of legal services;

- a new electronic system for making appointments with attorneys would be introduced; the staff of the Counter would in due course make appointments with the law office automatically by entering them in the system;
- the Counter would refer clients not only to attorneys but also to other types of service provider; use could be made not only of attorneys but also of mediators, debt counsellors, legal aid lawyers and social workers. This would strengthen competition since providers would have to compete for their market share. This would be bound to benefit litigants and would ensure that the authorities are not dependent on a single professional group for the provision of legal aid work;
- the extended consultation service at the Legal Advice and Assistance Centres would disappear and would be replaced by a 'light' form of assignment; in other words, the work could be assigned to all attorneys (and not just to the staff lawyers of the Centres). Litigants requiring only limited assistance could be helped for just half of the own contribution. However, this contribution would be a good deal higher than the present €13.50.

Airing of criticism

Naturally, there is also criticism of the proposals, mainly from the Legal Advice and Assistance Centres whose existence is threatened.

- The chief criticism is that the service will no longer be cheap. As explained above, this does not apply to the Legal Services Counter. This service is free and would remain so. Indeed, it would even be extended for an extra half an hour. Nothing would change with regard to the system of assignment, apart from the announced increase in the client's own contribution. This would indeed create problems, but they are unconnected with the introduction of the Legal Services Counter.
The discussion about costs has been muddled by the Ministry's recently announced plans to raise the client's own contributions in the case of assignment. This decision will make part of the service more expensive and could thus adversely affect the accessibility of the system. However, this has nothing to do with the Legal Services Counter. The increase in the client's own contribution would be introduced even if the present system were to be left unchanged.
- According to the critics, the disappearance of the extended consultation service would be a severe loss. However, it would be replaced by the 'light' assignment, which would have a much wider distribution since all attorneys who participate in the system could in future add this reduced-rate service to their range of services. On the other hand, the client's own contribution (presently € 13.50) will be increased. Although the increase will admittedly have the desirable effect of obliging potential litigants to make a careful assessment of their position in the light of the potential expenses, it may also have the undesirable effect of deterring some people from using the service (thereby causing under-use of the system).
- Another criticism is that the Bar will make no provision for these extended consultations. However, this relates only to a relatively small number of hours compared with the total time spent. In addition, it may be expected that a large number of the Centres' staff lawyers will go into private practice, thereby increasing supply of legal advice and safeguarding the expertise available for the extended consultations.
- Doubts are also expressed about the quality of the staffing of the Legal Services Counter. In my view, there is no reason to suppose that lawyers or legally trained staff from

colleges of higher education would not be able to provide quality staffing¹⁰. In addition to the higher vocational staff, qualified lawyers will also act as service providers in the Legal Services Counter. The service will be for visitors and for people who contact the Counter by telephone or online. Training and a varied caseload will make the work challenging and interesting for the staff. To a large extent, the work will be a continuation of the existing service. In addition, experience gained in the past with legal aid lawyers and the experiments with legal assistants at the Legal Aid, Advice and Assistance Centres show that this is perfectly possible. A high calibre Legal Services Counter would undoubtedly attract high quality legal staff.

Decision-making

The political decisions on the alterations to the system have not yet been completed. In April 2002 the State Secretary for Justice (who was then responsible for the system) informed the House of Representatives that she considered the advisory report of the Ouwerkerk Committee to be clear and consistent and that she wished to adopt the recommendations. She hoped that this would remove the long-standing uncertainty about the direction in which the system would evolve. She noted, however, that the proposals needed to be elaborated in more detail and the organisational and financial consequences to be accurately determined. After the new government took office in mid-2002 the legal aid portfolio was reassigned to the Minister of Justice. The Minister submitted a detailed plan to the House of Representatives on 16 December 2002. In April 2003 the House of Representatives held a committee meeting on the review of the system in preparation for a full debate in the House before the summer recess.

Generally speaking, it should be noted that the current political situation in the Netherlands does not provide a good climate for rapid decision-making on important areas of policy. The fall of two governments (and hence two long periods of a caretaker administration) followed by two general elections in the space of eight months has resulted in a good deal of delay and lack of clarity. This has had an impact on the decisions on the future of the legal aid system. A parliamentary debate on the proposals outlined above was planned for May, but it is uncertain whether this debate will take place in view of the current political situation and, even if it does, whether final decisions can be quickly taken.

If the political decision-making process can be completed in the near future, the introduction of the changes to the system can be quickly implemented. The Legal Aid Boards will be in charge of this. They will press, among other things, for adequate registration and provision of information. In this way trends and effects can be closely monitored. Where necessary, policy can then be adjusted at any given moment. In addition, this would make it possible for interested parties in other sectors or other countries to be informed in the relatively near future about the progress and results of the changes to the system.

¹⁰ See also the decision of the State Secretary for Education to allow seven colleges of higher education to provide courses in law. Communication of 12 March www.regering.nl/actueel. The State Secretary expects that the provision of a wider range of courses will better meet the needs of the public, private and other sectors. Graduates of these courses could, for example, prepare legal files and deal with the less complex claims. Such courses at the colleges of higher education could also help to fill the existing vacancies in the public prosecution service, the judiciary and the legal aid sector.